

**This volume was donated to LLMC
to enrich its on-line offerings and
for purposes of long-term preservation by**

Northwestern University School of Law

National Reporter System—United States Series

THE
FEDERAL REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 206
PERMANENT EDITION

CASES ARGUED AND DETERMINED IN THE
CIRCUIT COURTS OF APPEALS, DISTRICT
COURTS, AND COMMERCE COURT
OF THE UNITED STATES

SEPTEMBER—OCTOBER, 1913

ST. PAUL
WEST PUBLISHING CO.

1913

COPYRIGHT, 1913
BY
WEST PUBLISHING COMPANY
(206 FED.)

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS THE DISTRICT COURTS, AND THE COMMERCE COURT

FIRST CIRCUIT

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....	Washington, D. C.
Hon. WILLIAM L. PUTNAM, Circuit Judge.....	Portland, Me.
Hon. FREDERIC DODGE, Circuit Judge.....	Boston, Mass.
Hon. GEO. H. BINGHAM, Circuit Judge.....	Concord, N. H.
Hon. CLARENCE HALE, District Judge, Maine.....	Portland, Me.
Hon. JAS. M. MORTON, Jr., District Judge, Massachusetts.....	Boston, Mass.
Hon. EDGAR ALDRICH, District Judge, New Hampshire.....	Littleton, N. H.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....	Providence, R. I.

SECOND CIRCUIT

Hon. CHARLES E. HUGHES, Circuit Justice.....	Washington, D. C.
Hon. E. HENRY LACOMBE, Circuit Judge.....	New York, N. Y.
Hon. ALFRED C. COXE, Circuit Judge.....	New York, N. Y.
Hon. HENRY G. WARD, Circuit Judge.....	New York, N. Y.
Hon. HENRY WADE ROGERS, Circuit Judge ¹	New Haven, Conn.
Hon. THOMAS I. CHATFIELD, District Judge, E. D. New York.....	Brooklyn, N. Y.
Hon. VAN VECHTEN VEEDER, District Judge, E. D. New York.....	Brooklyn, N. Y.
Hon. GEORGE W. RAY, District Judge, N. D. New York.....	Norwich, N. Y.
Hon. GEORGE C. HOLT, District Judge, S. D. New York.....	New York, N. Y.
Hon. CHARLES M. HOUGH, District Judge, S. D. New York.....	New York, N. Y.
Hon. LEARNED HAND, District Judge, S. D. New York.....	New York, N. Y.
Hon. JULIUS M. MAYER, District Judge, S. D. New York.....	New York, N. Y.
Hon. JOHN R. HAZEL, District Judge, W. D. New York.....	Buffalo, N. Y.
Hon. JAMES L. MARTIN, District Judge, Vermont.....	Brattleboro, Vt.

THIRD CIRCUIT

Hon. MAHLON PITNEY, Circuit Justice.....	Washington, D. C.
Hon. GEORGE GRAY, Circuit Judge.....	Wilmington, Del.
Hon. JOSEPH BUFFINGTON, Circuit Judge.....	Pittsburg, Pa.
Hon. JOHN B. McPHERSON, Circuit Judge.....	Philadelphia, Pa.
Hon. EDWARD G. BRADFORD, District Judge, Delaware.....	Wilmington, Del.
Hon. JOHN BELLSTAB, District Judge, New Jersey.....	Trenton, N. J.
Hon. JOSEPH CROSS, District Judge, New Jersey.....	Elizabeth, N. J.
Hon. JAMES B. HOLLAND, District Judge, E. D. Pennsylvania.....	Philadelphia, Pa.
Hon. J. WHITAKER THOMPSON, District Judge, E. D. Pennsylvania.....	Philadelphia, Pa.
Hon. CHAS. B. WITMER, District Judge, M. D. Pennsylvania.....	Sunbury, Pa.
Hon. JAMES S. YOUNG, District Judge, W. D. Pennsylvania.....	Pittsburg, Pa.
Hon. CHARLES P. ORR, District Judge, W. D. Pennsylvania.....	Pittsburg, Pa.

¹ Appointed September 28, 1913.

FOURTH CIRCUIT

Hon. EDWARD D. WHITE, Circuit Justice.....	Washington, D. C.
Hon. JETER C. PRITCHARD, Circuit Judge.....	Asheville, N. C.
Hon. CHAS. A. WOODS, Circuit Judge	Marion, S. C.
Hon. JOHN C. ROSE, District Judge, Maryland.....	Baltimore, Md.
Hon. HENRY G. CONNOR, District Judge, E. D. North Carolina.....	Wilson, N. C.
Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....	Greensboro, N. C.
Hon. HENRY A. MIDDLETON SMITH, District Judge, E. and W. D. S. C. Charleston, S. C.	
Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia	Richmond, Va.
Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....	Lynchburg, Va.
Hon. ALSTON G. DAYTON, District Judge, N. D. West Virginia.....	Philippi, W. Va.
Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia.....	Charleston, W. Va.

FIFTH CIRCUIT

Hon. JOSEPH R. LAMAR, Circuit Justice.....	Washington, D. C.
Hon. DON A. PARDEE, Circuit Judge.....	Atlanta, Ga.
Hon. A. P. McCORMICK, Circuit Judge.....	Waco, Tex.
Hon. DAVID D. SHELBY, Circuit Judge.....	Huntsville, Ala.
Hon. THOMAS G. JONES, District Judge, N. and M. D. Alabama.....	Montgomery, Ala.
Hon. WM. I. GRUBB, District Judge, N. D. Alabama.....	Birmingham, Ala.
Hon. HARRY T. TOULMIN, District Judge, S. D. Alabama.....	Mobile, Ala.
Hon. WM. B. SHEPPARD, District Judge, N. D. Florida.....	Pensacola, Fla.
Hon. RHYDON M. CALL, District Judge, S. D. Florida.....	Jacksonville, Fla.
Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.....	Atlanta, Ga.
Hon. EMORY SPEER, District Judge, S. D. Georgia.....	Macon, Ga.
Hon. RUFUS E. FOSTER, District Judge, E. D. Louisiana.....	New Orleans, La.
Hon. ALECK BOARMAN, District Judge, W. D. Louisiana.....	Shreveport, La.
Hon. HENRY C. NILES, District Judge, N. and S. D. Mississippi.....	Kosciusko, Miss.
Hon. GORDON RUSSELL, District Judge, E. D. Texas.....	Sherman, Tex.
Hon. EDWARD R. MEEK, District Judge, N. D. Texas.....	Dallas, Tex.
Hon. WALLER T. BURNS, District Judge, S. D. Texas.....	Houston, Tex.
Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.....	Austin, Tex.

SIXTH CIRCUIT

Hon. WILLIAM R. DAY, Circuit Justice.....	Washington, D. C.
Hon. JOHN W. WARRINGTON, Circuit Judge.....	Cincinnati, Ohio.
Hon. LOYAL E. KNAPPEN, Circuit Judge	Grand Rapids, Mich.
Hon. ARTHUR C. DENISON, Circuit Judge	Grand Rapids, Mich.
Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky.....	Maysville, Ky.
Hon. WALTER EVANS, District Judge, W. D. Kentucky.....	Louisville, Ky.
Hon. ARTHUR J. TUTTLE, District Judge, E. D. Michigan.....	Detroit, Mich.
Hon. CLARENCE W. SESSIONS, District Judge, W. D. Michigan.....	Muskegon, Mich.
Hon. JOHN M. KILLITS, District Judge, N. D. Ohio.....	Toledo, Ohio.
Hon. WM. L. DAY, District Judge, N. D. Ohio.....	Cleveland, Ohio.
Hon. HOWARD C. HOLLISTER, District Judge, S. D. Ohio.....	Cincinnati, Ohio.
Hon. JOHN E. SATER, District Judge, S. D. Ohio.....	Columbus, Ohio.
Hon. EDWARD T. SANFORD, District Judge, E. and M. D. Tennessee....	Knoxville, Tenn.
Hon. JOHN E. McCALL, District Judge, W. D. Tennessee.....	Memphis, Tenn.

SEVENTH CIRCUIT

Hon. HORACE H. LURTON, Circuit Justice.....	Washington, D. C.
Hon. FRANCIS E. BAKER, Circuit Judge.....	Goshen, Ind.
Hon. WILLIAM H. SEAMAN, Circuit Judge.....	Sheboygan, Wis.
Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....	Chicago, Ill.
Hon. KENESAW M. LANDIS, District Judge, N. D. Illinois.....	Chicago, Ill.
Hon. GEORGE A. CARPENTER, District Judge, N. D. Illinois.....	Chicago, Ill.
Hon. FRANCIS M. WRIGHT, District Judge, E. D. Illinois.....	Urbana, Ill.
Hon. J. OTIS HUMPRHEY, District Judge, S. D. Illinois.....	Springfield, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana.....	Indianapolis, Ind.
Hon. FERDINAND A. GEIGER, District Judge, E. D. Wisconsin.....	Milwaukee, Wis.
Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin.....	Madison, Wis.

EIGHTH CIRCUIT

Hon. WILLIS VAN DEVANTER, Circuit Justice.....	Washington, D. C.
Hon. WALTER H. SANBORN, Circuit Judge.....	St. Paul, Minn.
Hon. WILLIAM C. HOOK, Circuit Judge.....	Leavenworth, Kan.
Hon. ELMER B. ADAMS, Circuit Judge.....	St. Louis, Mo.
Hon. WALTER I. SMITH, Circuit Judge.....	Council Bluffs, Iowa.
Hon. JACOB TRIEBER, District Judge, E. D. Arkansas.....	Little Rock, Ark.
Hon. F. A. YOUMANS, District Judge, W. D. Arkansas.....	Ft. Smith, Ark.
Hon. ROBERT E. LEWIS, District Judge, Colorado.....	Denver, Colo.
Hon. HENRY THOMAS REED, District Judge, N. D. Iowa.....	Cresco, Iowa.
Hon. SMITH McPHERSON, District Judge, S. D. Iowa.....	Red Oak, Iowa.
Hon. JOHN C. POLLOCK, District Judge, Kansas.....	Kansas City, Kan.
Hon. CHAS. A. WILLARD, District Judge, Minnesota.....	Minneapolis, Minn.
Hon. PAGE MORRIS, District Judge, Minnesota.....	Duluth, Minn.
Hon. DAVID P. DYER, District Judge, E. D. Missouri.....	St. Louis, Mo.
Hon. ARBA S. VAN VALKENBURGH, District Judge, W. D. Missouri.....	Kansas City, Mo.
Hon. W. H. MUNGER, District Judge, Nebraska.....	Omaha, Neb.
Hon. THOMAS C. MUNGER, District Judge, Nebraska.....	Lincoln, Neb.
Hon. WM. H. POPE, District Judge, New Mexico.....	Santa Fé, N. M.
Hon. CHARLES F. AMIDON, District Judge, North Dakota.....	Fargo, N. D.
Hon. RALPH E. CAMPBELL, District Judge, E. D. Oklahoma.....	Muskogee, Okl.
Hon. JOHN H. COTTERAL, District Judge, W. D. Oklahoma.....	Guthrie, Okl.
Hon. JAMES D. ELLIOTT, District Judge, South Dakota.....	Sioux Falls, S. D.
Hon. JOHN A. MARSHALL, District Judge, Utah.....	Salt Lake City, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming.....	Cheyenne, Wyo.

NINTH CIRCUIT

Hon. JOSEPH McKENNA, Circuit Justice.....	Washington, D. C.
Hon. WILLIAM B. GILBERT, Circuit Judge.....	Portland, Or.
Hon. ERSKINE M. ROSS, Circuit Judge.....	Los Angeles, Cal.
Hon. WM. W. MORROW, Circuit Judge.....	San Francisco, Cal.
Hon. WM. H. SAWTELLE, District Judge, Arizona ²	Phoenix, Ariz.
Hon. OLIN WELLBORN, District Judge, S. D. California.....	Los Angeles, Cal.
Hon. WM. C. VAN FLEET, District Judge, N. D. California.....	San Francisco, Cal.
Hon. MAURICE T. DOOLING, District Judge, N. D. California ³	San Francisco, Cal.
Hon. FRANK S. DIETRICH, District Judge, Idaho.....	Boise, Idaho.
Hon. GEO. M. BOURQUIN, District Judge, Montana.....	Butte, Mont.
Hon. EDWARD S. FARRINGTON, District Judge, Nevada.....	Carson City, Nev.
Hon. CHARLES E. WOLVERTON, District Judge, Oregon.....	Portland, Or.
Hon. ROBERT S. BEAN, District Judge, Oregon.....	Portland, Or.
Hon. FRANK H. RUDKIN, District Judge, E. D. Washington.....	Spokane, Wash.
Hon. EDWARD E. CUSHMAN, District Judge, W. D. Washington.....	Seattle, Wash.
Hon. JEREMIAH NETERER, District Judge, W. D. Washington ⁴	Seattle, Wash.

² Appointed August 18, 1913.³ Appointed July 23, 1913.⁴ Appointed July 21, 1913.

COMMERCE COURT

Hon. MARTIN A. KNAPP, Presiding Judge.....Washington, D. C.
Hon. WILLIAM H. HUNT, Associate Judge.....Washington, D. C.
Hon. JOHN E. CARLAND, Associate Judge.....Washington, D. C.
Hon. JULIAN W. MACK, Associate Judge.....Washington, D. C.

CASES REPORTED

	Page		Page
Abrast Realty Co. v. Maxwell (D. C.).....	333	Borden's Condensed Milk Co. v. Horlick's	
Acme Steel Goods Co. v. American Metal		Malted Milk Co. (D. C.).....	949
Fasteners Co. (D. C.).....	478	Boston-Cerrillos Mines Corp., In re (D. C.)	794
Adams & Westlake Co. v. Peter Gray &		Bradley County Bank, Bradley Lumber Co.	
Sons (D. C.).....	303	v. (C. C. A.).....	41
Aetna Life Ins. Co., B-R Electric & Tele-		Bradley Lumber Co. v. Bradley County	
phone Mfg. Co. v. (C. C. A.).....	885	Bank (C. C. A.).....	41
A. H. Chamberlain, The (D. C.).....	996	Brady, In re (D. C.).....	336
Albertini, United States v. (D. C.).....	133	Brady v. South Shore Traction Co. (D. C.)	336
Alder, Edenborn v. (C. C. A.).....	275	Brents, United States v. (D. C.).....	818
Alexander, Barron v. (C. C. A.).....	272	British-American Cigar Stores Co., British-	
Allegar v. American Car & Foundry Co.		American Tobacco Co. v. (D. C.).....	189
(C. C. A.).....	437	British-American Tobacco Co. v. British-	
American Car & Foundry Co., Allegar v.		American Cigar Stores Co. (D. C.).....	189
(C. C. A.).....	437	Brooklyn Bottle Stopper Co., Crown Cork	
American Cork Specialty Co., Crown Cork		& Seal Co. of Baltimore City v. (D. C.)..	473
& Seal Co. of Baltimore City v. (D. C.)..	473	Brophy, McKenna v. (D. C.).....	677
American Fibre Reed Co., In re (D. C.)..	309	Brown v. Fletcher (C. C. A.).....	461
American Ice Co., Wilson v. (D. C.).....	736	Brown, Morse v. (D. C.).....	232
American Metal Fasteners Co., Acme Steel		Brunswick-Balke-Collender Co. v. Charles	
Goods Co. v. (D. C.).....	478	Passow & Sons (D. C.).....	468
Anderson, Oregon Coal & Navigation Co.		B-R Electric & Telephone Mfg. Co. v.	
v. (C. C. A.).....	404	Aetna Life Ins. Co. (C. C. A.).....	885
Ashbourne, The (D. C.).....	861	B-R Electric & Telephone Mfg. Co. v.	
Atchison, T. & S. F. R. Co., Esquibel v.		Southwestern Engineering Co. (C. C. A.)	885
(D. C.).....	863	Bucknall S. S. Lines, Foster v. (C. C. A.)..	415
Atlantic Coast Line R. Co., United States		Bunting, United States v. (D. C.).....	341
v. (D. C.).....	190	Burnett, Holmes v. (D. C.).....	66
Atlantic Fruit Co., United States v. (C.		Burr, Hull v. (C. C. A.).....	1
C. A.).....	440	Buzby v. Keystone Oil & Mfg. Co. (D. C.)	136
Bagoian, Moxie Co. v. (C. C. A.).....	437	C. A. Dunham Co. v. Warren Webster &	
Baldwin, Eidman v. (C. C. A.).....	428	Co. (D. C.).....	168
Ballance, In re (D. C.).....	505	California-Atlantic S. S. Co. v. Central	
Bane, Lamson Bros. & Co. v. (C. C. A.)..	253	Door & Lumber Co. (C. C. A.).....	5
Barker v. Eastman (C. C. A.).....	865	Cantwell, Pope v., two cases (D. C.).....	908
Barnett Foundry Co., Crowe v. (D. C.)...	164	Carleton v. Three Hundred Sixty-Seven	
Barron v. Alexander (C. C. A.).....	272	Tons of Coal (D. C.).....	345
Bates v. United Shoe Machinery Co. (D.		Carolina Glass Co. v. Murray (C. C. A.)..	635
C.).....	716	Cartwright v. Southern Pac. Co. (D. C.)..	234
B. Borchardt Co. v. Yaryan Naval Stores		Central District & Printing Tel. Co., Heck-	
Co. (D. C.).....	366	ert v. (C. C. A.).....	653
Becker Co. v. Gill (C. C. A.).....	36	Central Door & Lumber Co., California-	
Bell, Louisville & N. R. Co. v. (C. C. A.)..	395	Atlantic S. S. Co. v. (C. C. A.).....	5
Bensel, In re (C. C. A.).....	369	Central of Georgia R. Co. v. Wright (D. C.)	107
Bethune, Central Vermont R. Co. v. (C. C.		Central Vermont R. Co. v. Bethune (C.	
A.).....	868	C. A.).....	868
Bettis, Universal Film Mfg. Co. v. (D. C.)	362	Chalmers, In re (D. C.).....	143
Bettis Amusement Co., Crown Feature		Chamberlain, The A. H. (D. C.).....	996
Film Co. v. (D. C.).....	362	Chamberlain v. Throckmorton (C. C. A.)..	459
Bing, Margarette Steiff v. (C. C. A.).....	900	Chappell v. Missouri, K. & T. R. Co. (D.	
Birdsall, United States v. (D. C.).....	818	C.).....	688
Blake v. Moyer (D. C.).....	559	Charles Passow & Sons, Brunswick-Balke-	
Blunt, Chicago, B. & Q. R. Co. v. (C. C.		Collender Co. v. (D. C.).....	468
A.).....	425	Chehalis River Lumber & Shingle Co. v.	
Bolton Steam Shipping Co. v. Crossman		Empire State Surety Co. (D. C.).....	559
(D. C.).....	183	Chesapeake & D. Canal Co., United States	
Borchardt Co. v. Yaryan Naval Stores Co.		v. (D. C.).....	964
(D. C.).....	366	Chicago, B. & Q. R. Co. v. Blunt (C. C. A.)	425

	Page		Page
Chicago, M. & P. S. R. Co., Stephens v. (D. C.).....	854	Edenborn v. Alder (C. C. A.).....	275
Chicago & M. Electric R. Co., Investment Registry v. (D. C.).....	488	Edenborn v. Sim (C. C. A.).....	275
City Nat. Bank of Paducah, Ky., Toof v. (C. C. A.).....	250	Edmonds v. Spanish River Pulp & Paper Co. (D. C.).....	92
City of Boston, Thayer v. (D. C.).....	969	Edward B. Winslow, The (D. C.).....	919
City of Des Moines, Des Moines Water Co. v. (C. C. A.).....	657	E. H. Stanton Co. v. Rochester German Underwriters' Agency (D. C.).....	978
City of New York v. Pennsylvania Steel Co. (C. C. A.).....	454	Eidman v. Baldwin (C. C. A.).....	428
City of New York v. Sage (C. C. A.).....	369	Elder, The George W. (C. C. A.).....	268
City of Pocatello v. Murray (D. C.).....	72	Elk Garden Co. v. T. W. Thayer Co. (D. C.).....	212
City of Seattle, Seattle Electric Co. v. (D. C.).....	955	Empire State Surety Co., Chehalis River Lumber & Shingle Co. v. (D. C.).....	559
Cohen, In re (C. C. A.).....	457	Enderlin, Siemund v. (D. C.).....	283
Concrete Steel Co., Ferro Concrete Const. Co. v. (C. C. A.).....	666	Epstein, In re (D. C.).....	568
Constam v. Haley (C. C. A.).....	260	Esquibel v. Atchison, T. & S. F. R. Co. (D. C.).....	863
Copperman, Universal Film Mfg. Co. v. (D. C.).....	69	Evans v. Sioux City Service Co. (D. C.)...	841
Coulter, In re (D. C.).....	906	Everitt v. Duss (C. C. A.).....	590
Cressey v. International Harvester Co. of America (C. C. A.).....	29	Exploration Mercantile Co., In re (C. C. A.)	24
Crossman, Bolton Steam Shipping Co. v. (D. C.).....	183	Falkenberg, In re (D. C.).....	835
Crowe v. Oscar Barnett Foundry Co. (D. C.).....	164	Farbenfabriken of Elberfeld Co., Dobson v. (D. C.).....	125
Crown Cork & Seal Co. of Baltimore City v. American Cork Specialty Co. (D. C.)...	473	Ferrell v. Frame (C. C. A.).....	278
Crown Cork & Seal Co. of Baltimore City v. Brooklyn Bottle Stopper Co. (D. C.)...	473	Ferro Concrete Const. Co. v. Concrete Steel Co. (C. C. A.).....	666
Crown Cork & Seal Co. of Baltimore City v. New York Specialty Co. (D. C.).....	679	Fidelity Title & Trust Co. v. Kansas Natural Gas Co. (D. C.).....	772
Crown Feature Film Co. v. Bettis Amusement Co. (D. C.).....	362	First Nat. Bank of Anamoose v. United States (C. C. A.).....	374
Currey, United States v. (D. C.).....	322	First Nat. Bank of Portland, Kendrick State Bank v. (D. C.).....	940
Curtis Bay, The (D. C.).....	919	Fletcher, Brown v. (C. C. A.).....	461
Daoust, Moxie Co. v. (C. C. A.).....	434	Foard Co. of Baltimore City, Zywicki v. (D. C.).....	975
Darnell v. Illinois Cent. R. Co. (C. C. A.)...	445	Foley, Harrison v. (C. C. A.).....	57
David v. Harris (C. C. A.).....	902	Fortuna, The (D. C.).....	573
Davitt, Reynolds v. (D. C.).....	187	Foster v. Bucknall S. S. Lines (C. C. A.)..	415
Daylight, The (D. C.).....	864	Galloway v. Michigan Savings & Loan Ass'n (C. C. A.).....	241
Deerfield Lumber Co., Ostrander v. (D. C.)	540	Gate City Malt Co. v. Stewart (C. C. A.)...	448
Delaware, L. & W. R. Co., United States v. (D. C.).....	513	George W. Elder, The (C. C. A.).....	268
De Mauriac, In re (D. C.).....	358	Giant Powder Co., Morehouse v. (C. C. A.)	24
Des Moines Water Co. v. Des Moines (C. C. A.).....	657	Gill, L. A. Becker Co. v. (C. C. A.).....	36
Detroit Wire Spring Co., Murray v. (C. C. A.).....	465	Gladwish, The Wm. E. (C. C. A.).....	901
De Villeneuve v. Morning Journal Ass'n (D. C.).....	70	Goldsmith Silver Co. v. Savage (D. C.)...	1001
De Voe Snuff Co. v. Wolff (C. C. A.).....	420	Gonzales, United States v. (D. C.).....	239
Dobson v. Farbenfabriken of Elberfeld Co. (D. C.).....	125	Grace Hospital, J. Elwood Lee Co. v. (D. C.).....	994
Dr. Riegel Sanitarium Co., In re (D. C.)...	319	Gray & Sons, Adams & Westlake Co. v. (D. C.).....	303
Dorman, Perkins v. (D. C.).....	858	Great Northern R. Co., Reynolds v. (D. C.).....	1003
Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co. (D. C.).....	813	Great Northern R. Co., United States v. (D. C.).....	838
Dunfee, In re (D. C.).....	745	Great Western Life Ins. Co. v. Snively (C. C. A.).....	20
Dunham Co. v. Warren Webster & Co. (D. C.).....	168	Grubissich, Oregon & C. R. Co. v. (C. C. A.).....	577
Dunlap Carpet Co., In re (D. C.).....	726	Gund Brewing Co. v. United States (C. C. A.).....	386
Dunphy, In re (D. C.).....	680	Hale, In re (D. C.).....	856
Duss, Everitt v. (C. C. A.).....	590	Haley, In re (C. C. A.).....	266
Eagen, Lazarus v. (D. C.).....	518	Haley, Constam v. (C. C. A.).....	260
Eastman, Barker v. (C. C. A.).....	865	Haley v. Pope (C. C. A.).....	266
		Hall, In re (D. C.).....	850

	Page		Page
Hall, United States v. (D. C.).....	484	Lee Co. v. Grace Hospital (D. C.).....	994
Hamilton-Brown Shoe Co., Wolf Bros. & Co. v. (C. C. A.).....	611	Lewis, Shea v., two cases (C. C. A.).....	877
Harris, David v. (C. C. A.).....	902	Little, The Samuel (D. C.).....	686
Harris, Schwarz v. (D. C.).....	936	Locomotive Engineers' Mut. Life & Accident Ins. Ass'n v. Thomas (C. C. A.).....	409
Harrison v. Foley (C. C. A.).....	57	Long-Bell Lumber Co., Moses v. (C. C. A.).....	51
Hasie, In re (D. C.).....	789	Louisville & N. R. Co. v. Bell (C. C. A.).....	395
Haven & Clements v. James (D. C.).....	683	Luckenbach, The Jacob (D. C.).....	226
Heckert v. Central District & Printing Tel. Co. (C. C. A.).....	653	Ludwigs v. Payson Mfg. Co. (C. C. A.).....	60
Henderson, In re (D. C.).....	139	Luten v. Lee (D. C.).....	904
Hoerning, Starke v. (D. C.).....	1006	Luten v. MacAfee (D. C.).....	175
Hollo, In re (D. C.).....	852	MacAfee, Luten v. (D. C.).....	175
Holmes v. Burnett (D. C.).....	66	McDonald v. Pless (C. C. A.).....	263
Horlick's Malted Milk Co., Borden's Condensed Milk Co. v. (D. C.).....	949	McKenna v. Brophy (D. C.).....	677
Horne Co., McLaughlin v. (C. C. A.).....	246	McKernan v. North River Ins. Co. (D. C.).....	984
Howard v. Moyer (D. C.).....	555	McKinney v. Kansas Natural Gas Co. (D. C.).....	772
Hub, The, In re (C. C. A.).....	260	McLaughlin v. Joseph Horne Co. (C. C. A.).....	246
Huff, United States v. (D. C.).....	700	Malschick & Levin, In re (D. C.).....	71
Hull v. Burr (C. C. A.).....	1	Manning, In re (D. C.).....	685
Illinois Cent. R. Co., Darnell v. (C. C. A.).....	445	Marconi Wireless Tel. Co. of America v. National Electric Signaling Co. (D. C.).....	295
International Harvester Co. of America, Cressey v. (C. C. A.).....	29	Margarete Steiff v. Bing (C. C. A.).....	900
Investment Registry v. Chicago & M. Electric R. Co. (D. C.).....	488	Maxwell, Abrast Realty Co. v. (D. C.).....	333
Jacob Luckenbach, The (D. C.).....	226	Meese v. Northern Pac. R. Co. (D. C.).....	222
James, Haven & Clements v. (D. C.).....	683	Merchants' Syndicate Catalog Co. v. Retailers' Factory Catalog Co. (D. C.).....	545
Jameson v. United States Farm Land Co. (C. C. A.).....	889	Merwin & Willoughby Co., In re (D. C.).....	116
J. Elwood Lee Co. v. Grace Hospital (D. C.).....	994	Michigan Savings & Loan Ass'n, Galloway v. (C. C. A.).....	241
John Gund Brewing Co. v. United States (C. C. A.).....	386	Midwest Oil Co., United States v. (D. C.).....	141
Johnson v. North Star Lumber Co. (C. C. A.).....	624	Miller, Schaupp v. (D. C.).....	575
Johnson v. Southwestern Surety Ins. Co. (D. C.).....	486	Millikin v. Second Nat. Bank of Baltimore (C. C. A.).....	14
Joseph Horne Co., McLaughlin v. (C. C. A.).....	246	Missouri, K. & T. R. Co. v. Chappell (D. C.).....	688
Jos. R. Foard Co. of Baltimore City, Zywicki v. (D. C.).....	975	Missouri Pac. R. Co., United States v. (D. C.).....	847
J. Sapinsky & Sons, In re (D. C.).....	523	Mitchell v. National Surety Co. (D. C.).....	807
Kansas City Southern R. Co., Lee v. (D. C.).....	765	Morehouse v. Giant Powder Co. (C. C. A.).....	24
Kansas Natural Gas Co., Fidelity Title & Trust Co. v. (D. C.).....	772	Morning Journal Ass'n, De Villeneuve v. (D. C.).....	70
Kansas Natural Gas Co., McKinney v. (D. C.).....	772	Morse, Ex parte (D. C.).....	232
Kendrick State Bank v. First Nat. Bank of Portland (D. C.).....	940	Morse, In re (D. C.).....	350
Kennedy, United States v. (C. C. A.).....	47	Morse v. Brown (D. C.).....	232
Keystone Oil & Mfg. Co., Buzby v. (D. C.).....	136	Moses v. Long-Bell Lumber Co. (C. C. A.).....	51
Kiendl v. Taunton (D. C.).....	509	Mt. Vernon Nat. Bank, Ryan v. (C. C. A.).....	452
Kinney, Rodier Co., Simmons Mfg. Co. v. (D. C.).....	68	Moxie Co. v. Bagoian (C. C. A.).....	437
Knight, United States v. (C. C. A.).....	145	Moxie Co. v. Daoust (C. C. A.).....	434
Kuykendall, Tod v. (D. C.).....	482	Moyer, Blake v. (D. C.).....	559
L. A. Becker Co. v. Gill (C. C. A.).....	36	Moyer, Howard v. (D. C.).....	555
La Mantia, Ex parte (D. C.).....	330	Munroe v. Trenton Oil Cloth & Linoleum Co. (C. C. A.).....	456
Lamson Bros. & Co. v. Bane (C. C. A.).....	253	Murray, Carolina Glass Co. v. (C. C. A.).....	635
Lane Lumber Co., In re (D. C.).....	780	Murray, City of Pocatello v. (D. C.).....	72
Lavenson, United States v. (D. C.).....	755	Murray v. Detroit Wire Spring Co. (C. C. A.).....	465
Lazarus v. Eagen (D. C.).....	518	Myers, United States v. (C. C. A.).....	387
Lee v. Kansas City Southern R. Co. (D. C.).....	765	Namquit Worsted Co., William Whitman & Co. v. (D. C.).....	549
Lee Chung, United States v. (D. C.).....	367	National Bank of Commerce of Seattle, Wash., Russo-Chinese Bank v. (C. C. A.).....	646
		National Electric Signaling Co., Marconi Wireless Tel. Co. of America v. (D. C.).....	295
		National Marble & Granite Co., In re (D. C.).....	185
		National Surety Co., Mitchell v. (D. C.).....	807
		Newburgh, The (C. C. A.).....	901

	Page		Page
New England Chair Co., In re (D. C.).....	309	Russellville Anthracite Coal Min. Co., Wells v. (D. C.).....	528
New England Tel. Co. of Massachusetts v. Essex (D. C.).....	926	Russo-Chinese Bank v. National Bank of Commerce of Seattle, Wash. (C. C. A.)...	646
New York City R. Co., Pennsylvania Steel Co. v. (C. C. A.).....	663	Ryan v. Mt. Vernon Nat. Bank (C. C. A.)..	452
New York Specialty Co., Crown Cork & Seal Co. of Baltimore City v. (D. C.)..	679	Sadler-Lusk Trading Co., Doyle-Kidd Dry Goods Co. v. (D. C.).....	813
New York & P. R. S. S. Co. v. United States (C. C. A.).....	443	Sage, City of New York v. (C. C. A.).....	369
Nipissing Mines Co., United States v. (C. C. A.).....	431	Samuel Little, The (D. C.).....	686
Northern Pac. R. Co., Meese v. (D. C.)....	222	Santa Clara, The (D. C.).....	179
Northern Pac. R. Co., Shade v. (D. C.)....	353	Sapinsky & Sons, In re (D. C.).....	523
North River Ins. Co., McKernan v. (D. C.)	984	Savage, Goldsmith Silver Co. v. (D. C.)..	1001
North Star Lumber Co., Johnson v. (C. C. A.)	624	Schaupp v. Miller (D. C.).....	575
Oregon Coal & Navigation Co. v. Anderson (C. C. A.).....	404	Schwarz v. Harris (D. C.).....	936
Oregon & C. R. Co. v. Grubissich (C. C. A.)	577	Seaboard Air Line Ry. v. Railroad Commission of Georgia (D. C.).....	181
Osborn Confectionery Co., In re (C. C. A.)	36	Seattle Electric Co. v. Seattle (D. C.)....	955
Oscar Barnett Foundry Co., Crowe v. (D. C.)	164	Second Nat. Bank of Baltimore, Millikin v. (C. C. A.).....	14
Ostrander v. Deerfield Lumber Co. (D. C.)	540	Shade v. Northern Pac. R. Co. (D. C.)....	353
Pacific Telephone & Telegraph Co. v. Starr (C. C. A.)	157	Sherard v. Walton (D. C.).....	562
Page, In re (D. C.).....	1004	Shea v. Lewis, two cases (C. C. A.).....	877
Passow & Sons, Brunswick-Balke-Collender Co. v. (D. C.).....	468	Sheriff of Kings County, People v. (D. C.)	566
Payson Mfg. Co. v. Ludwigs (C. C. A.)....	60	Shulman, In re (D. C.).....	129
Pennsylvania Steel Co., City of New York v. (C. C. A.).....	454	Siemund v. Enderlin (D. C.).....	282
Pennsylvania Steel Co. v. New York City R. Co. (C. C. A.).....	663	Sigmaringen, The (D. C.).....	226
People v. Sheriff of Kings County (D. C.)..	566	Silverman, In re (D. C.).....	960
Perkins v. Dorman (D. C.).....	858	Sim, Edenborn v. (C. C. A.).....	275
Peter Gray & Sons, Adams & Westlake Co. v. (D. C.).....	303	Simmons Mfg. Co. v. Kinney, Rodier Co. (D. C.)	68
Pless, McDonald v. (C. C. A.).....	263	Sioux City Service Co., Evans v. (D. C.)..	841
Pope v. Cantwell, two cases (D. C.).....	908	Sisson, United States v. (C. C. A.).....	450
Pope, Haley v. (C. C. A.).....	266	Smith, Ex parte (D. C.).....	685
Porter, Weir Frog Co. v. (C. C. A.).....	670	Snively, Great Western Life Ins. Co. v. (C. C. A.).....	20
Portis Min. Co., Sturges v. (D. C.).....	534	Southern Pac. Co., Cartwright v. (D. C.)..	234
Powell v. United States (C. C. A.).....	400	Southern Power Co., Price v. (D. C.)....	496
Prame, Ferrell v. (C. C. A.).....	278	South Shore Traction Co., Brady v. (D. C.)	336
Price v. Southern Power Co. (D. C.).....	496	Southwestern Engineering Co., B-R Electric & Telephone Mfg. Co. v. (C. C. A.)	885
Prinz Eitel Friedrich, The (C. C. A.).....	898	Southwestern Surety Ins. Co., Johnson v. (D. C.).....	486
Queen, The (C. C. A.).....	148	Spanish River Pulp & Paper Co., Edmonds v. (D. C.).....	92
Railroad Commission of Georgia, Seaboard Air Line Ry. v. (D. C.).....	181	Spokane Mill Co., United States v. (D. C.)	999
Rectanus Co., United Drug Co. v. (D. C.)..	570	Spokane & I. E. R. Co., United States v. (D. C.).....	988
Remmerde, In re (D. C.).....	822	Stannard, United States v. (D. C.).....	326
Remmerde, In re (D. C.).....	826	Stanton Co. v. Rochester German Underwriters Agency (D. C.).....	978
Retailers' Factory Catalog Co., Merchants' Syndicate Catalog Co. v. (D. C.).....	545	Starke v. Hoerning (D. C.).....	1006
Reynolds v. Davitte (D. C.).....	187	Starkweather & Albert, In re (D. C.)....	797
Reynolds v. Great Northern R. Co. (D. C.)	1003	Starr, Pacific Telephone & Telegraph Co. v. (C. C. A.).....	157
Richards Bros., In re (D. C.).....	932	Steamship Overdale Co. v. Turner (D. C.)	339
Riegel Sanitarium Co., In re (D. C.).....	319	Steiff v. Bing (C. C. A.).....	900
Robinson, In re (D. C.).....	176	Stephens v. Chicago, M. & P. S. R. Co. (D. C.)	854
Rochester German Underwriters' Agency, E. H. Stanton Co. v. (D. C.).....	978	Stewart, Gate City Malt Co. v. (C. C. A.)	448
Romadka Bros. Co., In re (D. C.).....	944	Stone, In re (D. C.).....	356
Rose, In re (D. C.).....	991	Sturges v. Portis Min. Co. (D. C.).....	534
Rosenzweig, In re (D. C.).....	360	Taunton, Kiendl v. (D. C.).....	509
Rubin, In re (D. C.).....	505	T. B. Wood's Sons Co. v. Valley Iron Works (D. C.).....	172
		Tennessee River Coal Co., In re (D. C.)..	802
		Thayer v. Boston (D. C.).....	969
		Thayer Co., Elk Garden Co. v. (D. C.)....	212
		The Hub, In re (C. C. A.).....	260

	Page		Page
Theodore Rectanus Co., United Drug Co. v. (D. C.).....	570	United States, Powell v. (C. C. A.).....	400
Thomas, Locomotive Engineers' Mut. Life & Accident Ins. Ass'n v. (C. C. A.).....	409	United States v. Sisson (C. C. A.).....	450
Thomason v. Wellman & Rhoades (C. C. A.).....	895	United States v. Spokane Mill Co. (D. C.)	999
Three Hundred Sixty-Seven Tons of Coal, Carleton v. (D. C.).....	345	United States v. Spokane & I. E. R. Co. (D. C.).....	988
Throckmorton, Chamberlain v. (C. C. A.)...	459	United States v. Stannard (D. C.).....	326
Titanic, The (D. C.).....	500	United States v. Union Naval Stores Co. (C. C. A.).....	57
Tod v. Kuykendall (D. C.).....	482	United States v. Van Wert (D. C.).....	818
Toof v. City Nat. Bank of Paducah, Ky. (C. C. A.).....	250	United States v. Weisberger (C. C. A.)...	641
Town of Essex, New England Tel. Co. of Massachusetts v. (D. C.).....	926	United States, Williams v. (C. C. A.)....	460
Town of Lee, Luten v. (D. C.).....	904	United States Farm Land Co., Jameson v. (C. C. A.).....	889
Trenton Oil Cloth & Linoleum Co., Munroe v. (C. C. A.).....	456	United States Lumber Co., In re (D. C.)..	236
Turner, Steamship Overdale Co. v. (D. C.)	339	Universal Film Mfg. Co. v. Bettis (D. C.)..	362
T. W. Thayer Co., Elk Garden Co. v. (D. C.).....	212	Universal Film Mfg. Co. v. Copperman (D. C.).....	69
Umatilla, The (C. C. A.).....	148	Valley Iron Works, T. B. Wood's Sons Co. v. (D. C.).....	172
Union Furniture Co. v. Walker-Cooley Furniture Co. (D. C.).....	217	Van Wert, United States v. (D. C.).....	818
Union Naval Stores Co., United States v. (C. C. A.).....	57	Waggoner, In re (D. C.).....	789
United Drug Co. v. Theodore Rectanus Co. (D. C.).....	570	Wagner's Estate, In re (D. C.).....	364
United Shoe Machinery Co., Bates v. (D. C.).....	716	Walker-Cooley Furniture Co., Union Furniture Co. v. (D. C.).....	217
United States v. Albertini (D. C.).....	133	Walton, Sherard v. (D. C.).....	562
United States v. Atlantic Coast Line R. Co. (D. C.).....	190	Warren Webster & Co., C. A. Dunham Co. v. (D. C.).....	168
United States v. Atlantic Fruit Co. (C. C. A.).....	440	Waters-Colver Co., In re (D. C.).....	845
United States v. Birdsall (D. C.).....	818	Webster & Co., C. A. Dunham Co. v. (D. C.).....	168
United States v. Brents (D. C.).....	818	Wegadesk, The (D. C.).....	919
United States v. Bunting (D. C.).....	341	Weir Frog Co. v. Porter (C. C. A.).....	670
United States v. Chesapeake & D. Canal Co. (D. C.).....	964	Weisberger, United States v. (C. C. A.)..	641
United States v. Currey (D. C.).....	322	Wellman & Rhoades, Thomason v. (C. C. A.).....	895
United States v. Delaware, L. & W. R. Co. (D. C.).....	513	Wells v. Russellville Anthracite Coal Min. Co. (D. C.).....	528
United States, First Nat. Bank of Anamoose v. (C. C. A.).....	374	Weston, In re (C. C. A.).....	281
United States v. Gonzales (D. C.).....	239	Whitman & Co. v. Namquit Worsted Co. (D. C.).....	549
United States v. Great Northern R. Co. (D. C.).....	838	Wm. E. Gladwish, The (C. C. A.).....	901
United States v. Hall (D. C.).....	484	William Whitman & Co. v. Namquit Worsted Co. (D. C.).....	549
United States v. Huff (D. C.).....	700	Williams v. United States (C. C. A.).....	460
United States, John Gund Brewing Co. v. (C. C. A.).....	386	Wilson v. American Ice Co. (D. C.).....	736
United States v. Kennedy (C. C. A.).....	47	Wink, In re (D. C.).....	348
United States v. Knight (C. C. A.).....	145	Winslow, The Edward B. (D. C.).....	919
United States v. Lavenson (D. C.).....	753	Wolf Bros. & Co. v. Hamilton-Brown Shoe Co. (C. C. A.).....	611
United States v. Lee Chung (D. C.).....	367	Wolff, De Voe Snuff Co. v. (C. C. A.)....	420
United States v. Myers (C. C. A.).....	387	Wood's Sons Co. v. Valley Iron Works (D. C.).....	172
United States v. Midwest Oil Co. (D. C.)...	141	Wright, Central of Georgia R. Co. v. (D. C.).....	107
United States v. Missouri Pac. R. Co. (D. C.).....	847	Yaryan Naval Stores Co., B. Borchardt Co. v. (D. C.).....	366
United States, New York & P. R. S. S. Co. v. (C. C. A.).....	443	Young, In re (D. C.).....	187
United States v. Nipissing Mines Co. (C. C. A.).....	431	Zywicki v. Jos. R. Foard Co. of Baltimore City (D. C.).....	975

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS THE DISTRICT COURTS, AND THE COMMERCE COURT

HULL et al. v. BURR et al.

(Circuit Court of Appeals, First Circuit. June 25, 1913.)

No. 1,015.

COURTS (§ 508*)—RESTRAINING SUIT IN STATE COURT—FRAUD.

Where trustees in bankruptcy were appointed for a corporation doing business in Florida, and such trustees instituted a suit in equity in a superior state court in Florida to recover certain property from complainants as the property of the corporation, complainants could not maintain a bill in equity on the equity side of the District Court in Massachusetts to restrain, directly or indirectly, the proceedings in the Florida court, although the bankruptcy proceedings were initiated, and the trustees appointed, in that District Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418–1423, 1425–1430; Dec. Dig. § 508.*]

Enjoining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. of New York v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Suit by Joseph Hull and others against Arthur E. Burr and others. From a decree dismissing the bill, complainants appeal. Affirmed.

The following is the decree and opinion of Dodge, Circuit Judge, in the trial court:

According to the records of this court in bankruptcy, the defendants are trustees in bankruptcy of the Port Tampa Phosphate Company, adjudged bankrupt by this court on November 27, 1905. The number of the case on the bankruptcy docket is 10,748. From the records it also appears that the defendant Burr was appointed sole trustee of the bankrupt estate December 27, 1905, that he resigned March 12, 1909, and that on the same day he, with the other defendants Simpson and Edwards, were appointed trustees in his place, also that they have ever since continued to be and now are trustees; the estate never having been closed nor the trustees discharged.

The plaintiffs in the present suit allege in their bill that they are defendants in a suit in equity begun March 26, 1908, by Burr, as sole trustee, in the circuit court for Polk county, Fla., and that in that suit Burr, Simpson, and Edwards have asked to be substituted as complainants in place of Burr alone by a supplementary bill filed January 9, 1912. The plaintiffs further allege that they have answered the supplementary bill in the Florida court, and that issues raised by their answer and a replication are pending and undetermined.

The relief which the plaintiffs ask is an injunction against Burr, Simpson, and Edwards, forbidding them to assert or claim, as trustees in bankruptcy,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
206 F.—1

in any court or place, any right, title, or interest in or to any of certain properties which the bill describes. These properties appear from the bill to be lands and machinery in Polk county, Fla., wherein the trustees in the Florida suit referred to assert an interest belonging to the bankrupt estate, but in which the plaintiffs in the present suit claim that no person except themselves has any interest.

The ground asserted in the bill for asking the relief prayed for is that the bankruptcy adjudication and all proceedings under it are void, and the defendants are assuming to act as trustees without right.

There is no want of jurisdiction apparent from the record of the bankruptcy proceedings. The petition filed November 8, 1905, against the Port Tampa Phosphate Company, was signed and sworn to by three persons alleging themselves creditors of that company for amounts aggregating more than \$500. It alleged the company to be a Massachusetts corporation engaging principally in mining pursuits, and having had its principal place of business in Boston for the greater part of the preceding six months. It alleged the company's insolvency and the commission by it of an act of bankruptcy in that on or about October 9, 1905, it "suffered and permitted, while insolvent as aforesaid, certain creditors to obtain a preference through legal proceedings by process of attachment, and not having at least five days before a sale or final disposition of its property effected by such preference, vacated or discharged such preference." A subpoena, proper in form, returnable November 20, 1905, duly issued and returned, shows by the return upon it due service on the alleged bankrupt. On the return day an appearance for the company, signed by J. H. Robinson, was entered. It is neither alleged nor suggested that he was not duly qualified so far as the requirements of general order 4 (89 Fed. iv, 32 C. C. A. iv) are concerned, and at any rate schedules were later filed on behalf of the company as required by section 7a (8) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]). See *Re Kindt* (D. C.) 98 Fed. 867. It is said that the allegation charging an act of bankruptcy was not specific enough. Had this objection been raised at the time, the petition might have been dismissed unless amended. See *Sig. H. Rosenblatt*, 193 Fed. 638, 113 C. C. A. 506. Followed as it was, however, by appearance and adjudication without objection, it cannot now be said to disclose any want of jurisdiction for that reason. The parties and subject-matter being thus within the jurisdiction of the court, so far as the record shows, the court's jurisdiction to determine the further questions upon which its power to adjudicate depended cannot be questioned upon the record itself. These questions were whether the alleged bankrupt was insolvent, whether it had committed the act of bankruptcy alleged, and whether the petitioning creditors had provable claims to the requisite amount. Nor is there anything in the record to contradict the presumption that the court rightly determined all such questions when it ordered adjudication. It is alleged that the schedules later filed show the alleged bankrupt's assets to have exceeded its liabilities. But the schedules bind no one but the bankrupt, and do not purport to set forth any estimates of values except the bankrupt's. It is alleged that the claims of two of the petitioning creditors have not been proved or allowed in the proceedings. But from this, if it be the fact, no further result follows than the loss of their right to participate in the proceedings under the adjudication, or in dividends. There is nothing in the record, therefore, which raises such an objection to its jurisdiction in bankruptcy as the court must consider, though suggested by a stranger and not by a party to the proceedings.

The adjudication is void, according to the plaintiff's bill, because procured by fraud. The allegations charging fraud may be summarized as follows:

The Port Tampa Phosphate Company's principal place of business was not in Boston, and it did no business except in Florida.

It was not insolvent.

It never committed the act of bankruptcy alleged, nor any act of bankruptcy.

Rowell, Lougee, and Hamilton, the three petitioning creditors, and Wills, who afterward joined in the petition as a creditor, were four out of the five directors of the company; Rowell being president and Wills treasurer.

They knew the company was solvent, and had committed no act of bankruptcy.

The claims they asserted against it were, to their knowledge, not just debts of the company.

Being the company's officers and directors, they nevertheless promoted the bankruptcy proceedings for the purpose of "pretending to create" a bankruptcy trustee and "procuring" the trustee "to attack" the plaintiff's title to the properties.

The petition was prepared and filed for the purpose and with the intent of deceiving the court, and making it believe (contrary to the fact) that the company had committed an act of bankruptcy.

The jurisdictional facts alleged were "falsely and fraudulently averred" and "fabricated for the purpose of pretending to state a case within the jurisdiction" of the court.

The petitioning creditors and Wills controlled both sides of the litigation through their ownership of a majority of the company's stock.

J. H. Robinson was never authorized to appear for or represent the company.

Though falsely made to appear as an involuntary petition, the petition was in fact voluntary on the part of the company, its officers and directors.

If, as here, no want of jurisdiction over the parties or subject-matter appears from the record and the decree is not void in form, it cannot be collaterally attacked, and can only be assailed by a direct proceeding in a competent court. *New Lamp Co. v. Brass, etc., Co.*, 91 U. S. 656, 662, 23 L. Ed. 336; *Graham v. Boston, etc., Co.*, 118 U. S. 161, 179, 6 Sup. Ct. 1009, 30 L. Ed. 196. The plaintiffs say that this is such a proceeding. Regarded in that light, their bill seems to me defective in the following respects:

In the first place, no right or interest of the plaintiffs appears by it to be so prejudiced by the adjudication as to entitle them to equitable relief. The bankruptcy proceedings and the adjudication concern only the bankrupt and its creditors. It makes no difference to the plaintiffs whether the claim to the Florida properties is asserted by the bankrupt itself or by its trustee or trustees. The plaintiffs allege in their bill that a final decree in the Florida suit will not bar a suit asserting a claim to the properties on behalf of the bankrupt itself. This, however, is a mere conclusion of law, and, of course, not admitted for any purpose by the demurrer. *Fogg v. Blair*, 139 U. S. 118, 127, 11 Sup. Ct. 476, 35 L. Ed. 104; *Kent v. Lake Superior, etc., Co.*, 144 U. S. 75, 91, 12 Sup. Ct. 650, 36 L. Ed. 352. It is in my opinion an unsound conclusion in view of the facts alleged. Neither the bankrupt nor its creditors have ever questioned the adjudication. They are therefore bound by it, and under it the trustees are in the bankrupt's place so far as any claim which it could assert to these properties is concerned. The plaintiffs, therefore, have only to prove, in the suit pending in Florida, that their interests are, as they allege, exclusive of any other, so that the bankrupt could have had no interest in the properties, and they have finally disposed of the trustees' claim. That it may be for their advantage to escape the necessity of making such proof in the Florida suit I cannot regard as sufficient to establish the claim to equitable relief here. The controversy regarding the Florida properties can presumably be better determined by the Florida court than by this court.

In the next place, the only defendants named in the bill are the bankruptcy trustees. It is not alleged that they were parties to the bankruptcy proceedings, nor that they participated in the fraud whereby the adjudication is said to have been procured. Neither the bankrupt, nor any of its officers charged with participation in the fraud alleged, nor any of its creditors are made defendants. But in an equity suit for relief of this kind the parties to the suit wherein the judgment or decree was entered are indispensable parties. *Harwood v. Railroad Co.*, 17 Wall. 78, 21 L. Ed. 558; *Ralston v. Sharon (C. C.)* 51 Fed. 702, 712; *Johnson v. Hunter (C. C.)* 127 Fed. 219-221. I am wholly unable to believe that bankruptcy trustees, charged by the court with the duty of collecting and distributing the assets of their estate, can be called upon by themselves to disprove an alleged fraud not committed by

them in obtaining the adjudication under which they or their predecessor have been acting for several years.

The above grounds I consider quite sufficient to require the sustaining of this demurrer, without discussing any of the other grounds upon which the defendants rely. This court, in equity, would in any case be slow to hold the bankruptcy adjudication invalid and thus disturb rights which have been for so long a time accruing under it while it remained unquestioned. It would be still more reluctant to hold the adjudication void for the purposes of this case, leaving it still in force on the record as regards everybody affected by it and not a party to this proceeding.

Certain irregularities in the appointment of the trustee or trustees are alleged, but these seem to me of no consequence whatever; particularly if, as I think, the adjudication cannot be attacked in this suit.

The demurrer is therefore sustained.

Eldon Bisbee, of New York City (Horatio Bisbee and Bisbee & Be-
dell, all of Jacksonville, Fla., on the brief), for appellants.

Frank L. Simpson and Arthur E. Burr, both of Boston, Mass.
(James F. Glen, of Tampa, Fla., on the brief), for appellees.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN,
District Judges.

PUTNAM, Circuit Judge. The facts in this case are so fully stated in the opinion of the learned judge of the District Court that we do not find it necessary to restate them. We are also entirely satisfied with his conclusions and with his reasoning so far as the same is necessary to the conclusions reached by him. We find, however, a shorter and more simple way of reaching the result than that suggested by the counsel for the respondents below, the appellees here.

It appears that the parties are the same before the District Court in this case as were joined in the judicial proceedings in Florida described in the opinion referred to. The questions raised, or which may be raised, are substantially the same in each case. While the proceedings in bankruptcy occurred in the same district from which the appeal to us was brought, yet the proceedings in the District Court in no manner invoked the powers of the court in bankruptcy, but rested entirely on its general powers as a chancery court, having been instituted by a bill in equity in the proper sense of the word. It also appears that the proceedings in Florida were instituted by a bill in equity in the proper sense of the word, although the parties were reversed. The bill before us does not in form ask that we should restrain the proceedings in the Florida court or the plaintiffs in the case there. Its prayer, however, concludes as follows:

"Inasmuch as your orators are without a practical remedy at law, may it please this honorable court, by its interlocutory decree, to restrain and enjoin the said defendants, and each of them, and each of their attorneys at law and solicitors in chancery, and each and every one of their agents and attorneys, from asserting or claiming as trustees in bankruptcy, in any court or place, any right, title, or interest in or to any of the properties herein described until the further decree of this court; and to make such interlocutory decree final by the final decree of this court."

While this does not in terms name the Florida court, yet a decree in pursuance of the prayer would necessarily restrain the defendants from proceeding in that court with the litigation already pending there. So far as the litigation is concerned, the questions in the Flor-

ida court are or may be exactly the same as we have here, and the Florida court being a chancery court, and a court of superior jurisdiction proceeding in equity, it is for the present purpose of the same dignity and authority as the District Court from which this appeal was taken. Consequently, the District Court, in a case in which it had exercised no special jurisdiction as in bankruptcy, but only its general jurisdiction in equity, is asked to indirectly restrain a state court, also having general jurisdiction in equity, and while proceeding in equity between the same parties in a suit anticipating the suit appealed to us. The result is an attempt on the part of the complainants to obtain an injunction from a United States court to a state court, contrary to the express statute in reference thereto. The authority of the court which first acquired jurisdiction, the parties being substantially the same, must prevail.

Of course, a federal court proceeding in equity has the same right to control litigation at common law in state courts, when equitable rights subsist in preference over rights at common law, which the federal courts have to restrain common-law suits in other federal courts. This is the undergoing rule of *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870, but it does not extend further than there applied. The various phases of this topic are so thoroughly covered by decisions of the Supreme Court that it is not necessary to cite in detail those decisions in reference thereto. We only refer again to *Marshall v. Holmes*, where, beginning at page 596 and ending at page 601 of 141 U. S., 12 Sup. Ct. 62, 35 L. Ed. 870, the various phases of the topic are sufficiently explained; and the matter also is somewhat enlarged on in *Bank v. Stevens*, 169 U. S. 432, 462, 18 Sup. Ct. 403, 42 L. Ed. 807, and sequence. We leave this appeal to stand on the rules applied in the two cases cited.

The decree of the District Court is affirmed; and the appellees recover their costs of appeal.

CALIFORNIA-ATLANTIC S. S. CO. v. CENTRAL DOOR & LUMBER CO.

(Circuit Court of Appeals, Ninth Circuit. May 19, 1913.)

No. 2,116.

1. ADMIRALTY (§ 59*)—PLEADING.

In admiralty the court determines cases on equitable principles, and it is never made a point of pleading whether the case rests on contract or tort.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 479, 480; Dec. Dig. § 59.*]

2. ADMIRALTY (§ 18*)—JURISDICTION—CASES OF TORT.

In cases of tort the jurisdiction in admiralty depends entirely on locality, and to confer jurisdiction the tort must have been committed on the high seas or navigable waters.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 206-221; Dec. Dig. § 18.*]

Jurisdiction of torts, see notes to *Campbell v. H. Hackfeld & Co.*, 62 C. C. A. 279; *Monongahela River Consol. Coal & Coke Co. v. Schinnerer*, 117 C. C. A. 203.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. COURTS (§ 280*)—JURISDICTION OF FEDERAL COURTS—PRESUMPTION.

The jurisdiction of a federal court cannot rest on presumption, but, on the contrary, the presumption is against jurisdiction and it must appear by positive and direct averment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816-818; Dec. Dig. § 280.*]

4. ADMIRALTY (§ 60*)—JURISDICTION—SUFFICIENCY OF LIBEL.

The libel in a suit in personam in admiralty alleged that libelant shipped goods at Philadelphia on a steamship of respondent bound to the Isthmus of Panama, to be carried by such steamer and connecting lines to Portland, Or.; that the goods arrived at Portland on another steamer of respondent in a damaged condition; that the loss was caused solely by the negligence and misconduct of respondent, its employes, agents, or servants, who negligently and improperly stowed, carried, and handled the goods. *Held*, that the libel did not state a cause of action in tort within the admiralty jurisdiction, since it did not show that the tort was committed on the high seas; nor one on contract within such jurisdiction, because the contract was not all maritime, and, conceding that it was divisible, there was no allegation of a breach of the maritime portion.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 482-496; Dec. Dig. § 60.*]

Morrow, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suit in admiralty by the Central Door & Lumber Company against the California-Atlantic Steamship Company. Decree for libelant, and respondent appeals. Reversed.

The appeal in this case is taken from a decree rendered upon a default against the appellant for failure to answer or except to the libel. The libel was in personam, and it alleged that in December, 1910, the appellee, pursuant to an arrangement theretofore made with the appellant, shipped in good order and condition on board the steamship "Mills," then lying in the port of Philadelphia, and bound to the Isthmus of Panama, to be transported in said steamer and by connecting lines of the appellant's steamers to Portland, Or., certain merchandise therein described, and that the appellee directed the appellant to insure said shipments for the appellee's account; that on the arrival of said goods at Portland, Or., they were found to be injured; that some were injured by being water soaked, and others by heat, that others had been broken and rendered valueless, all owing to the negligence of appellant in stowing and handling the same; that the market value of said goods at Portland on the date of the arrival thereof was \$6,988.81 "including the charges paid to respondent, all of which became and was a total loss to libelant." The appellee in its libel proceeded to allege that the loss was without fault or negligence on the appellee's part, but was occasioned solely by negligence and misconduct of the appellant, its employes, agents, or servants. Attached to the libel was a schedule, setting forth in detail the quantities, qualities, and market values of the goods so shipped and damaged, amounting to the sum of \$6,988.81 "including the freight, insurance, and other charges paid to respondent by libelant, after deducting all allowance for salvage on goods shipped." The default of the appellant and its surety having been entered, the court thereafter, upon proofs adduced by the appellee, decreed that the libel be amended to conform to the proof of damages sustained by the appellee by increasing the amount claimed in the libel to \$7,288.42 with interest thereon as prayed in the libel, and the court found that the appellee had sustained damages by reason of the negligence of the appellant in the sum of \$7,288.42, and for that amount with interest and costs a decree was entered.

Malarkey, Seabrook & Stott, of Portland, Or., and T. A. Thacher, G. S. Arnold, and William Denman, all of San Francisco, Cal., for appellant.

Jesse Stearns and John H. Hall, both of Portland, Or., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). On the appeal to this court, the appellant presents the question of the jurisdiction of the District Court to entertain the libel and contends that no cause within the jurisdiction of the admiralty is stated for the reason that it is not alleged in the libel that the damage to the goods occurred while the same were upon either of the vessels which carried the same, and that, for aught that appears to the contrary, all the injury may have been sustained during the transportation of the goods across the Isthmus of Panama.

[1] When goods are delivered to a carrier, there is a contract, either expressed or implied, that the carrier will carry them with safety. For negligence in carrying them, resulting in loss or damage thereto, an action will lie either for breach of contract or for tort. Cooley on Torts, 157. In the present case the libel is for tort, but in admiralty the court will determine cases upon equitable principles. "It is never made a point of pleading whether the case rests upon contract or tort." *Borden v. Hiern*, 1 Blatch. & H. 293, Fed. Cas. No. 1,655; *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 182, 193, 36 C. C. A. 135. We have to inquire, therefore, whether upon either view of the cause of action here pleaded facts are alleged which show affirmatively that there is jurisdiction in admiralty.

[2] In cases of tort the jurisdiction in admiralty depends entirely upon locality. There can be no other test. The tort must have been committed on the high seas or navigable waters. The Propeller "Commerce," 1 Black, 574, 17 L. Ed. 107. Now, there is no allegation in the libel as to the place where the goods were injured. The libel alleges that the appellant owned or had chartered the steamships "Mills" and "Stanley Dollar"; that the appellee at Philadelphia shipped the goods on the "Mills" bound to the Isthmus of Panama, "to be transported in said steamer and connecting lines to Portland, Or."; that the goods arrived at Portland by the "Stanley Dollar" and were there found to be injured and damaged when they were delivered to the appellee; that the loss was caused solely by the negligence and misconduct of the appellant, its employés, agents, or servants; that the goods were negligently and improperly stowed, *carried, and handled* by the appellant, its employés, agents, and servants. From these allegations the injury and damage to the goods might have occurred as well while they were in transit by rail across the Isthmus as upon either or both of the steamships; for, while the operatives of the railway were not "employés" or "servants" of the appellant, they were its "agents" in moving the goods on the railway. The railway was the "connecting line" between the two steamships. No jurisdiction, therefore, is alleged as for tort.

We turn to the question whether there is shown a breach of con-

tract within the jurisdiction of the admiralty. The contract of af-freightment was to carry the goods from Philadelphia to Portland, Or. It involved two voyages by steamers and a carriage across the Isthmus by rail. In *The Pacific*, 1 Blatchf. 569, Fed. Cas. No. 10,643, Mr. Justice Nelson said:

"A contract must be wholly of admiralty cognizance or else it is not at all within it. There cannot be a divided jurisdiction."

In *Insurance Co. v. Dunham*, 11 Wall. 1, 20 L. Ed. 90, the court said that if the subject-matter of a contract is maritime the contract is maritime. Decisions illustrative of that doctrine are *Pacific Coast S. S. Co. v. Ferguson*, 76 Fed. 993, 22 C. C. A. 671; *The Richard Winslow*, 67 Fed. 259, affirmed 71 Fed. 426, 18 C. C. A. 344; *The Pulas-ski* (D. C.) 33 Fed. 383; *The Murphy Tugs* (D. C.) 28 Fed. 429.

The decision in *The Moses Taylor*, 4 Wall. 411, 18 L. Ed. 397, is cited by both the appellant and the appellee. The *Moses Taylor* was a steamship owned by one Roberts in the city of New York, and was employed by him in carrying passengers and freight between Panama and San Francisco. Hammons at New York had entered into a contract with Roberts, the owner of this steamship, by which, in consideration of \$100, Roberts agreed to transport him from New York to San Francisco, with reasonable dispatch, and to furnish him with proper and necessary food, water, and berths or other conveniences for lodging on the voyage. For alleged breach of the contract Hammons brought an action against the *Moses Taylor* in a justice court in the city of San Francisco under a statute of California which provided for such a proceeding in rem, alleging in his complaint that he was detained at the Isthmus of Panama eight days, and that the provisions furnished him on the *Moses Taylor* were unwholesome, and that he was crowded into an unhealthy cabin therein, without sufficient room or air for health or comfort, to his damage, etc. Objection was made to the jurisdiction. The justice decided that he had jurisdiction, and gave judgment for Hammons. The case was appealed to the county court, where the objection to the jurisdiction was renewed but overruled, and thence the case was taken to the Supreme Court of the United States on the question of the jurisdiction. That court in the opinion took no note of the argument, which was adduced by counsel for the plaintiff, that the contract required for its fulfillment the use of two steamers and a railway, and that the land carriage was a substantial part of the voyage, and that the question of jurisdiction will not be determined by a comparison of the distances by land and by water, and made no reference to the allegation of the complaint that there was a breach of the contract in that the plaintiff was delayed eight days on the Isthmus, but treated the case as one arising solely on breach of contract on the voyage from Panama to San Francisco. The court said that:

"Notwithstanding the *Moses Taylor* was not named in the original contract, the contract should be treated as if it specified a transportation by that steamer on the Pacific for the distance between Panama and San Francisco, and for alleged breach of this contract the present action was brought.

* * * The contract for the transportation of the plaintiff was a maritime

contract. As stated in the complaint, it related exclusively to a service to be performed on the high seas."

That the contract related solely to a service to be performed on the high seas could not have been said if the court had had under consideration the whole contract, for a considerable portion of it was to be performed, not on the high seas, but by a railway across the Isthmus. It will be seen that the court found jurisdiction in admiralty only in the breach of that portion of the contract which provided for transportation by sea from the Isthmus to San Francisco. The implication of the decision is to deny jurisdiction in admiralty of the contract as a whole. In any view of its effect, the most that the appellee can claim therefrom is that it contemplates that a contract such as that which is here before us, although in its terms it is undivided, may, in case of a breach thereof occurring upon either arm of the transportation by sea, be deemed divisible into its three component parts so as to give jurisdiction in admiralty to recover for the loss or damage which occurred on that branch of the voyage. But even in such a case there can be no question that it would be necessary to allege in the libel that the breach occurred upon one of the voyages by sea or upon both.

Aside from *The Moses Taylor* no other case is found which presents facts similar to those in the case at bar; but certain cases are cited in support of the general proposition that a contract of affreightment is maritime and within the admiralty jurisdiction if it is substantially to be performed on navigable waters. Thus in *Phoenix Ins. Co. v. Erie & W. Trans. Co.*, 10 Biss. 18, Fed. Cas. No. 11,112, it was said:

"The true test of a maritime service or a maritime contract is whether it is to be substantially performed * * * on navigable waters."

In that case the libel was brought in personam to recover for a loss on shipments of grain. The grain was to be carried from Chicago by the lakes to Erie, Pa., and thence by rail to inland towns in Pennsylvania and New Jersey. Through bills of lading denoting a rate for through transportation were issued. The respondent was to carry the grain to Erie and there deliver it to the elevator company. The bills of lading expressly provided that of the several connecting carriers only the one upon whose line a loss might happen should be responsible therefor. The loss occurred while the property was in the possession of the respondent in course of transportation by water. Although a single through freight was charged, the court held that the carriage of the grain by water by the respondent was a distinct and independent service. The court said:

"That a very substantial part of the service to be performed under these contracts was to be performed upon navigable waters is not to be disputed. The loss happened upon these waters, while such service was being rendered."

And the court held that admiralty had jurisdiction.

Applying that doctrine to the case at bar, its effect is to sustain the proposition that, if the libel in the present case had alleged that the

loss occurred on either voyage on the high seas, there would be jurisdiction in admiralty to recover therefor.

In *Monteith v. Kirkpatrick*, 3 Blatchf. 279, Fed. Cas. No. 9,721, decided in 1855 at a time when canals were held not to be navigable waters of the United States, the libel was in personam to recover freight charges for the transportation of flour from a port in Canada through Lake Ontario and the Erie Canal to Albany, and thence to New York. The jurisdiction was challenged on the ground that part of the transportation was through the canal. The court said:

"According to the usage of the business, the contract of shipment with the respondent implied an undertaking to repay those charges, when advanced by the libelants; and they became thereby chargeable upon the goods shipped, the same as the freight from Albany to New York. The contract, therefore, as respected the whole amount claimed by the libelants, was, in judgment of law, an entirety, not severable, and contains all the essential elements of a maritime contract. The shipment of the goods to which it related, began and ended upon waters within the admiralty jurisdiction. I am inclined, therefore, to think that this ground of defense is not well taken."

A somewhat similar case was decided by Judge Blatchford in 1875, in *The E. M. McChesney*, 8 Ben. 150, Fed. Cas. No. 4,463. The court sustained the jurisdiction in admiralty over a contract of affreightment whereby a cargo of oats was shipped on a canal boat at Erie and carried by a navigable stream flowing into Lake Erie, and thence to New York by the Erie Canal and Hudson river, all in the same canal boat. But one of the grounds of the decision was that in the case of *The Montello*, 20 Wall. 430, 22 L. Ed. 391, the Supreme Court had held that a canal connecting the Fox river and the Wisconsin river was navigable water of the United States, and therefore under the general jurisdiction of admiralty.

So also there is a line of cases which hold that the jurisdiction in admiralty of libels for seamen's wages for services rendered depends upon the question whether the services were substantially performed or to be performed upon the sea or navigable waters connected therewith. *The Steamboat Thomas Jefferson*, 10 Wheat. 428, 6 L. Ed. 358; *The Steamboat Orleans*, 11 Pet. 175, 9 L. Ed. 677; *The Salisbury*, Olcott, 71, Fed. Cas. No. 3,694; *McCormick v. Ives*, 1 Abb. Ad. 418, Fed. Cas. No. 8,720. Such a rule as to cases of that nature is a rule of necessity, for it is impossible to sever such services and to say what was performed on navigable waters of the United States and what was performed on other waters.

[3] The determination of the question of jurisdiction in the present case is not aided by reference to decisions which hold that, in case of loss or damage to goods covered by a bill of lading, the presumption is that the loss or damage was occasioned by the act or default of the carrier, and that the burden is upon the latter to show that it arose from a cause for which it is not responsible, or decisions which hold that the presumption is that the damage occurred while the goods were in the possession of the respondent. Those are presumptions raised by law to fix liability in cases of which the court has jurisdiction. They cannot be invoked for the purpose of showing jurisdiction. "No presumptions arise in favor of the jurisdiction of the federal

courts." Ex parte Smith, 94 U. S. 455, 24 L. Ed. 165. On the contrary, the legal presumption is that every case is without their jurisdiction unless the contrary affirmatively appears. *Robertson v. Cease*, 97 U. S. 646, 649, 24 L. Ed. 1057; *United States v. Southern Pacific R. Co. (C. C.)* 49 Fed. 297. Said Marshall, C. J., in *Brown v. Keene*, 8 Pet. 112, 8 L. Ed. 885:

"The decisions of this court require that the averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments."

If the jurisdictional facts are not alleged in the pleadings, the judgment or decree, while not an absolute nullity, is erroneous, and may upon writ of error or appeal be reversed for that cause. *McCormick v. Sullivant*, 10 Wheat. 192, 6 L. Ed. 300; *Metcalf v. Watertown*, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543.

[4] For the purpose of determining the question of the jurisdiction of this cause as a case in the admiralty, the libel must be regarded as if it had affirmatively alleged that the damage to the goods occurred while they were being carried by rail across the Isthmus. The test question is: Would there be jurisdiction in admiralty if the libel had so alleged? The carriage across the Isthmus was not a mere incident to carriage by sea. It was a distinct, independent, and substantial part of the transportation of the goods. Its place in this contract of affreightment is not to be determined by its length in miles or time relative to the two voyages by sea.

We see no escape from the conclusion that the court below was without jurisdiction of the cause, and for that reason the decree must be reversed and the cause remanded, with leave to the appellee to amend its libel; but, as the question of the jurisdiction was not presented to the court below, the appellant will be denied costs on the appeal.

MORROW, Circuit Judge (dissenting). I am of the opinion that the libel in this case states a case within the admiralty and maritime jurisdiction of the District Court, and that the decree should be affirmed.

It is alleged in the libel, in substance, that the respondent is a common carrier, and owned and chartered divers steamships which respondent employed in carrying cargo between Philadelphia and other Atlantic ports and Portland and other Pacific ports; that among the steamships so owned or chartered were the steamships "Mills" and "Stanley Dollar"; that the libelant shipped certain merchandise in good order and condition on board the steamship "Mills" at the port of Philadelphia, bound for the Isthmus of Panama, and connecting lines and steamers, to Portland, Or.; that the merchandise was properly packed for carriage and handling, and was consigned to the libelant at Portland, Or.; that the merchandise arrived at Portland, Or., in the steamship "Stanley Dollar" and was delivered to the libelant in a damaged condition, owing to the negligence of the respondent in stowing and handling said merchandise.

The "stowing" of merchandise is a technical term, used in maritime law, and refers to "the stowage, packing or arranging of cargo in a ship, in such manner as to protect the goods from friction, bruising or damage from leakage." Black's Dictionary. See, also, Scrutton on Charter Parties & Bills of Lading (6th Ed.) art. 50; Carver on Carriage by Sea (5th Ed.) §§ 272, 273; Abbott on Shipping (14th Ed.) p. 505.

"The stowage of the cargo is the sole act of the shipowner." Lord Esher, in *Harris v. Best, Ryley & Co.*, 7 Asp. M. C. (1892) 274.

In the "Harter Act" (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]) the word "stowage" is used in the sense of maritime law, providing against any agreement in a bill of lading or other shipping document relieving the shipowner or master from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery, of merchandise committed to his charge; and I do not find it used in any other sense in any of the decisions. When, therefore, the libel charges that the merchandise delivered to the libelant was damaged through the negligence of the respondent in stowing and handling such merchandise, a case is stated within the admiralty and maritime jurisdiction of the federal court; and this is so whether the case is for a tort or upon a contract of affreightment. Furthermore, there is a presumption that the contract was a maritime contract, arising out of the rule that, if the goods were delivered by the last carrier in a damaged condition, a presumption arises, without further evidence, that the damage occurred while the goods were in the possession of the last carrier, and that the burden is upon him to prove that they were in a damaged condition when received by him; a double presumption being entertained that the goods were accepted in good condition by the first carrier and that such good condition continued until they were received by the last carrier, notwithstanding transportation over intermediate lines. 6 Cyc. 491.

The merchandise having been shipped in good order and condition at Philadelphia, on board the steamer "Mills," and delivered at Portland, Or., to the libelant, from the steamer "Stanley Dollar," in a damaged condition, the presumption is that the merchandise was damaged while in the care and custody of the last carrier, namely, the steamer "Stanley Dollar." This presumption adheres to the transaction and determines its character for the purpose of jurisdiction.

But dealing with the transaction as a whole I am of the opinion that the court had jurisdiction of the case under the rule laid down in the case of *The Moses Taylor*, 71 U. S. (4 Wall.) 411, 18 L. Ed. 397. In that case one Hammons entered into a contract with one Roberts, as owner of the steamship, for transportation from New York to San Francisco, as a steerage passenger, with reasonable dispatch, and to furnish him with proper and necessary accommodations on the voyage. For alleged breach of this contract Hammons brought an action, under a law of the state of California, against the vessel, in the justice's court in San Francisco. The breach alleged

was that the plaintiff was detained at the Isthmus of Panama eight days, and that the provisions furnished him on the voyage were unwholesome, and that he was crowded into an unhealthy cabin, without sufficient room or air for either health or comfort, in consequence of a large number of steerage passengers, more than the vessel was allowed by law to have, or could properly carry. The agent of the vessel filed an answer in which he denied the allegations of the complaint, and asserted that the court had no jurisdiction, because the cause of action, as against the vessel, was one of which the courts of admiralty had exclusive jurisdiction. The justice decided that he had jurisdiction, and gave judgment for the plaintiff. The case was taken to the county court, where the objection to the jurisdiction was again made and again overruled, and, final judgment being entered in favor of the plaintiff, the case was taken to the Supreme Court of the United States on a writ of error. In the Supreme Court it was contended, in favor of the jurisdiction of the state court, among other things, that, as the land carriage at the Isthmus was a substantial part of the voyage, the jurisdiction of the admiralty court did not attach, for the reason that a contract, to come within that jurisdiction, "must be wholly of admiralty cognizance, or else it was not at all within it," citing the case of *The Pacific*, 1 Blatchf. 569, Fed. Cas. No. 10,643. The Supreme Court held that the case presented was clearly one within the admiralty and maritime jurisdiction of the federal courts, and that the state court had no jurisdiction of the case in a proceeding in rem. The court did not consider the incidental land transportation at the Isthmus, or the breach of contract involved in the detention of the plaintiff on land, as impairing the admiralty jurisdiction over that part of the contract relating exclusively to a service to be performed on the high seas, and pertaining solely to the business of commerce and navigation.

I do not think the implication of the decision is to deny jurisdiction in the admiralty of the contract as a whole. The court had before it the entire contract, and it was upon the entire contract that the decision was based.

In a subsequent reference to this case by the Supreme Court, in the case of *Insurance Co. v. Dunham*, 78 U. S. (11 Wall.) 28, 20 L. Ed. 90, the court said:

"In the case of *The Moses Taylor*, it was decided that a contract to carry passengers by sea, as well as a contract to carry goods, was a maritime contract and cognizable in admiralty, although a small part of the transportation was by land; the principal portion being by water."

As I understand these two decisions, they sustain the contention that the District Court had jurisdiction in the present case.

NOTE.—Petition for certification of certain questions to the Supreme Court of the United States denied August 4, 1913.

MILLIKIN v. SECOND NAT. BANK OF BALTIMORE.

(Circuit Court of Appeals, Fourth Circuit. May 21, 1913.)

No. 1,155.

BANKRUPTCY (§ 184*)—LIENS—CHattel MORTGAGE—VALIDITY—RECORD.

Code Pub. Gen. Laws Md. 1904, art. 21, § 41, provides that no personal property, whereof the vendor, mortgagor, or donor shall remain in possession, shall pass to any mortgagee, unless by mortgage acknowledged and recorded as subsequently required. Sections 45 and 46 require bills of sale and chattel mortgages to be recorded in the county where the mortgagor resides within 20 days from the date thereof, and section 48 provides that chattel mortgages shall be valid and take effect except as between the parties only from the time of recording. *Held* under Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), as amended by Act Cong. June 25, 1910, c. 412, 36 Stat. 838 (U. S. Comp. St. Supp. 1911, p. 1490), giving to the bankrupt's trustee the rights of a creditor holding a lien by legal or equitable proceedings, that a chattel mortgage on a vessel not documented, which was not recorded as required by state statute, was invalid to confer a lien on the mortgagee as against the mortgagor's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

In the matter of bankruptcy proceedings of John H. Riehl. Claim by the Second National Bank of Baltimore against C. Howard Millikin, trustee, for the proceeds of the sale of a derrick hoister vessel, under an unrecorded chattel mortgage. From an order allowing the bank's claim of lien (200 Fed. 455), the trustee appeals. Reversed.

G. W. S. Musgrave, of Baltimore, Md., for appellant.

William H. Hudgins, of Baltimore, Md., for appellee.

Before PRITCHARD, Circuit Judge, and BOYD and DAYTON, District Judges.

PRITCHARD, Circuit Judge. This was a suit in bankruptcy instituted in the District Court of the United States for the District of Maryland. The facts are as follows:

On February 29, 1912, John H. Riehl, a resident of Baltimore, Md., was adjudicated a bankrupt upon his voluntary petition. At the time of his adjudication he was in possession of certain vessel property used by him in his business, of some of which he was sole owner and of others co-owner. One of the vessels of which he was the sole owner was a derrick hoister named "Calvin." On August 17, 1911, the said John H. Riehl made and executed to the Second National Bank of Baltimore, to secure an indebtedness of \$14,000, a mortgage on all of the said vessel property, including the derrick hoister Calvin. This mortgage was recorded in the customhouse at Baltimore where all of the vessels were registered and enrolled, except the derrick hoister Calvin, which was also specifically mentioned in said mortgage as "not documented." The said mortgage was never recorded in the record of-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fice of the superior court of Baltimore city. The said vessel property was sold under order of the District Court of the United States for the District of Maryland, and the said derrick hoister Calvin brought the sum of \$1,600, which amount of money, less its proportionate share of the expenses of sale, is now in controversy.

The Second National Bank of Baltimore filed its claim, and the trustee excepted thereto in so far as it affected the derrick hoister Calvin and the fund representing the same, which exceptions were sustained by the referee, and said claim disallowed as a preferred claim to that extent. Upon a petition for review, the District Court reversed the finding of the referee, and the matter is brought before this court by appeal from this decision. The learned judge who tried this case in the court below in referring to the law of Maryland said:

"The law of Maryland is that, as previously existing creditors are not hurt by the withholding of a mortgage from the record, the fact that it is not recorded gives them no other or better right than they would have had had it been recorded."

In other words, the court held that the bank's mortgage constituted an equitable lien, and as such had priority over debts contracted prior to its execution.

The real question involved in this controversy has not as yet been passed upon by the Court of Appeals of Maryland, but it is insisted by counsel for appellee that in the case of *Textor v. Orr*, 86 Md. 392, 38 Atl. 939 (a case wherein the facts are different from the case at bar), that court rendered a decision, the effect of which is to sustain the ruling of the lower court. In that case a trustee for the benefit of creditors under a deed of assignment executed according to the laws of Maryland instituted a suit to recover certain personal property which was held by virtue of an unregistered paper in the nature of a chattel mortgage. There was no levy of an execution or attachment upon the property; the only claim upon which the trustee based his right being the deed of assignment. It was held that the agreement or chattel mortgage was not effective as a bill of sale or chattel mortgage as against third parties, and was not valid or enforceable against a bona fide purchaser or mortgagee without notice, because it was not acknowledged and recorded as required by the Code in cases where the mortgagor or seller of chattels remains in possession of the same, yet the unregistered mortgage or bill of sale constituted an equitable mortgage or lien, and as such was enforceable not only against the mortgagor himself, but also against parties who claimed under him as volunteers or without an equity superior to that of the creditor holding the lien, and that the assignee was such a party. In other words, he was not a purchaser for value, and that he could not assert any claim against the property which the assignor could not.

Thus it will be seen that the case was disposed of upon the theory that the assignee held no lien by judgment or otherwise that was superior to the equitable lien. The question before us was not passed upon in that case. The court below, in referring to this phase of the question, said:

"It may be that the courts of Maryland, when the question shall come squarely before them, may hold that other and more serious consequences

would follow from the absence of an affidavit than they have held will result from a mere failure to record a mortgage or deed of trust, or they may not. It is not necessary to consider that question in this case."

This question not having been determined by the Court of Appeals of Maryland, it devolves upon this court to determine the same in the light of the bankruptcy law and the general rule applicable to such cases. It is conceded that the Calvin was on the same footing as other personal property, subject to all the laws applicable thereto inasmuch as it had not been documented in the custom house. Therefore, the question for us to decide is as to whether the mortgage in question not having been recorded in accordance with the requirements of the laws of Maryland relating to bills of sale and mortgages of personal property has priority over the claims of the general creditors of the bankrupt as to the funds in controversy.

Prior to the enactment of the amendment of June 25, 1910, a trustee in bankruptcy in so far as the rights of the bankrupt were concerned stood in the shoes of the bankrupt, and the property taken by him was subject to the enforcement of any rights or equities that could have been enforced between the parties at the time of the adjudication, and at that time the principles contended for by counsel for appellee would have applied to a case like the one at bar. In other words, an unregistered mortgage being good inter partes could have been enforced as such, but the act as amended completely changed the situation, and now the trustee is the representative of all the creditors, thus accomplishing what the law intended, to wit, to cut up by the roots all secret liens or other agreements between the parties. Under the old law a general creditor was not permitted to contest such transactions, and as a result was deprived of the right to share in an equal distribution of the assets of the bankrupt.

Under the present law (section 47, subd. 2) a trustee occupies the same position as a judgment creditor with an execution in his hands at the time of the adjudication; the amendment in question being in the following language:

"* * * And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

The Bankruptcy Act was intended to secure an equal and equitable distribution of the assets of the bankrupt among all creditors, and, keeping this in mind, we will now consider the question: Did the appellee acquire a lien on the property in question so as to entitle him to priority over the general creditors?

The law of Maryland relating to registration of bills of sale and chattel mortgages is to be found in article 21 of the Public General Code of the Laws of Maryland, and the pertinent sections are as follows:

"Sec. 41. No personal property, of any description whatever, whereof the vendor, mortgagor or donor shall remain in possession, shall pass, alter or

change, or any property therein be transferred to any purchaser, mortgagee or donee, unless by bill of sale or mortgage acknowledged and recorded as herein provided; but nothing herein shall be construed to extend to any sale or gift, where the same is accompanied by delivery, nor to invalidate such transfer as between the parties thereto."

"Sec. 43. A bill of sale or chattel mortgage, if acknowledged within this state, may be acknowledged before any officer authorized to take acknowledgments of deeds within this state in the same manner as deeds are acknowledged, or acknowledged as certified."

"Sec. 45. Bills of sale shall be recorded in the county or city where the vendor or donor resides within twenty days from the date thereof. If the vendor or donor resides out of the state, and the personal property conveyed by such bill of sale, is located in this state, then such bill of sale shall be recorded in the county where such property is located, or in Baltimore city, if it be located in said city, within twenty days from the date of such bill of sale.

"Sec. 46. A mortgage of personal property shall be executed, acknowledged and recorded as bills of sale."

"Sec. 48. Mortgages of personal property shall be valid and take effect, except as between the parties thereto, only from the time of recording; and in case of more than one mortgage, the one first recorded shall have preference."

It appears that the Legislature of Maryland has from time to time changed the law in regard to the registration of deeds of conveyances of real estate, but it has never changed the law in regard to the registration of bills of sale, mortgages and gifts of goods and chattels where the vendor, mortgagor, or donor remains in possession.

In the case of *Gill v. Griffith*, 2 Md. Ch. 271, we are told:

"Though the Legislature has changed the law with regard to the registration of deeds or conveyances of real estate, * * * it has never, in any respect, modified the act of 1729, to prevent secret sales, mortgages, and gifts of goods and chattels, of which the vendor, mortgagor, or donor, should remain in possession, but these have continued exposed to the stern, but wholesome provisions of that act."

Section 45 of article 21 requires bills of sale to be recorded in the county or city wherein the vendor or donor resides within twenty days from the date thereof, and, if the vendor or donor resides out of the state and the personal property conveyed by such bill of sale is located in the state, then such bill of sale shall be recorded in the county where such property is located, or in Baltimore city, if it be located in that city within 20 days from the date of such bill of sale, and by section 46 it is provided that a mortgage of personal property shall be executed, acknowledged, and recorded in the same manner as bills of sale, and section 48 provides that mortgages of personal property shall be valid and take effect, except as between the parties thereto, only from the time of recording.

Thus it will be seen that the provisions of the law clearly require that mortgages of personal property shall be recorded within 20 days from the date thereof, and it is apparent that the real purpose of the statute is to prevent one from disposing of his property by mortgage, bill of sale, or other secret conveyances. This requirement renders it impossible for one to execute a secret lien and thereafter deal with the public as though nothing had transpired to lessen or impair his financial ability.

In other words, the statute provides that, where one desires to execute a mortgage, he may do so, and that the same shall be good as between the mortgagor and mortgagee, but, if such mortgage be not registered, the mortgagor cannot by the execution of the same defeat the rights of other creditors who may thereafter acquire liens upon such property.

The case of *Pleasanton v. Johnson*, 91 Md. 673, 47 Atl. 1025, is pertinent to the case at bar. In that case there was a failure on the part of the mortgagee to make the affidavit in pursuance to the requirements of section 50 of article 21 of the Code of Maryland, and therefore it was held that the mortgage was invalid, notwithstanding the fact it had been recorded. The court in that instance was of the opinion that the requirements of this section were mandatory.

If the failure to comply with this requirement renders a mortgage invalid, does it not necessarily follow that a failure to comply with the requirements of the section relating to recordation of mortgages would render such instrument invalid? The requirements contained in section 48 in regard to the conveyances and mortgages of personal property are as plain and positive as those contained in section 50, which require a mortgagee to make an affidavit as to the bona fides of the transaction. It is the purpose of registration to give notice to the world of the fact that the conveyance in question has been made. The requirement that the mortgagee should make an affidavit as to the nature of the transaction was to prevent fraud and to secure fair dealings, and no doubt serves a good purpose.

The provision that a mortgage shall be registered in order to pass title as against judgment creditors or purchasers for value is equally important; and, if the laws of Maryland are to be so construed that one with a secret lien can defeat the rights of a judgment creditor with an execution in his hand, then the requirements relating thereto are wholly ineffective and amount to nothing.

"A mortgage does not become a valid lien against creditors of the mortgagor until it is recorded. That the mortgage is given for the purchase money of the mortgaged property does not relieve the mortgagee from the necessity of recording it before other liens attach. Thus, if there be an execution in the hands of a sheriff at the time of the debtor's purchase of the property, so that the lien of the execution would attach to the property upon the delivery of it to the debtor, and he gives a chattel mortgage for the purchase money at the time of the purchase, but the mortgagee neglects for twenty hours to record it, the execution becomes a prior lien. It is not necessary for a creditor attaching (attacking) an unrecorded mortgage to show that he intended credit on the faith of the property covered by the mortgage. If the mortgage has not been recorded, it is not a valid lien against the creditor, even though his claim accrued before the giving of the mortgage." *Jones on Chattel Mortgages* (5th Ed.) § 263.

In the case of *Sidener v. Bible*, 43 Ind. 234, the Supreme Court of that state passed upon a statute containing provisions similar to that of the Maryland statute, and in referring to the same said:

"The mortgage was not legally recorded, as may be seen by referring to the statute on the subject, which provides that 'no assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged,

as provided in case of deeds of conveyance, and recorded in the recorder's office of the county where the mortgagor resides within ten days after the execution thereof."

The court in that instance held that a failure to record the mortgage in pursuance to the statute of that state rendered the mortgage invalid against all parties other than the parties thereto, and in discussing this phase of the question said:

"It is claimed that the mere existence of creditors, if they have acquired no lien upon the property, does not prevent the owner from making a bona fide conveyance of it, and that the mortgage in this case being valid between the parties, and the mortgagee having obtained possession of the mortgaged property under the mortgage, before appellant acquired any lien thereon it can make no difference whether the mortgage was ever recorded or not."

In the case of *In re Noel* (D. C.) 137 Fed. 694, Morris, District Judge, in passing upon this phase of the question, said:

"Whether or not the unrecorded mortgages which during the period of over a year he was executing every 45 days, and which were intended to be an undisclosed incumbrance on his real estate, is a valid security, or is to be considered invalid, as hindering and delaying creditors, is to be determined by the state law, irrespective of the question of preference under the Bankruptcy Act. *Dooley v. Pease*, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457. The question is whether a mortgage kept off the record, as this one was, is valid under the Maryland decisions. The object of the recording of conveyances is to prevent the hardship resulting to creditors and purchasers from the existence of secret conveyances, not disclosed by the public records, of property of which the grantor remains the ostensible owner. The reasonable time of six months is provided within which a mortgagee must record his mortgage in Maryland, to be of any avail whatever. Obviously the purpose of the law requiring the recording of mortgages is defeated if, by a contrivance such as was resorted to in this case, a mortgage can be kept in existence, and remain a secret incumbrance, and be ready to be made effective at any moment when a crisis in the affairs of the mortgagor arises. By such a scheme the plain intention of the Legislature is outwitted.

"In the leading case of *Gill v. Griffith*, 2 Md. Ch. 270, the opinion of the chancellor, which was adopted by the Court of Appeals of Maryland, decided that a similar device with regard to a bill of sale of chattel property was void. The reason given in *Gill v. Griffith* for keeping the bill of sale off the record and renewing it every 19 days was to spare the mortgagor, who was a professional man, the mortification resulting from the community knowing that he had been obliged to mortgage his household effects. The reason in the present case is stated by both Noel and the bank to have been, and no doubt was, to prevent the injury to the financial credit of a man largely engaged in business, and badly needing credit, which would result if a mortgage upon his dwelling house was put upon record, and thus became known to those with whom he did business. What was said by the Chancellor in the case of *Gill v. Griffith* is equally applicable to this case: 'There was a fixed design, persevered in for more than twelve months, to prevent actual or constructive notice from being communicated to the public of the existence of this deed. Whatever may have been the cause of this—whether the result of an agreement, promise, or mere acquiescence in the expressed request of the mortgagor, and to save his feelings from mortification—it is so clearly repugnant to the letter and policy of the Legislature that it seems to me impossible it can escape condemnation.'"

The case of *In re Noel*, supra, was brought to this court on appeal, and the judgment of the lower court was affirmed on the 12th day of March, 1907.

The Maryland cases seem to have no bearing upon the situation as presented in the administration of the Bankruptcy Act of 1898, as amended June 25, 1910. Under that act a mortgage for a pre-existing indebtedness made by a mortgagor when insolvent and duly recorded would be an act of bankruptcy, because working a preference, and would (by the recordation) give notice to all other creditors of the facts and enable them to file a petition against the debtor within four months and avoid the preference.

If, however, the mortgage be unrecorded, it would afford no notice to the creditors, and they would not be in a position to file a petition. Is it to be said that they are to be placed in a worse position as to the assertion of their rights in respect to an insolvent estate than if all the formalities attendant upon the attempt to create the purpose had been complied with?

While it is true that in this instance it is not insisted that a fraud upon the rights of other creditors was intended by the failure to record the mortgage in question, yet, if it should be held that an unregistered deed was valid and passed title to the property sought to be conveyed as against creditors with a superior lien, it would encourage fraudulent transactions, and thereby practically nullify the bankruptcy law as respects the making of mortgages by insolvent debtors.

We have carefully considered the various cases relied upon by appellee, and are of the opinion that they do not apply to the case at bar.

In view of what we have said, we are impelled to the conclusion that the court below erred in holding that the mortgage of the bank was entitled to priority over the other creditors.

For the reasons stated, the decree of the lower court is reversed.
Reversed.

GREAT WESTERN LIFE INS. CO. v. SNAVELY.

(Circuit Court of Appeals, Ninth Circuit. June 12, 1913.)

No. 2,231.

INSURANCE (§ 400*)—LIFE INSURANCE—CONSTRUCTION AND EFFECT OF INCONTESTABLE CLAUSE—REINSTATEMENT OF POLICY.

A policy of life insurance provided that "This contract is incontestable after one year from date of issue." It also contained a provision that, in case of default on the payment of any premium, it would be reinstated on application and payment of arrears, with evidence of insurability satisfactory to the company. Insurer made default in payment of a premium, and on his application and signing a "certificate of reinstatement and revival" the policy was reinstated. He paid the premiums thereafter until his death, which occurred more than a year after the reinstatement. *Held* that, whether the reinstatement constituted a new contract or a renewal of the old, the terms of the policy were the terms of such contract, and the incontestable clause precluded any defense by the company to an action thereon, on the ground of misrepresentation or false statements in the certificate for reinstatement.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1086; Dec. Dig. § 400.*]

In Error to the District Court of the United States for the District of Montana; George M. Borquin, Judge.

Action at law by Esta M. Snavely against the Great Western Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. J. Miller and James F. O'Connor, both of Livingston, Mont., for plaintiff in error.

E. M. Niles and Fred L. Gibson, both of Livingston, Mont., for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. On December 27, 1907, plaintiff in error, in consideration of the sum of \$164.70 then paid, and a like sum to be paid in advance for each and every year for 20 years, issued to Arthur G. Snavely a 20-year life policy of insurance for \$5,000, payable in case of his death to Esta M. Snavely, his wife, the defendant in error, as beneficiary. The application for the insurance was made a part of the policy. The contract contained, among other things, the following provisions:

"A grace of 30 days, during which this contract will remain in full force, will be allowed in the payment of all premiums except the first.

"In case of default in the payment of any premium or interest, the company will reinstate the contract at any time, if not previously surrendered for its cash value, upon written application by the insured to the company at its home office with evidence of insurability satisfactory to the company, payment of all premiums that would have been paid in the intervening time if no default had been made, with interest thereon at the rate of 5 per cent. per annum computed from the premium due date, and payment or reinstatement, with interest at like rate, of any indebtedness existing at the time of default.

"This contract is incontestable after one year from date of issue."

The insured defaulted in the second payment, due December 27, 1908, for more than 30 days, and did not pay the same until March 5, 1909; but upon such payment the policy was reinstated by the insurance company. In order to secure the reinstatement, the insured was required to and did sign what is denominated a "Certificate of Health and Revival Contract," and among other things made declaration as follows:

"I hereby declare to and agree with said company that I am now in good health and free from every ailment and complaint; * * * that I have not had any injury, sickness, or ailment of any kind; and that I have not consulted or been prescribed for by any physician or received any medical treatment since the date of my original application on which said policy was issued, except as here stated:

"Operation appendicitis, Sept. 1—08. Off duty two weeks. Entirely recovered.

"And I hereby renew the statements and agreements contained in said original application, and expressly agree that if any answer or statement contained therein, except as modified in this contract, or if any statement made or contained herein, be untrue in any respect, then said policy is and shall continue to be absolutely null and void, and the reinstatement thereof inoperative and of no effect."

As a defense the insurance company set up that the reinstatement of the policy was consented to upon the strength of this certificate, and that the same was false, fraudulent, and untrue, in that the insured was then afflicted with a serious malady, of which he subsequently died. The insured paid the third installment of premium when due, and thereafter, to wit, on July 3, 1910, died.

Trial was proceeded with before a jury; but, when the defendant came to offer proof in support of its defense, it was not allowed to introduce such proof, on the ground that the policy was by its terms rendered incontestable. Whereupon a verdict for plaintiff was directed, and from the judgment entered thereon the defendant predicates error.

It is the contention of counsel for plaintiff in error that the representations made by the insured for a reinstatement of the policy are in effect warranties, and, the insured having expressly agreed that if such representations were untrue in any respect the policy should remain inoperative, it follows that the reinstatement is nugatory and of no effect, and hence that the company should have been permitted to introduce its proofs showing the falsity of the statements made. This depends wholly upon the operative effect of the clause rendering the policy incontestable after one year.

It will be noted that the insured died more than one year after the policy was reinstated, a fact which renders it unnecessary to inquire whether the reinstated policy became a new contract or merely a revival of the old. In either case, death occurred more than one year after the negotiations were consummated. It can hardly be disputed that the terms of the old contract became the terms of the new or revived contract, call it what you will, so far as applicable to the new conditions; for it is the policy that is reinstated, and it contains the terms which constitute the contract. No new policy is issued, but the old becomes again the contract, and the parties must look to that for its terms and conditions, and to none other. Among others, the incontestable clause remains in the policy, and must be given effect if applicable to the conditions attending the negotiations for reinstatement.

The incontestable clause in the present policy is very general, excepting nothing from its scope, and by the strong current of authority precludes any defense after the expiration of one year on account of false statements, warranted to be true, although they may have been made for a fraudulent purpose. This is true as spoken of the original policy. The grounds for its support are that insurance companies, in order to obtain business, represent that they will issue policies incontestable as to certain matters after a designated period, and individuals negotiate with them on that basis. Furthermore, the clause constitutes in effect a short period of limitation, which it is perfectly competent for the parties to agree upon. While it is true that fraud vitiates all contracts, yet in contracts of the kind, where the beneficiaries are placed at a disadvantage because the dead cannot speak, it is not contrary to public policy for the parties to agree that the company shall be precluded upon the subject after some specified time, reasonable, within which to make investigation. The clause lends stabil-

ity to the contract, and renders life insurance of greater value to the insured and beneficiary. The subject is exhaustively and ably discussed in *Massachusetts Life Ass'n v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261. See, also, *Wright v. M. B. L. Ass'n*, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749; *Teeter v. United Life Ins. Ass'n*, 159 N. Y. 411, 54 N. E. 72; *Austin v. Mutual Reserve Fund Life Ass'n (C. C.)* 132 Fed. 555; s. c., 142 Fed. 398, 73 C. C. A. 498, 6 L. R. A. (N. S.) 1064; 25 Cyc. 872.

Now, if it be said that the reinstated policy is a new contract, about which we pass no opinion, the incontestable clause must needs speak from the date of the reinstatement. It must do this, or else it is a dead letter in the contract. Further, if the clause precludes the defense of false representation and fraud in the original contract, by a strong parity of reasoning it would preclude a like defense as to the new contract, for both were secured upon the representations of the insured as to his physical fitness, condition of health, etc. But the fraud is charged only as to the later representations. Speaking of a policy containing an incontestable clause, which had been reinstated, the court in *Teeter v. United Life Ins. Ass'n*, supra, said:

"Thereupon the policy of insurance was restored in full vigor as of that date (the date of the reinstatement), and by its very terms it was to become incontestable after two years."

The two years having elapsed from that date, it was held that the company was barred by the terms of the contract from contesting the policy on the ground that the statements contained in the reinstated certificate of the insured touching the state of his health were untrue. In *Pacific Mutual Life Insurance Co. v. Galbraith*, 115 Tenn. 471, 91 S. W. 204, 112 Am. St. Rep. 862, where it was held that the revived policy became a new contract, the court, in its preliminary reasoning, said:

"If this be its nature, then it must operate in the future from the date of its reinstatement, and whatever might be its original date, or howsoever long it may have run, yet it would seem, by the force of necessary logic, to follow that the incontestable clause would begin its new life with the date of the new contract."

The reasoning appeals to us as logical and sound, and the conclusion suggested must inevitably follow from the premises. We conclude, therefore, that the District Court committed no error in the present controversy, and its judgment will be affirmed.

MOREHOUSE et al. v. GIANT POWDER CO. et al.

In re EXPLORATION MERCANTILE CO.

(Circuit Court of Appeals, Ninth Circuit. May 20, 1913.)

No. 2,145.

1. COURTS (§ 418½, New, vol. 14 Key-No. Series)—JURISDICTION OF DISTRICT COURTS—EFFECT OF NEW JUDICIAL CODE—CONTEMPTS.

Under the provisions of the Judicial Code (Act March 3, 1911, c. 231, §§ 294, 299, 36 Stat. 1167, 1169 [U. S. Comp. St. Supp. 1911, pp. 244, 246]) that its provisions "so far as they are substantially the same as existing statutes shall be construed as continuations thereof, and not as new enactments," and that the repeal of existing laws or the amendments thereof embraced in the act "shall not affect any act done or any right accruing or accrued or any suit or proceeding," the taking effect of such Code did not affect pending suits or proceedings in the District Court, nor the power of the court to punish as a contempt disobedience of an order previously made.

2. INJUNCTION (§ 232*)—PROCEEDINGS FOR PUNISHMENT—DISPOSITION OF FINES.

A proceeding for contempt instituted by creditors of a bankrupt in the bankruptcy proceedings for violation of an injunction by which the estate was depleted is essentially civil and remedial, and the punitive element only incidental, and, where as a result of the action of the creditors a substantial sum is restored to the estate, it is within the power of the court to impose a fine for the contempt and direct its payment to such creditors as partial reimbursement for their costs and attorney's fees expended.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 519-528; Dec. Dig. § 232.*]

3. CONTEMPT (§ 54*)—PROCEEDINGS FOR PUNISHMENT—AFFIDAVIT OR INFORMATION.

There is no prescribed form which must be followed in an information on which a citation for civil contempt is issued; and, in the absence of objection in limine, the papers are sufficient if they clearly apprise the defendant of the nature of the charge.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 143-149; Dec. Dig. § 54.*]

4. BANKRUPTCY (§ 20*)—JURISDICTION OF COURT—INJUNCTIONS.

A proceeding in a state court to wind up an insolvent corporation in which a receiver is appointed tends to defeat the operation of the bankruptcy law, and may be stayed by injunction by the bankruptcy court under the power given by Bankr. Act July 1, 1898, c. 541, § 2 (15), 30 Stat. 545 (U. S. Comp. St. 1901, p. 3421), to "make such orders as may be necessary for the enforcement of the provisions of the act."

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. § 20.*]

5. BANKRUPTCY (§ 20*)—JURISDICTION OF COURT—INJUNCTION.

A court of bankruptcy has jurisdiction to grant an injunction restraining any act which will interfere with the administration of the bankruptcy law against any person within its jurisdiction, whether a party to the bankruptcy proceedings or not.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. § 20.*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

In Error to the District Court of the United States for the District of Nevada; Edward S. Farrington, Judge.

In the matter of the Exploration Mercantile Company, bankrupt. From an order granted on application of the Giant Powder Company, Consolidated, the Pacific Hardware & Steel Company and J. A. Folger & Co., adjudging H. V. Morehouse and J. S. Thompson guilty of contempt and imposing fines, defendants bring error. Affirmed.

On August 6, 1908, W. C. Stone, the president and a director and the principal stockholder of the Exploration Mercantile Company, a corporation of Nevada, caused to be filed in one of the courts of that state an application for the appointment of a receiver to take charge of the affairs of that corporation with a view to its dissolution under the directions and orders of that court. On the same day C. E. Wylie, who was the manager of the corporation, and also one of its directors and stockholders, made application that he be appointed such receiver. Thereupon an order was made declaring the corporation dissolved and appointing Wylie receiver, with full power to take charge of its assets, and to control its business. At that time and ever since the corporation was and has been insolvent. On September 12, 1908, a petition was filed in the court below by certain creditors of the corporation praying that it be adjudged a bankrupt. On the same day the creditors presented a petition in which they alleged that the corporation had a large stock of merchandise, which would be dissipated and lost unless the corporation and Wylie, the receiver, be restrained from selling or otherwise disposing of it. The court thereupon made an order that, until its decision should be rendered on the petition, the parties against whom the injunction was sought abstain from selling or in any other manner disposing of the property or estate or any part thereof of the said corporation.

On the same day another petition was filed by the creditors, alleging that a petition in bankruptcy had been filed, and that proceedings had been had in the state court resulting in the appointment of Wylie as receiver, who was then conducting the business of the bankrupt to the injury of the creditors, and praying that the suit in the state court be stayed, and that Stone and Wylie, their agents, servants, and counselors, be restrained from further prosecuting that suit. An injunction was issued commanding and enjoining Stone, Wylie, the corporation, their agents, servants, and attorneys, from further prosecuting said suit in said state court, and from taking any further step or proceeding in said suit "until our said District Court shall make further order in the premises."

On September 17, 1908, the plaintiffs in error herein filed their appearance in the court below as attorneys for the corporation and for Stone and Wylie. The corporation filed a demurrer to the petition for adjudication, and Stone presented a plea to the jurisdiction. On the following day a motion was made for the dissolution of the injunction, but that motion had not been decided when the contempt proceedings hereinafter referred to were had. On July 9, 1909, the corporation was duly adjudged a bankrupt on the ground that, being insolvent, it had on August 6, 1908, applied for a receiver for its property. At the same time it was shown the court by affidavit that between September 30, 1908, and April 30, 1909, Wylie had paid out more than \$10,000 of the money of the corporation, and had committed further acts in violation of the order of the district court, and that plaintiffs in error on December 7, 1908, and after notice and knowledge of the orders of the court below, demanded and received \$1,000 from Wylie as attorney's fee; and that one of said plaintiffs in error, H. V. Morehouse, acting as attorney for Wylie, receiver, and for Stone, after notice and knowledge of said orders, asked the state court to order the sale of the property of the company and advised that court to pay no attention to the action of the federal court.

For those acts the plaintiffs in error were ordered to show cause why they should not be adjudged guilty of contempt of the court below for disobedience of its lawful orders. In answer to that order they filed affidavits disclaiming willful or contemptuous disobedience, but admitting the receipt of \$1,000 as attorney's fee. The matter came on to be heard on May 26, 1910, and the

court thereupon found that the plaintiffs in error willfully, knowingly, and contemptuously violated its order restraining Wylie from disposing of the property of the corporation in receiving the attorney's fees so paid them by the receiver, and it was ordered and adjudged that they were guilty of contempt of court, and that they each be fined \$100; that in default thereof they be committed to the county jail until payment of the fine, or until the further order of the court; and that they each be fined the sum of \$500.

H. V. Morehouse, of Reno, Nev., and I. S. Thompson, of Goldfield, Nev., for plaintiffs in error.

Joseph Kirk, of San Francisco, Cal., and J. L. Kennedy, of Eureka, Cal., for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] We find no merit in the contention that the court below had no power or jurisdiction to enter the judgment for contempt committed against the court wherein the injunction was issued for the reason that that court ceased to exist on January 1, 1912, by virtue of the provisions of the new Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1167 [U. S. Comp. St. Supp. 1911, p. 244]). The District Court was not abolished by the Judiciary Act in the sense and with the effect which is contended for. The new Judicial Code, so far as it affected the District Courts, was but a re-enactment of the existing law. Section 294 provides that:

"The provisions of this act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments."

And section 299 declares that the repeal of existing laws or the amendments thereof embraced in the act shall not affect any act done or any right accruing or accrued.

[2] It is assigned as error that the proceeding in the court below was for a criminal contempt, and that the judgment requiring the plaintiffs in error each to pay \$500 as remedial compensation for expenses, costs, and attorney's fees to the petitioning creditors was beyond the power and jurisdiction of the court, that in the affidavit upon which the proceedings were had no prayer of any kind was made, and no relief of any kind was demanded, and that the court had no power to grant civil relief where none was demanded. On the argument it is contended that, the proceeding for contempt being a criminal proceeding, the petition upon which it is instituted must have a title of its own, and that the charge and the prayer must be as specific as an indictment, and it is pointed out that the title is "In the Matter of Exploration Mercantile Company, a Corporation, an Alleged Bankrupt," and that the order to show cause follows that caption, and that, therefore, the same is not a separate proceeding, but a part of the original proceeding in bankruptcy. In support of that contention *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, is cited. In that case the court held that a proceeding instituted by an aggrieved party to punish the other party for contempt for violating the injunction in the suit in which the

injunction order was issued and praying for damages and costs is a civil proceeding in contempt, and is part of the main action, and that the court cannot punish the contempt by imprisonment for a definite term, and that the only punishment is by fine measured in the amount of the pecuniary injury, and that the party against whom the proceeding is instituted is entitled to the protection of the constitutional provisions against self-incrimination.

It is a sufficient answer to the contention to point to the fact that in the present case the punitive element of the proceeding was clearly only incidental, that its aspect was civil and remedial, and that the primary purpose was to protect the estate in bankruptcy. In the judgment it was found that Wylie was guilty of contempt in violating the order restraining him from disposing of the property of the bankrupt in paying \$3,000 to Stone, \$1,000 to the plaintiffs in error, \$700 to Hobbs, and \$1,000 to himself. For that Wylie was fined \$1,000, and Stone was required to pay \$3,000, both of which sums were ordered repaid for the benefit of the bankrupt's estate. The judgment that the fines of the plaintiffs in error should be paid by the clerk to the creditors as partial compensation for their costs and attorney's fees in prosecuting the proceedings was but a provision for the benefit of the estate, since the service of the creditors resulted in the restitution to the estate of \$4,000 by means of the proceedings.

In *Kreplik v. Couch Patents Co.*, 190 Fed. 565, 111 C. C. A. 381, the court held that in a proceeding against the defendant in an equity suit for violation of its injunction a fine may properly be imposed for the benefit of the complainant, measured by the pecuniary injury caused him; that such a fine is remedial and not punitive; that it does not exclude punishment of the defendant where the contempt has also a criminal aspect; and that upon a petition separate and distinct from the original suit the court may in the same proceeding impose a compensatory fine and also a sentence of imprisonment as punishment. In *Merchants' Stock & Grain Co. v. Board of Trade*, 187 Fed. 398, 109 C. C. A. 230, it was held that a judgment for contempt against the defendants in an equity suit who had violated an interlocutory injunction that they pay fines therefor, three-fourths to the complainant and one-fourth to the government, is a proceeding to punish a civil contempt because its chief purpose is to prevent injury to the complainant, and because the dominant effect as well as the object of the proceeding is to coerce the defendant to obey the injunction for the purpose of preserving the property of the complainant, and the punitive element in it is subordinate and incidental.

[3] In the affidavit and the motion upon which the order to show cause in the present case was issued the contempt was fully and specifically described, and the object was declared to be the issuance of an attachment against the plaintiffs in error for disobedience of the orders of the court. No objection was interposed in the court below to the form or sufficiency of the papers. The parties to the controversy treated the proceeding as civil and remedial, and there was no deprivation of any constitutional protection. In *Aaron v. United States*, 155 Fed. 833, 84 C. C. A. 67, the court said:

"It is now the recognized rule that the information in a contempt proceeding is sufficient if it clearly apprises the defendant of the nature of the charge against him, and no particular form is necessary. * * * If the information for the writ was defective in matter of form, it should have been taken advantage of by the defendant in proper manner by motion before going to trial. Where the party charged with the contempt appears without objection to the sufficiency of the information and affidavits by appropriate motion, but answers and goes to trial, the objection is deemed as waived."

[4] It is contended that the judgment is void for the reason that the District Court was prohibited by section 720 of the Revised Statutes (U. S. Comp. St. 1901, p. 581) to issue an injunction to stay the proceedings, that the exception in that statute as to cases where injunctions may be authorized by any law relating to proceedings in bankruptcy is not applicable since under the Bankruptcy Act a stay order is authorized only against "a suit founded upon a claim from which a discharge in bankruptcy would be a release," and it is said that the suit in the state court was not founded upon such a claim. But the instance so specified is not the only one in which the bankruptcy court may issue an injunction to stay proceedings in a state court. It may also enjoin such a proceeding "where it has the effect to defeat the operation of the bankrupt law by interfering with the administration of the debtor's property in bankruptcy." Act July 1, 1898, c. 541, § 2, cl. 15, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3421). The power of the bankruptcy court to administer property in the custody of a receiver appointed in a state court depends upon whether or not such custody tends to defeat the operation of the bankruptcy law. *In re Knight* (D. C.) 125 Fed. 35; *Hooks v. Aldridge*, 145 Fed. 865, 76 C. C. A. 409. *In Re Watts and Sachs*, 190 U. S. 1, 27, 23 Sup. Ct. 718, 724 (47 L. Ed. 933), Mr. Chief Justice Fuller said:

"The operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive."

The receiver in the state court was appointed for the purpose of winding up an insolvent corporation. The institution of the suit and the appointment of the receiver were an act of bankruptcy, and tended to defeat the operation of the bankruptcy law. This court so held in *Exploration Mercantile Co. v. Pacific H. & S. Co.*, 177 Fed. 825, 101 C. C. A. 39.

[5] It is contended that the plaintiffs in error were not and could not have been made parties to the bankruptcy proceedings, and that, therefore, the District Court had no jurisdiction over them, and no power to enjoin them. But section 2, cl. 15, gives the bankruptcy court power to issue injunctions against persons within the court's jurisdiction, whether parties to the bankruptcy proceedings or not, to prevent the transfer or disposition of any part of the bankrupt's property. 1 *Remington*, § 359; *In re Hornstein* (D. C.) 122 Fed. 266; *In re Jersey Island Packing Co.*, 138 Fed. 625, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560. "To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which

the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice." In *re Lennon*, 166 U. S. 548, 554, 17 Sup. Ct. 658, 660 (41 L. Ed. 1110).

It is contended that as the injunction and the stay order were only preliminary and not perpetual, and were not continued in force by the order of the court, they ceased to exist on July 9, 1909, when the adjudication in bankruptcy took place, and that the proceedings herein being instituted after that date the jurisdiction of the court in that behalf had ended. We find no merit in the contention. The injunction against the prosecution of the suit ran until the court "shall make further order in the premises," and the restraining order against the disposition of the property ran until the decision of the court upon the motion for an injunction. The motion had not been disposed of at the time of the adjudication of bankruptcy and during that time the offense for which these proceedings were had was complete; and, even if the injunction and restraining order had been thereafter dissolved, that fact would have no effect upon the right of the court to proceed against the plaintiffs in error as for contempt. In *Houghton v. Meyer*, 208 U. S. 149, 156, 28 Sup. Ct. 234, 236 (52 L. Ed. 432), it is said:

"A temporary restraining order is distinguished from an interlocutory injunction, in that it is ordinarily granted merely pending the hearing of a motion for a temporary injunction, and its life ceases with the disposition of that motion and without further order of the court."

Plaintiffs in error quote the decision in that case as authority for their proposition that the restraining orders ceased with the order of the court whereby the motion was held under advisement. But that order was not a disposition of the motion. If it had any effect on the motion, it was but to reaffirm it as the order of the court until the decision on the motion.

There are other assignments of error presenting minor points, in none of which do we find ground for disturbing the judgment of the court below. That judgment is affirmed.

CRESSEY V. INTERNATIONAL HARVESTER CO. OF AMERICA.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1913.)

No. 2,194.

1. EVIDENCE (§ 442*)—PAROL EVIDENCE AFFECTING WRITING—ADMISSIBILITY.

A written contract which required plaintiff to devote his whole and undivided time to the service of defendant, and to perform such service to the best of his ability, and which fixed his compensation therefor must be presumed to embody the entire agreement of the parties with respect to the subjects dealt with, which are the services to be rendered and the consideration therefor, and plaintiff cannot recover on an alleged contemporaneous parol agreement that he should use extraordinary efforts and devote extra time to the work, and should receive, in addition to the stated salary, a bonus or commission measured by the results obtained.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1897; Dec. § 442.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MASTER AND SERVANT (§ 21*)—CONTRACT OF EMPLOYMENT—PROVISIONS FOR TERMINATION.

Where a contract for personal services provided that it might be terminated by either party by giving 30 days' notice, but further provided that the employer might terminate it at any time for neglect of duty, refusal to follow instructions, or if it should consider the employé's work unprofitable or undesirable, "in which event compensation shall cease the day and date the agreement is terminated," its termination by the employer without giving its reasons was presumably for one of the causes specified, and the employé cannot recover compensation after such date.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 20, 21; Dec. Dig. § 21.*]

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Action at law by J. A. Cressey against the International Harvester Company of America. Judgment for defendant, and plaintiff brings error. Affirmed.

S. A. Keenan, of Seattle, Wash., for plaintiff in error.

Cole & Cole, of Portland, Or., for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. This was an action to recover money upon contract. Certain parts of the complaint were stricken out upon motion. Subsequently a demurrer was sustained to the complaint with the clauses thus stricken. Judgment having been rendered in favor of the defendant for its costs and disbursements, the plaintiff brings his writ of error for review.

Defendant is a manufacturing institution, engaged in the manufacture, sale, and distribution of farming implements and machinery. As such it employs agents in its service for selling its products and collecting from purchasers the sales prices. The complaint sets forth a great deal by way of inducement. Omitting much of such matter, it alleges in substance: That it was the universal practice and custom of the defendant company in South Dakota, at all times mentioned in the complaint and for a long time prior thereto, to pay its collecting agents a bonus or commission over and above the fixed salary stated in its printed contracts, provided the agent reached a certain standard set by the company, and kept his expenses below a fixed limit. That the company, according to its custom, and for its own special reasons, never incorporated the agreement to pay said commission or bonus in its printed contract for the stated salary. That on July 10, 1908, plaintiff was employed as collecting agent at a fixed salary of \$125 a month in addition to a bonus or commission as hereinafter stated. That in the agreement represented by said printed form, and in accordance with the universal practice and custom of the defendant and its agents, the latter were not to be engaged in any other business, nor to be employed by any other person or company, while in defendant's employ, and were to be paid a fixed salary and all their necessary expenses. That on or about July 1, 1908, defendant, through its general agent,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. C. Sheldon, at Sioux Falls, S. D., solicited plaintiff to enter its employ as such collection agent, requesting him to sign one of its printed contracts at a fixed salary of \$125 per month. That at that time plaintiff was familiar with defendant company's custom of paying said bonus or commission, and as an inducement and consideration for the plaintiff's signing the said contract defendant, through its said general agent, promised and agreed that, if plaintiff would sign said contract and enter into its employ, and continue therein during the balance of 1908 and all of 1909, it would pay him, in addition to the fixed salary as stated in said printed contract, a bonus or commission for the year 1909 as more specifically hereinafter set out. That, relying absolutely upon defendant's promise and agreement to pay the said bonus or commission, plaintiff signed one of defendant's printed contracts, wherein the fixed salary is stated at \$125, a copy of which contract (bearing date July 13, 1908) is annexed to the complaint, marked "Exhibit A." That \$125 per month was not the real consideration for the execution and delivery of the contract, but was only a part thereof, said bonus or commission being the real incentive and consideration for plaintiff's entering into defendant's employ, which defendant well knew. That at the time of the signing of the printed agreement and the execution and delivery thereof, and in consideration of plaintiff's signing and executing the same, and as an inducement for his signing and executing said contract, defendant promised and agreed that, if plaintiff would use extraordinary efforts in the handling and collection of its commercial paper, reduce his personal expenses to the limit fixed in the schedule, devote extra time to the collection and securing of said paper and the performance of other services for the defendant outside of and beyond that required by said printed contract, such as working overtime on holidays, Sundays, and nights, and on desperate claims or those considered uncollectible, and remain in its employ until January 1, 1910, and, further, if plaintiff collected desperate claims aggregating \$2,500 between January 1, 1909, and January 1, 1910, the total cost and expense to defendant for the collection of its paper in cash or secured notes not exceeding the following schedule, plaintiff should receive as a commission or bonus the difference between the amount fixed by said schedule and the actual cost and expense to defendant: "For the first eight months of the year—that is, from January 1 to September 1, 1909—per cent. cost on cash collected, 7 per cent.; per cent. cost on claims secured, 5 per cent. For the four months of the year from September 1, 1909, to January 1, 1910, per cent. cost on cash collected, 2 per cent.; per cent. cost on claims secured, 2 per cent." That, relying upon said promise and agreement of the defendant, plaintiff signed the written contract and entered into the service of the defendant company. That plaintiff was enabled to collect cash between January 1, 1909, and September 1, 1909, \$22,373.53, and to renew and secure notes and claims during the same period, \$12,340.05. That the total expense incurred by plaintiff during the period, including his salary, was \$1,590.41. That plaintiff collected cash from September 1, 1909, to January 1, 1910, \$112,140.29 and renewed and secured notes to the amount of \$11,290.24. That his total expense in making such collections and procuring renewals was \$884.47. That

plaintiff collected more than \$4,000 desperate claims during the same period. That plaintiff earned thereby the total sum of \$2,172.78, no part of which has been paid except \$89.82, leaving a balance due from defendant to plaintiff of \$2,082.96.

The contract (Exhibit A) provides as follows:

"That the first party hereby hires the second party to serve and to perform such duties and at such places as it may from time to time direct; and the second party agrees to faithfully perform to the best of his ability all the duties and responsibilities of such service, and to devote his whole and undivided time to the party of the first part during the continuance of this contract, and not to engage, or to be engaged, nor to be interested in other business during the existence of this contract.

"In consideration the first party will pay to the second party at the rate of one hundred twenty-five and no/100 dollars (\$125.00) per month and necessary traveling expenses actually incurred in the business while away from Aberdeen, S. D., his home or usual place of residence.

"This contract to be in force from 15th day of August, 1908, until canceled, which may be done by either party hereto, without liability for damage, by giving written notice."

On August 10, 1909, plaintiff and defendant entered into another contract of like nature, in which the defendant agreed to pay plaintiff the sum of \$137.50 per month and necessary traveling expenses, which contract is set out, marked "Exhibit B," and made a part of the complaint, and as to which it is alleged that it was entered into under the same terms and conditions and understanding as the previous contract marked "Exhibit A."

The second cause of action is for a month's salary in the sum of \$125, and is based upon a contract, a copy of which is attached to the complaint, marked "Exhibit D." This contract provides, among other things, that:

"Either party may terminate this agreement by giving thirty days' notice to the other party. The first party may terminate the agreement at any time for neglect of duty, refusal to follow instructions, or should it consider second party's work unprofitable or undesirable, in which event compensation shall cease the day and date the agreement is terminated."

[1] The principal question presented for our determination is whether the written contract embodies in legal intendment the entire understanding of the parties as it relates to the plaintiff's employment by the defendant. Strictly speaking, the question is not whether that which it is sought to have added to the written contract is matter varying the terms thereof, but whether the matter is or is not already integrated; that is, in legal effect, written into the memorial which the parties have adopted as the final embodiment of all the terms and conditions of their contract. Mr. Wigmore, in his admirable work on Evidence (Vol. 4, p. 3409), puts the proposition thus:

"When a legal act is reduced into a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act."

Speaking further to the subject (page 3426), the same author says:

"The inquiry is whether the writing was intended to cover a certain subject of negotiation; for, if it was not, then the writing does not embody

the transaction on that subject; and one of the circumstances of decision will be whether the one subject is so associated with the others that they are in effect 'parts' of the same transaction, and therefore, if reduced to writing at all, they must be governed by the same writing."

And again the learned author, still pursuing the same subject (pages 3426, 3427), says:

"Whether a particular subject of negotiation is embodied by the writing depends wholly upon the intent of the parties thereto. * * * In deciding upon this intent, the chief and most satisfactory index for the judge is found in the circumstance whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element of the negotiation."

An illustration is cited from *Webb v. Plummer*, 2 B. & Ald. 746, 750, as follows:

"Where there is a written agreement between the parties, it is naturally to be expected that it will contain all the terms of their bargain. But, if it is entirely silent as to the terms of quitting, it may let in the custom of the country as to that particular. If, however, it specifies any of those terms, we must then go by the lease alone."

Another illustration may be found in *National Wire Bound Box Co. v. Healy*, 189 Fed. 49, 57, 110 C. C. A. 613, 621:

"The question has been raised whether, in the light of the existing written contracts entered into between appellee and appellants, the conversations constituting the 'general verbal agreement' are admissible at all. We think they are. The written agreements were not intended to merge and embody the understanding between the parties on the subject of the ownership of future inventions, but only to define the rights of the parties with respect to the particular city or territory for which a license was then to be granted. As already stated, the general understanding and agreement between the parties was one thing; it fixed their relations to each other. The particular written agreements was another and a different thing; they were only the *modus vivendi* of carrying out the general understanding as business conditions and opportunity developed. There is no ground, therefore, for applying the rule of law that verbal conversations are merged in a subsequent written agreement; for these subsequent written agreements were not accepted or acted upon by the parties as a written embodiment of the verbal agreement."

In the light of this method of examination as stated by Mr. Wigmore, we quote from counsel's brief (not being able to obtain the book) what Mr. Greenleaf has to say upon the subject:

"Even though there has been an integration—i. e., a reduction of a transaction to a final and exclusive written memorial—yet, since several transactions may be consummated by the same parties at the same time of negotiation, and since the parties may integrate one of these transactions and not another or may integrate one part of a transaction and not another part, it is, of course, always open to show that the integration was partial only; and in such case the terms of the remainder, not covered by the written memorial, may be gleaned from anything said or done by the parties independently of the writing. Effect is given to the written memorial as exclusively representing the terms of the transaction, but only because the parties have so intended it, and therefore only so far as the parties have intended it. Since all depends thus on the parties' intention as to the extent or scope of the integration, the application of the principle will depend almost entirely on the circumstances of each case, including the kind of

transaction, the usual terms of such transactions, the scope of the writing, and the surrounding circumstances of the particular negotiation. No detailed rules can be formulated; and the working of the principle can best be understood by noticing its application in particular instances." 1 Greenleaf on Evidence (16 Ed.) 445.

The principle must be recognized and applied that the transaction should be considered in the light of all the facts and circumstances surrounding and attending it which may by legal inference have induced or prompted the parties in their understanding when the written memorial was executed by them. The complaint is very full as to all matters of inducement leading up to the execution, and there seems to exist no good reason why the controversy may not be determined as well upon the demurrer as otherwise.

A close analysis of the contract in the light of the foregoing authorities will serve in large measure to determine the issue. It is alleged, in brief, that the plaintiff, being aware of the custom of the defendant to pay its collecting agents over and above the salary fixed by the company and specified in its printed contracts, provided the agent earned through his commissions a greater sum than such specified salary, signed one of such printed contracts. It further appears that he signed another more than a year later. The written contract provides that plaintiff shall perform such duties and at such places as the company may from time to time direct, shall faithfully perform, to the best of his ability, all the duties and responsibilities of such service, shall devote his whole and undivided time to the company during the continuance of the contract, and shall not engage nor be interested in other business during the time. The company agrees to pay plaintiff for his services \$125 per month by the first contract, and \$137.50 by the second, and his necessary traveling expenses actually incurred. It is further alleged in this relation that the defendant company, in consideration that plaintiff would sign these contracts, use extraordinary efforts in making collections and securing claims, devote extra time to such work, perform other services outside of that required by the written contracts, and reduce his personal expenses to the limit fixed in the schedule, promised and agreed to pay plaintiff a commission or bonus equal to the difference between the amount fixed by the schedule, namely, 7 per cent. on cash collected and 5 per cent. on claims secured between the dates of January 1 and September 1, 1909, and 2 per cent. on cash collected and claims secured between September 1, 1909, and January 1, 1910, and the actual cost and expense to the defendant for making collections and securing claims, including the salary of the plaintiff as fixed in the written contracts. Thus it will be seen that the alleged additional contract, read in connection with the written contracts, accords to the plaintiff for his services, ordinary and extraordinary, and for overtime, the fixed salary named in the written contracts, together with the excess of commission called a bonus above the cost of collections including such salary. Now, the elements of each of these contracts are simply the consideration and the service to be rendered. The consideration under the written contracts is the sums named therein. The consideration under the alleged verbal contract is, in effect, the sums

named in the written contracts plus the bonus, because the defendant company is required to pay to the plaintiff the sums named in the written contracts as a part of the expense of collecting and securing claims. This as it respects one of the elements of these contracts. As to the other element, the plaintiff agrees, under his written contracts, to devote his "whole and undivided time" to the service of the defendant company. Under the alleged added or supplemental contract, he agrees to make extraordinary efforts and devote extra time to the service, but both contracts contemplate the giving of his personal services, the one ordinary and the other extraordinary, to the defendant company. These elements are the subjects dealt with by the parties in the transaction touching plaintiff's employment. As to the consideration, the same subject-matter enters in part into both the contracts, and as to the service, the same subject-matter is, in effect, dealt with, namely, the "whole and undivided time" of plaintiff—call it ordinary or extraordinary. It is somewhat anomalous that a person engaging to devote his whole time to a service should be able to devote extra time thereto, where the service is personal. So that, under the rule laid down by Mr. Wigmore, there is such an association and near relation of the subject-matter dealt with and comprised by the written contract and the alleged oral contract as that it must be presumed that the parties intended to incorporate all their negotiations relative to the subject-matter into one memorial or contract, which must be held to be evidenced by the written contract.

It thus appearing that the subjects with which the parties dealt in their negotiations are the same in both contracts, the written and the alleged verbal contract, it follows that the alleged parol agreement cannot be held to constitute the consideration or inducement for entering into the written contract, nor can the parol agreement be held to be collateral to such written agreement. Neither are we disposed to adopt the fraud theory which seems to prevail in Pennsylvania. It does not help plaintiff's contention to style the result of the transaction a fraud, when it is considered that the writing itself was freely signed, with admitted knowledge of its entire contents and meaning. *Atchison, T. & S. F. Ry. Co. v. Vanordstrand*, 67 Kan. 386, 73 Pac. 113.

[2] As to the second cause of action, the defendant was authorized to discharge the plaintiff when it should consider his work unprofitable or undesirable. This constituted defendant the judge of when plaintiff's work was profitable or unprofitable to it, or whether it was desirable that it be continued. Having discharged the plaintiff summarily and without specifying its reasons therefor, it is probable that it was for one of these causes.

These considerations lead to the affirmance of the judgment, and it is so ordered.

L. A. BECKER CO. v. GILL.

In re OSBORN CONFECTIONERY CO.

(Circuit Court of Appeals, Eighth Circuit. May 29, 1913.)

No. 3,817.

1. BANKRUPTCY (§ 184*)—CONDITIONAL SALE—RECORD.

Where a contract of conditional sale of a soda fountain to a bankrupt was never recorded as required by the Missouri law in which state the bankrupt resided, it was void as to subsequent general creditors of the buyer and his trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

2. BANKRUPTCY (§ 166*)—MORTGAGES—PREFERENCES.

A bankrupt, having purchased a soda fountain from claimant under a conditional contract of sale which was never recorded, three days before bankruptcy proceedings were commenced executed a chattel mortgage on the fountain to the seller, which was immediately recorded. At this time, however, the bankrupt was hopelessly insolvent, and claimant's representatives had reasonable ground to believe a preference was intended, and would result from the mortgage. *Held*, that the mortgage was void as against the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

3. BANKRUPTCY (§ 345*)—CONDITIONAL SALE—CHATTEL MORTGAGE—INVALIDITY—RIGHTS OF SUBSEQUENT CREDITORS.

Where a contract of conditional sale executed by a bankrupt was invalid because not recorded, and a chattel mortgage on the same property executed three days before bankruptcy was void as a preference, the right of subsequent creditors to urge such objections was defensive merely against the seller so as to invalidate a lien giving a preference on distribution in bankruptcy, and did not entitle such creditors to priority in the distribution of proceeds as against the seller, who on filing his claim as a general one was entitled to participate equally with such subsequent creditors in the distribution of the bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. § 345.*]

Smith, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburg, Judge.

In the matter of bankruptcy proceedings of the Osborn Confectionery Company. From an order denying a petition of the L. A. Becker Company for the proceeds of a soda fountain and appurtenances in the hands of Charles S. Gill, trustee in bankruptcy, and postponing petitioner's claim to the claims of subsequent creditors, petitioner appeals. Modified and affirmed.

Edwin A. Krauthoff, of Kansas City, Mo. (Alexander New and E. J. Geittman, both of Kansas City, Mo., on the brief), for appellant.

Lester W. Hall, of Kansas City, Mo. (Justin D. Bowersock and Inghram D. Hook, both of Kansas City, Mo., on the brief), for appellee.

Before SANBORN, HOOK, and SMITH, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HOOK, Circuit Judge. This is an appeal from an order denying the petition of L. A. Becker Company, the appellant, for the proceeds of a soda fountain and appurtenances in the hands of the trustee in bankruptcy and postponing its general claim against the bankrupt's estate to the claims of subsequent creditors.

[1] The property was sold by the appellant to the bankrupt about five months before the proceedings in bankruptcy were begun upon a contract reserving title in the vendor. The transaction occurred in the state of Missouri. The contract of sale was never recorded. Three days before the proceedings were begun the bankrupt gave the appellant a chattel mortgage upon the same property to secure the price then fixed somewhat in excess of the amount specified in the prior contract, and the mortgage was promptly recorded. In the interval between the contract and mortgage the bankrupt incurred other debts in its business aggregating more than the value of the property in question. The mortgage is said to have been substituted for the contract, but the appellant claims under each independently, and also that, aside from any rights under those instruments, the property was originally obtained from it by fraud of the bankrupt.

In *First National Bank v. Connett*, 73 C. C. A. 219, 142 Fed. 33, 5 L. R. A. (N. S.) 148, we held that in Missouri the lien of a chattel mortgage does not come into existence until the instrument is recorded or possession is taken under it; and, while neither is done, it is void as to subsequent general creditors or a trustee in bankruptcy. In *McElvain v. Hardesty*, 94 C. C. A. 399, 169 Fed. 31, the above rule was held applicable to contracts of conditional sale in that state. We are satisfied with those decisions, and therefore will not reconsider them. We think the construction of the state statutes and decisions is sound, and, in addition, makes for the observance of the letter and spirit of the registry laws and business honesty.

[2] But it is urged that, even if appellant fails on the contract, it has a valid lien by the chattel mortgage. As already observed, the mortgage was taken and promptly recorded three days before the proceedings in bankruptcy were commenced. But a thorough consideration of the evidence convinces us that at that time the bankrupt was hopelessly insolvent, and that the representatives of appellant had reasonable grounds for believing a preference was intended and would result. Counsel rely too greatly upon the representations of the president of the bankrupt in the face of the fact which must have clearly appeared when the mortgage was taken that his statements and his promises were altogether unreliable. Of course, too much of observation and inquiry suggested by it should not be required of a creditor seeking security, but he ought to do what a creditor would naturally and ordinarily do when not fearful of the bankrupt act; he should not carefully pick his way to avoid information. As to the claim that the original sale to the bankrupt was induced by false and fraudulent representations, it is sufficient to say that no rescission or effort at recalculation on that ground occurred before the proceedings in bankruptcy were commenced.

[3] One other question remains: The trial court, having held the unrecorded contract of conditional sale void as to creditors who be-

came such after it was executed, then ruled that, while appellant might prove its claim as a general creditor, it could not participate equally with them because they, the subsequent creditors, had an equitable lien on the property in question superior to the prior general creditors, and were first entitled to the proceeds. The court followed *In re Wade* (D. C.) 185 Fed. 664, and *Simmons v. Greer*, 98 C. C. A. 408, 174 Fed. 654. We think the right of the subsequent creditors is merely a defensive one against the holder of the contract of conditional sale who has failed to comply with the registry statute, and that it is not a lien giving them a preference upon distribution in bankruptcy. It prevents the successful assertion against them of an unrecorded instrument, but does not in addition confer an affirmative right against others. In such cases the defense against the unrecorded instrument is generally due directly or primarily to the provisions of the statute. In a broad sense the statute is founded upon considerations of justice and equity which are recognized and frequently referred to by the courts in construing and applying it, but it was not intended by such references to give the parties so protected a substantive lien superior to others. If the holder of the unrecorded instrument made no claim on it, but was content to be a general creditor, it would hardly be contended that subsequent creditors upon discovering its existence could bring it up themselves as ground for a lien or preference over creditors otherwise of the same class. It does not seem admissible that the existence of such a lien should depend upon the assertion of the unrecorded instrument by the holder and his failure. Equity has a large place in the administration of the bankruptcy law, but so far as may be without disturbing positive rights the dominant note is that "equality is equity." An assignment for the benefit of creditors which is vacated by proceedings in bankruptcy may yet be used to defeat, for the benefit of the estate, an intervening execution levy. *Reed v. McIntyre*, 98 U. S. 507, 25 L. Ed. 171. Section 67f of the present act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]) provides that liens obtained by legal proceedings within four months prior to the filing of the petition in bankruptcy shall be void unless the court preserves them for the benefit of the estate. In *First National Bank v. Staake*, 202 U. S. 141, 26 Sup. Ct. 580, 50 L. Ed. 967, liens of attaching creditors void under the section cited were nevertheless preserved for the trustee against a prior unrecorded conveyance by the bankrupt which solely regarded was valid between the parties and as to the trustees. And the property so saved was for the general estate, not for a special class of creditors. If in the case at bar liens had been obtained by the subsequent creditors by judicial proceedings within the four months, they would, in the discretion of the court, have been set aside or retained for the benefit of the general estate in bankruptcy. Yet, it is urged that by an equitable lien, purely by construction, the subsequent creditors regardless of proximity in time to the bankruptcy proceedings secure a preference they might not have been able to get by industrious resort to the courts. In equity it would appear that when appellant's contract is out of the way its right of participation is equal to that of subsequent creditors. Its property enriched the estate of the bankrupt as well as theirs, and to deny it a

ratable participation would be an undue punishment for an ineffectual attempt to secure or protect itself. It is suggested that *In re Bothe*, 97 C. C. A. 547, 173 Fed. 597, is authority for the ruling of the court, but it was made clear in the opinion in that case that the subsequent creditors alone sought the proceeds of the mortgaged chattels, and, being successful, no one objected when the trial court classed the mortgagee with them for distribution. *In re Abell*, 117 C. C. A. 243, 198 Fed. 484, is a nearer approach. In that case all the creditors who proved claims, except the mortgagee, became such while the mortgage was unrecorded. The court denied them a preference over the mortgagee who, having abandoned the mortgage, obtained an allowance as an unsecured creditor. We think the proceeds of the property in question are assets of the general estate and that appellant is entitled to participate ratably with all unsecured creditors.

As so modified the order is affirmed.

SMITH, Circuit Judge (dissenting). I concur in the foregoing opinion so far as it affirms the judgment of the District Court, but respectfully dissent from the modification made of its order.

The District Court held that the proceeds of the soda fountain should be distributed to the creditors who became such between the time of the conditional sale and the filing of the chattel mortgage but allowed the claim of L. A. Becker Company as a general creditor against the estate of the bankrupt. In its decree the District Court contented itself with deciding that the funds be distributed in accordance with the principles announced in *In re Wade*, 185 Fed. 664. That was a case decided by the same judge and fully considers the question, and I shall not in general review the authorities there cited, but fully concur in all that is there said concerning them.

This court has decided that the chattel mortgage created a voidable preference, and the question now under consideration is with reference to the conditional sale contract. The case is one of construction of the Missouri statute on the subject. That law is as follows:

"Conditional Sales Void as to Creditors Unless Recorded.—In all cases where any personal property shall be sold to any person, to be paid for in whole or in part in installments, or shall be leased, rented, hired or delivered to another on condition that the same shall belong to the person purchasing, leasing, renting, hiring or receiving the same whenever the amount paid shall be a certain sum, or the value of such property, the title to the same to remain to the vendor, lessor, renter, hirer or deliverer of the same, until such sum, or the value of such property, or any part thereof, shall have been paid, such condition, in regard to the title so remaining until such payment, shall be void as to all subsequent purchasers in good faith, and creditors, unless such condition shall be evidenced by writing executed, acknowledged and recorded as provided in cases of mortgages of personal property." Section 2889, Revised Statutes of Missouri, 1909.

The language of this statute is slightly different from that in reference to chattel mortgages, but the majority opinion announces that this court has construed them as identical in meaning and refuses to reconsider the question of differences in verbiage. It has been held by the courts of Missouri that a chattel mortgage is, while unrecorded, void as against both prior and subsequent creditors, yet if before a

prior creditor obtains a lien the mortgage is recorded, or if the mortgagee takes possession that will defeat the prior creditor in his efforts to assert his claim as superior to the mortgage. But this is not true of a creditor who became such subsequent to the giving of the mortgage and before the mortgage was recorded or the mortgagee took possession. *Landis v. McDonald*, 88 Mo. App. 335. And the same ruling was announced by this court in the *First National Bank of Buchanan County v. Connett*, 142 Fed. 33, 73 C. C. A. 219, 5 L. R. A. (N. S.) 148. Whether the law is the same in reference to conditional sales depends upon whether the word "subsequent" towards the close of section 2889 modifies creditors as well as purchasers, but that is not material here.

In *First National Bank of Buchanan County v. Connett*, this court said:

"Such a mortgage is also utterly void as to simple contract creditors who extended credit after it was given and who have secured no title or lien by purchase, execution, attachment, or otherwise. As to them the subsequent recording of the instrument is of no effect; *it cannot be asserted against the enforcement of their demands.*"

The opinion quotes the maxim "equality is equity," but, of course, this does not mean that one party to litigation may not have superior equities which control the determination of the case.

This court in *In re Bothe*, 97 C. C. A. 547, 173 Fed. 597, said:

"As between the mortgagee and those dealing with and extending credit to the mortgagor subsequent to the date of the mortgage and prior to the recording of it, there is an obvious equity in favor of the latter."

Assuming that section 2889 of the Revised Statutes of Missouri refers only to subsequent creditors, it positively declares that as to them the contract of conditional sale is void, and yet the majority hold that the owner is entitled to set it up and take under it a pro rata share of the proceeds of the property.

The question under consideration is not one of general law, but of Missouri law. Did the property pass to the trustee subject to an equitable lien in favor of creditors subsequent to the conditional sale contract? I think it did. Assuming there are no prior creditors and the holder of the conditional sale contract has a claim nine times as great as the aggregate of the claims of the subsequent creditors and that the property sells for just enough to pay the subsequent creditors under this decision do they get their claims paid in full? No. They get 10 per cent. of their claims or of the amount the property sells for and the vendor gets 90 per cent. of the gross proceeds under his contract which is expressly declared to be void as to them.

The only case cited by the majority which seems to me to in any manner sustain the holding is the very brief opinion in *Re Abell*, 117 C. C. A. 243, 198 Fed. 484. In that case a bank had a claim for \$19,208.58 of which \$9,800 had been secured by an unrecorded chattel mortgage which had been abandoned. "A dividend having been declared, Lacy, the trustee, filed a petition, alleging that all of the creditors who had proved claims became such creditors between the date of the mortgage and the date of its filing, and asked that the bank be barred from claiming any of the proceeds of the mortgaged goods un-

til these creditors had been paid in full. This petition was denied by the referee."

To have sustained the application in that case in its fullness would have required the court to hold not only that the subsequent creditors were entitled to be paid in full before the bank could draw anything upon its debt secured by a chattel mortgage, but before it could draw anything upon the \$9,400 of its claim which had never been secured by chattel mortgage. Manifestly such an order could not be made. The court in that case said:

"It is difficult to see how any support for the trustee's position can be found in the cases cited by his counsel. In re Bothe, 173 Fed. 597, 97 C. C. A. 547; In re Wade (D. C.) 185 Fed. 664."

The court did not announce that either of these cases was overruled, but that they failed to furnish any support for the trustee's position, and of course that was true.

A holding that one is not entitled to participate under a chattel mortgage or a conditional sale contract is not a holding that he is not entitled to participate under claims never secured by chattel mortgage or conditional sale contract. It is manifest the court did not mean to overrule those cases, and it is equally manifest that In re Wade is on all fours with the case at bar.

I regard the case of Simmons v. Greer, 98 C. C. A. 408, 174 Fed. 654, in the Circuit Court of Appeals of the Fourth Circuit, as substantially on all fours with this case, and as fully sustaining the trial court.

I entertain no doubt that the case should be affirmed without modification.

BRADLEY LUMBER CO. v. BRADLEY COUNTY BANK et al.

(Circuit Court of Appeals, Eighth Circuit. May 2, 1913.)

No. 3,820.

1. **BANKS AND BANKING (§ 161*)—COLLECTIONS—DRAFTS—MODE OF PAYMENT.**
A bank, holding a draft for collection, is not authorized to accept anything but money in payment thereof.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 554-561, 564; Dec. Dig. § 161.*]

2. **MONEY RECEIVED (§ 1*)—NATURE AND ELEMENTS OF ACTION.**

An action for money received will only lie where the defendants have received money, the property of plaintiff, under such circumstances as to be obliged by natural justice, good conscience, right, and equity to refund.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. **MONEY RECEIVED (§ 12*)—MONEY PAID ON FALSE VOUCHER.**

Plaintiff's manager having applied to a lumber company for a loan of \$5,000, the lumber company borrowed the amount from defendant bank on a note signed by it and indorsed by A. and others, certain of its officers, depositing plaintiff's note for the same amount as collateral. On maturity of the note A., the secretary of the lumber company, drew on plaintiff's manager for \$650, and on plaintiff, through the bank, for \$4,-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

492, the balance of the amount necessary to pay the loan; the draft on plaintiff being marked "Customer's Draft" and sent by the bank to its correspondent for collection. On presentation thereof to plaintiff's manager, he took up the draft by a voucher on plaintiff's home office at St. Louis, falsely stating that it was "to apply on timber purchased." This voucher was never seen by defendant bank, which, having been paid by its correspondent before the voucher was presented to plaintiff, credited the amount with the \$650 draft on the lumber company's note, by which it was satisfied and surrendered. The books of plaintiff's branches in charge of such manager were audited in June and December, 1910, and in January, 1911; but the falsity of the voucher was not discovered until October of that year. On March 7, 1912, plaintiff sued to recover the money as having been paid under mistake of fact after the lumber company had become insolvent. *Held* that, plaintiff having been deceived by its own agent into paying the voucher, and defendant bank having collected the money as a mere agent of the drawer of the draft, without notice that it had been obtained on a false voucher, and the maker of the note to the bank having become insolvent, defendants could not be said to have money belonging to plaintiff, which in equity and good conscience they ought not to keep, and hence plaintiff could not recover.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 38, 39; Dec. Dig. § 12.*]

In Error to the District Court of the United States for the Eastern District of Arkansas; Robert E. Lewis, Judge.

Action by the Bradley Lumber Company against the Bradley County Bank and others. From a judgment for defendants, plaintiff brings error. Affirmed.

Ratcliffe & Ratcliffe, of Little Rock, Ark., Luther E. Mackall, of Baltimore, Md., and Thomas C. Hennings, of St. Louis, Mo., for plaintiff in error.

John T. Hicks, of Little Rock, Ark., for defendant in error Colvin.

U. M. Rose, W. E. Hemingway, G. B. Rose, D. H. Cantrell, and J. F. Loughborough, all of Little Rock, Ark., for other defendants in error.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

SMITH, Circuit Judge. The Bradley Lumber Company, located at St. Louis, maintained lumber mills at Warren, Ark., and at Lumberton, Miss. It was a considerable purchaser of lumber lands in the vicinity of its mills. Mr. John F. Forsythe purchased for the plaintiff many of these lands and was manager of both the mills named. About the 1st of December, 1909, Mr. Forsythe applied to the Lagle Stave & Lumber Company, of Hermitage, Ark., for a loan of \$5,000, and it made the loan, but to secure the money borrowed it from the defendant, the Bradley County Bank, on a note signed by the Lagle Stave & Lumber Company and indorsed by M. J. Anders, G. B. Colvin, and J. M. Adams. It is not clear whether the loan was made to Forsythe in his individual capacity, or to the Bradley Lumber Company; but the note by the Lagle Stave & Lumber Company to the Bradley County Bank recites that one note of the Bradley Lumber Company for \$5,-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

000, with interest from December 12, 1909, at 10 per cent., due March 2, 1910, has been deposited as collateral security for the payment of the principal note. About March 17, 1910, by direction of Mr. Forsythe, Mr. M. J. Anders, who was secretary of the Lagle Stave & Lumber Company, and who had indorsed the note of that company to the Bradley County Bank, drew on Mr. Forsythe individually for \$650, and on the Bradley Lumber Company, through the Bradley County Bank, for \$4,492. Both drafts were paid, but the draft on the Bradley Lumber Company for \$4,492 is the only one material here. The draft was dated at Hermitage, Ark., March 17, 1910, and called upon the Bradley Lumber Company to pay at sight to the order of the Bradley County Bank \$4,492. This was plainly marked: "Customer's Draft." It was sent for collection by the Bradley County Bank to the Merchants' & Planters' Bank at Warren. Upon its presentation Mr. Forsythe took up the draft and issued to the Merchants' & Planters' Bank a voucher on the Bradley Lumber Company at St. Louis for the amount thereof. This voucher contained the following untrue statements:

"To take Jasper Anders draft—to apply on timber purchase—Cap Asst Vou [capital asset voucher] will be issued when deal is consummated."

On this same day the Merchants' & Planters' Bank forwarded the amount of the Anders draft to the Bradley County Bank and sent forward the voucher for collection, and it was subsequently paid on the 21st of March at St. Louis by the Chicago Lumber & Coal Company, who owned the Bradley Lumber Company, and was charged to its account. This voucher was never seen by the Bradley County Bank, who had been paid by the Merchants' & Planters' Bank long before it was presented to the Bradley Lumber Company, and neither the Bradley County Bank, the Lagle Stave & Lumber Company, M. J. Anders, G. B. Colvin, nor J. M. Adams had any knowledge that Forsythe had drawn on his company for the money by a false voucher.

[1] Of course, the Merchants' & Planters' Bank had no authority to receive in payment of this draft of Anders anything but money, and if they took this alleged false voucher they did it upon their own responsibility, and that fact was known at the time to Mr. Forsythe. After this money had been received by the Bradley County Bank, by an understanding with the Lagle Stave & Lumber Company and Mr. Anders it was credited upon the note of the Lagle Stave & Lumber Company; and, it being paid by such credit and an additional credit on account of the \$650 draft drawn on John F. Forsythe, its note was satisfied and was surrendered to the maker.

The books of the Warren branch were audited in June or July, 1910, and again in December, 1910, and January, 1911, but the fact that this voucher was false was not discovered. About June or July, 1911, Mr. Forsythe ceased to act as manager at Warren, and was succeeded by Mr. J. L. Jamison; but Mr. Forsythe continued for some time as manager at Lumberton. Later he surrendered that position, and shortly thereafter died. The books were not again audited until in November, 1911. In the meantime, in October, 1911, the Bradley Lumber Company discovered the voucher was false; but not until March 7,

1912, was this suit brought to recover the amount of money as having been paid under a mistake of fact.

The Lagle Stave & Lumber Company, M. J. Anders, and J. M. Adams demurred to the complaint, and G. B. Colvin moved to strike his name from the complaint, which motion seems to have been treated as a demurrer, and these demurrers were all sustained. The case was then tried to a jury as against the Bradley County Bank, and at the conclusion of the evidence, both parties having asked a directed verdict, the jury, upon the direction of the court, returned a verdict for the Bradley County Bank, and the Bradley Lumber Company sued out a writ of error, assigning:

"First. The court erred in sustaining the demurrers of the defendants M. J. Anders, G. B. Colvin, and J. M. Adams to the complaint, and dismissing the complaint as to them and each of them.

"Second. The court erred in not directing a verdict for the plaintiff, Bradley Lumber Company, as requested by it.

"Third. The court erred in directing a verdict for the defendant Bradley County Bank.

"Fourth. That the court erred as a matter of law and fact in finding that 'there are equities on the part of the bank of such a substantial character that they are not overcome by the mere contention that it still has the right to go out and sue the makers, including the Lagle Company. It appears that, if it should sue and recover a judgment, it would be, in large part, at least, worthless. I feel that these facts are sufficient to defeat the equitable right, if it is so called, on behalf of the plaintiff to recover.'

"Fifth. The court erred in finding as a matter of fact that the plaintiff, Bradley Lumber Company, was guilty of laches in the premises.

"Sixth. The court erred in finding against the plaintiff upon the pleadings and evidence in said cause, and that said finding is contrary to law and the facts as stated in the pleadings and evidence in said cause."

There is no specification of errors in plaintiff's brief as required by rule 24 of this court. We will, however, without intimating that it will be done in other cases, consider briefly the errors assigned in the District Court.

Upon the trial it appeared that, at the time of the collection of the debt in question and the payment of the note of the Lagle Stave & Lumber Company, it was a going concern owning some hardwood and pine lands and a lumber mill and was worth \$8,000. Just when it ceased to be solvent does not appear; but at the time of this suit its mill had been burned down, and it was worth, all told, from \$100 to \$125, aside from a claim in a bankrupt court at Cleveland, Ohio, amounting to about \$600.

It is manifest that, if this draft had not been paid, the entire note could have been collected of the Lagle Stave & Lumber Company, and therefore nothing would have been collected from the indorsers who were upon it, Messrs. Anders, Colvin, and Adams. The mistake was in no sense attributable to the Bradley County Bank. It was in this transaction a mere agent for the collection of the Anders draft, and received the money as such agent, and subsequently by agreement credited it upon the Lagle Stave & Lumber Company note. The mistake was in no sense attributable to the Bradley County Bank, the Lagle Stave & Lumber Company, or to Anders, Colvin, or Adams. It was solely attributable to the misconduct of the plaintiff's agent,

who is now dead, and the information that the money was paid upon an untrue voucher was never communicated to any of the defendants for substantially two years, and for about five months after it was confessedly discovered.

[2] This was an action which at common law would have been assumpsit for money had and received. While this was an action at law, it was based upon the broad equities of the plaintiff. Such an action would lie if the defendants had received money, the property of the plaintiff, under such circumstances as to be obliged by natural justice, good conscience, right, and equity to refund. *Bayne et al., Trustees, v. United States*, 93 U. S. 642, 23 L. Ed. 997; *United States v. State Bank*, 96 U. S. 30, 24 L. Ed. 647; *Merchants' Bank v. United States*, 96 U. S. 36 note, 24 L. Ed. 648 note.

"Assumpsit for money had and received is an equitable action to recover back money which the defendant in justice ought not to retain, and it may be said that it lies in most, if not all, cases where the defendant has moneys of the plaintiff which, *ex æquo et bono*, he ought to refund." *Nash v. Towne*, 5 Wall. 689, 702, 18 L. Ed. 527.

In such cases, if the defendant may in good conscience retain the money in his hands, there can be no recovery. *Barr v. Craig*, 2 Dall. 151, 1 L. Ed. 327; *Morris v. Tarin*, 1 Dall. 147, 1 L. Ed. 76.

In *Cary v. Curtis*, 3 How. 235, 246, 11 L. Ed. 576, Mr. Justice Daniel said:

"The action of assumpsit for money had and received, it is said by Lord Mansfield (*Burr.* 1012, *Moses v. MacFarlen*), will lie in general whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund. And by Buller, Justice, in *Stratton v. Rastall*, 2 T. R. 370, 'that this action has been of late years extended on the principle of its being considered like a bill in equity, and therefore, in order to recover money in this form of action, the party must show that he has equity and conscience on his side, and could recover in a court of equity.' These are the general grounds of the action as given from high authority. There must be room for implication as between the parties to the action, and the recovery must be *ex æquo et bono*, or it can never be. If the action is to depend on the principles laid down by these judges, and especially by Buller, a case of hardship merely could scarcely be founded upon them; much less could one of injustice or oppression, nor even one which arose from irregularity or indiscretion in the plaintiff's own conduct. So far as the liability of agents in this form of action appears to have been considered, the general rule certainly is that the action should be brought against the principal, and not against a known agent, who is discharged from liability by a bona fide payment over to his principal, unless anterior to making payment over he shall have had notice from the plaintiff of his right and of his intention to claim the money. The absence of notice will be an exculpation of the agent in every instance. And with regard to the effect of the notice in fixing liability upon the agent, that effect is dependent on the known powers of the agent and the character of his agency. If, for instance, the agent was known to be a mere carrier or vehicle to transfer to his employer the amount received, payment to the agent with such knowledge, although accompanied with a denial of the justice of the demand, would seem to exclude every idea of an agreement express or implied on the part of the agent to refund, and could furnish no ground for this action against the agent who should pay over the fund received to his principal."

[3] It will be observed that the plaintiff company was deceived by its own agent into paying this voucher; that the Merchants' & Plant-

ers' Bank had no authority to accept anything but cash on the Anders draft, and in doing so it acted wholly upon its own responsibility, and this fact was well known to the plaintiff company's agent; that the money was remitted by the Merchants' & Planters' Bank three days before this voucher was ever presented; that the Bradley County Bank collected the money as a mere agent of Anders, and without any notice or knowledge of the matters complained of in effect turned the money over to Anders by crediting it upon the note on which he was indorser and surrendering the note; that subsequently the maker of the note became insolvent, and no one except those secondarily liable remained for the bank to sue; that for five months after the plaintiff discovered the fraud of its agent it gave no notice to the Bradley County Bank or any other of the defendants; that the parties can none of them be restored to statu quo if compelled to refund this money under such circumstances.

Quite persuasive upon this subject is the opinion of the Supreme Court of Michigan delivered by Cooley, Judge, in *First Nat. Bank of Detroit v. Burkham*, 32 Mich. 328. It is there said:

"The beauty and value of the rules governing commercial paper consist in their perfect certainty and reliability. They would be worse than useless if the ultimate responsibility for such paper, as between payee and drawee, both acting in good faith, could be made to depend on the motives which influenced the latter to honor the paper. The best view that can be taken of this case for the plaintiffs below is that there was a mutual mistake of fact under which the bank discounted and the drawees paid the bill. Conceding this, why should the drawees be allowed to transfer the loss to the bank? Usually, when one of two parties equally innocent must suffer, the law leaves the loss where it has chanced to fall; but in a case like this, if the law should assist either party on the ground of mutual mistake, it certainly should not be the drawees. This suit seeks to reverse the rule of commercial law, and transfer from the acceptor to the payee the responsibility which the former assumes by acceptance, and which the law leaves there."

Somewhat to a similar effect is the opinion of the Circuit Court of Appeals of the Second Circuit in *Riverside Bank v. First Nat. Bank of Shenandoah*, 74 Fed. 276, 20 C. C. A. 181, in which it is said:

"Upon principle, where the holder of a note presents it at the bank at which it is made payable, receives the money, and surrenders the paper, the transaction is, in effect, a purchase from the holder. It is a completed transaction, which cannot be rescinded, except for fraud, or in case of mutual mistake."

We are convinced that neither equity, good conscience, justice, nor right compels the defendants to refund, and the judgment of the District Court is affirmed.

UNITED STATES v. KENNEDY.

(Circuit Court of Appeals, Fifth Circuit. June 2, 1913.)

No. 2,330.

PUBLIC LANDS (§ 11*)—GOVERNMENT OWNERSHIP—ACTION FOR CONVERSION OF TURPENTINE—DEFENSES.

Whoever buys public land, or an interest therein, from an entryman holding no patent, but only a final receipt, buys charged with knowledge of the law that the government has authority, for proper cause, to cancel such receipt at any time before issuance of a patent; and where it is subsequently canceled he cannot defend against an action by the United States for conversion of timber or turpentine from the land on the ground that he was a bona fide purchaser.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 9, 11-13; Dec. Dig. § 11.*

Cancellation of entries, certificates, receipts, warrants, or transfers prior to issuance of patents to public lands, see note to Northern Pac. Ry. v. United States, 101 C. C. A. 120.]

In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Action at law by the United States against G. M. Kennedy. Judgment for defendant, and plaintiff brings error. Reversed.

Wm. H. Armbrrecht, Sp. Asst. Atty. Gen., and R. C. Lee, U. S. Atty. of Jackson, Miss.

J. I. Ford, of Pascagoula, Miss., and Richard Wm. Stoutz, of Muskogee, Okl. (W. A. White, of Gulfport, Miss., on the brief), for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

SHELBY, Circuit Judge. This is an action brought by the plaintiff in error against the defendant in error for conversion. In some of the counts the property alleged to be converted is described as crude turpentine, and in others as spirits of turpentine. In each count the thing converted is alleged to have been obtained from pine trees on land belonging to the government. The action is based, therefore, on an alleged trespass and injury to property of the plaintiff.

The defendant filed the following plea:

"And for a further and special plea in this behalf to the several counts set forth in this declaration, and numbered from 1 to 12, inclusive, the said defendant says that, prior to the happening of the matters and things therein complained of, said land described in the first count of said amended declaration (being the same land whereon it is complained by the plaintiff that the trees grew from which said turpentine and rosin described in all of said counts was taken) was the homestead of one Annie May Hartfield, and the plaintiff, the United States, through its Land Department, did issue to said Annie May Hartfield on October 30, 1902, a receiver's final receipt, showing that said Annie May Hartfield had complied with the United States homestead laws and was entitled to a patent for said land, and which under the laws and practice of the United States Land Department could at any time thereafter be exchanged for a patent, and that while said final receipt was outstanding, and upon faith thereof, this defendant acquired from said Annie

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

May Hartfield, or her grantees, a right to operate upon said timber and trees growing upon said land for turpentine purposes, and that the said turpentine and rosin so taken by this defendant from said land described in said amended declaration, for the alleged conversion of which this suit is brought, was taken by this defendant, under the authority of said lease and final certificate, before this defendant had any knowledge, or notice that said certificate had been canceled, and in fact before said certificate was canceled, all of which the defendant is ready to verify."

The plaintiff demurred to the plea, alleging several grounds, three of which are as follows:

(a) "Because the plea does not allege that the turpentine and rosin alleged to have been taken by Kennedy was taken before the final certificate was canceled, but only alleges that it was taken by Kennedy prior to the time when Kennedy had knowledge or notice that the final certificate had been canceled."

(b) "Because the fact, if it be a fact, that Kennedy had no notice or knowledge of the cancellation of the final certificate before the conversion of the turpentine and rosin for which this suit was brought is no bar to the plaintiff's right to recover."

(c) "Because it appears from the said plea that the final certificate was, prior to the institution of this suit, canceled, and the fact, if it be a fact, that the turpentine and rosin for the alleged conversion of which this suit was brought was taken by the said Kennedy under the authority of the alleged lease and the said final certificate before the same was canceled, and while the said final certificate was outstanding, constitutes no bar to the plaintiff's right to recover, because by the cancellation of this final certificate any right or authority which the said Anna May Hartfield may have had, by reason of the existence of the said final certificate, was, by the cancellation of the same, canceled, annulled, and abrogated, and that such cancellation related back to the date of the original entry, and annulled and destroyed and abrogated any right, if any, which the said Anna May Hartfield may have had from the date of the original homestead application."

The court overruled the demurrer. The plaintiff declined to plead further. Final judgment was entered against the plaintiff. The plaintiff assigns that the District Court erred in overruling the demurrer to the plea.

The question to be decided is whether or not the plea states a legal defense to the action.

The plea does not deny the conversion of the turpentine. It sets up a right and title to it, and states the facts on which the right is based. In brief, it is that the turpentine was taken from trees on the homestead of Anna May Hartfield, and that the plaintiff, by its Land Department, on October 30, 1902, had issued to her a final certificate, and that, after the final certificate was issued, and while it was outstanding, the defendant obtained a turpentine lease, which authorized him to go on the lands and box the trees thereon and take the turpentine, and that this was done before the defendant had notice "that said final certificate had been canceled." The defendant's right, asserted by the plea, is a purchase from a homesteader holding a final certificate, which certificate the plea shows has been canceled. The plea showing the cancellation of the final certificate shows that the plaintiff has not only the legal title to the land from which the turpentine was taken, but that the outstanding equity created by the final certificate no longer exists. The plea is intended to set up in an action at law the defense of innocent or bona fide purchaser without notice.

The main question raised by the record is whether or not the purchaser of turpentine rights from an entryman holding a final certificate, who enters on the homestead and boxes the pine trees and takes from them the turpentine, can defend, when sued by the government for conversion, on the ground that he is an innocent purchaser without notice; the final certificate, without the knowledge of the purchaser, having been canceled.

The decision of the question requires the consideration of the nature and effect of the final certificate and the effect of the cancellation by the Land Department of the certificate.

The final certificate vests the entryman with an equitable title to the land, and shows, *prima facie*, that he is entitled to a patent conveying to him the legal title. The legal title remains in the government till the issuance of the patent. Although the holder of the final certificate has the equitable title, it is subject to the jurisdiction and control of the Land Department of the government, and, for proper cause, it may cancel the certificate. Up to the time the patent is issued, the proceedings in the Land Office, like interlocutory judgments of courts, may, for cause, be vacated and annulled. After the patent is issued and delivered, resort must be had to the courts by the government or by an adverse claimant who would annul the patent.

The plea shows the purchase from the holder of the final certificate, but it also shows that the certificate and entry have been canceled. The legal title to the land had never been divested out of the government. The cancellation of the final certificate destroyed the outstanding equity. Whoever buys from the entryman, holding no patent, but only a final certificate, buys charged with knowledge of the law that the government has authority, for proper cause, to cancel the final certificate. The entryman can convey no greater right than he has. It cannot be that, although the government retained the right, for cause, to cancel the certificate as against the entryman, this power and right could be defeated by a mere transfer of his claim by the entryman to a third party. The certificate having been canceled, the equitable title of the entryman or his transferee no longer exists. A transferee of an entryman, who purchases before the issuance of the patent, the entry being subsequently canceled, does not occupy the position of a bona fide purchaser. It is so decided in *Hawley v. Diller*, 178 U. S. 476, the reasons being stated and many authorities cited on pages 484 to 488, inclusive, 20 Sup. Ct. 986, 44 L. Ed. 1157. We find no decision of the Supreme Court in conflict with this view.

It is true that it has been held in a later case that the second headnote in *Hawley v. Diller*, *supra*, goes further than, and does not conform to, the opinion of the court, which it is intended to condense for the convenience of the profession. In general terms, that headnote states that a purchaser from an entryman "cannot be regarded as a bona fide purchaser * * * unless he become such after the government, by issuing a patent, has parted with the legal title." This headnote, to conform to the opinion, should have been confined to cases in which the equitable title of the entryman was subsequently canceled by the Land Department. If an entryman holding a final certificate transfer the same, his transferee may become a bona fide

purchaser, if such certificate be not canceled by the Land Department, but a patent be issued thereon. *United States v. Detroit Lumber Company*, 200 U. S. 321, 337, 26 Sup. Ct. 282, 50 L. Ed. 499. When it is considered that in *Hawley v. Diller*, *supra*, the court was dealing with a case where the entry had been canceled, and in *United States v. Detroit Lumber Company*, *supra*, it was considering a case in which no cancellation occurred, but in which the patents were issued, there is no conflict in the two opinions. The latter case criticises the work of the reporter in the first case in not limiting the second headnote to cases in which the entry had been canceled; but it does not, as we understand it, overrule or limit what was decided by the court in the first case.

It is a general doctrine of equity that one who purchases from a vendor who has only an equitable title, and who is chargeable with notice that another holds the legal title, takes only such rights as his vendor had, and cannot defend against the holder of the legal title as a bona fide purchaser. It is not in conflict with, but confirmatory of, this rule to hold, as was held in the *Detroit Lumber Company Case*, *supra*, and in *United States v. Clark*, 200 U. S. 601, 607, 26 Sup. Ct. 340, 50 L. Ed. 613, that one who purchases from an entryman holding a certificate that carries only an equitable title, but who, subsequent to such purchase, obtains a patent conveying the legal title, may defend as a bona fide purchaser, because, by the doctrine of relation, the title is treated as taking effect at the date of the entry.

If the final certificate had not been canceled, and the patent had been issued to the entryman or his transferee, in the instant case, then a different rule would prevail, and a sale of the land, or an interest in the timber on it, although made before the issuance of the patent, would be effective, because the patent operates to transfer the title, not only from its date, but from the inception of the equitable right upon which it is based. A purchaser, therefore, from one holding a final certificate which is never canceled, but on which ultimately a patent is duly issued, may defend a suit to cancel the patent, on the ground that he is a bona fide purchaser. *United States v. Detroit Lumber Company*, *supra*.

We are of the opinion that the case at bar is controlled by *Hawley v. Diller*, *supra*.

The Land Department, as a special tribunal, has confided to it the administration and execution of the laws for the disposition of the public lands. It has the power to review its prior rulings, and to cancel existing entries and all proceedings prior to the issuance of the patent. This power is not arbitrary nor unlimited, and can be exercised only after notice to parties in interest, who must have opportunity to defend, but, when exercised, as shown by the plea in this case alleging the cancellation of the final certificate, its action, being brought to the notice of the court collaterally, and not by direct attack, must be deemed valid. If, after the cancellation of the final certificate to Hartfield, the government had issued a patent to another, such patentee could have maintained an action against any one who cut and took timber from the land, or who took gum from the trees on it, pending such patentee's application for a patent, although the tres-

passer acted by authority of one who held the final certificate, which was subsequently canceled. *Peyton v. Desmond*, 129 Fed. 1, 63 C. C. A. 651, and cases there cited. If the government, by its patent, after the cancellation of the final certificate, can confer such right of action on another, it follows that it can itself maintain such action in cases where, after cancellation of the final certificate, it grants no patent, but retains the title.

There are other defects in the plea, making it amenable to the demurrers; but it is not necessary to consider them.

The circumstances under which the purchase was made may affect the question of the measure of damages, but that matter is not now before the court.

The judgment is reversed, and the cause remanded, with instructions to sustain the demurrer to the plea.

MOSES V. LONG-BELL LUMBER CO.

(Circuit Court of Appeals, Fifth Circuit. June 2, 1913.)

No. 2,328.

1. PUBLIC LANDS (§ 109*)—CONTROVERSY BETWEEN ENTRYMEN—JURISDICTION OF COURTS.

A final receipt issued to a homestead entryman does not divest the title of the United States, but confers only an equity; and until the issuance of a patent jurisdiction to cancel the entry and certificate for proper cause, and to permit another entry, remains in the land department, and so long as its action is not illegal or arbitrary a court is without jurisdiction to interfere to decide which of the two entries is valid.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 307; Dec. Dig. § 109.*]

Cancellation of entries, certificates, receipts, warrants, or transfers prior to issuance of patents to public lands, see note to *Northern Pac. Ry. Co. v. United States*, 101 C. C. A. 120.]

2. PUBLIC LANDS (§ 138*)—SALE OF TIMBER BY HOMESTEAD ENTRYMAN—RIGHTS OF PURCHASER ON CANCELLATION OF ENTRY.

A purchaser of standing timber from a homestead entryman holding only a final receipt is chargeable with notice that the legal title is in the government, and that the certificate is subject to cancellation by the land department for cause, and, where it is so canceled, cannot claim, as a bona fide purchaser, better title than his vendor had.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 368; Dec. Dig. § 138.*]

Bona fide purchasers, see notes to *United States v. Detroit Timber & Lumber Co.*, 67 C. C. A. 13; *McClure v. United States*, 111 C. C. A. 4.]

3. PUBLIC LANDS (§ 110*)—CANCELLATION OF HOMESTEAD ENTRY—STATUTORY LIMITATION.

The directing of an investigation by a special agent of the land department within two years from the time final proof was submitted and final receipt issued on a homestead entry is sufficient to bar the operation of the proviso in Act March 3, 1891, c. 561, § 7, 26 Stat. 1098 (U. S. Comp. St. 1901, p. 1521), that after the lapse of two years from the issuance of such final receipt, "and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

entitled to a patent"; and especially is such direction sufficient where it was made because of a protest filed within the two years.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 308, 309; Dec. Dig. § 110.*]

Appeal from the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge.

Suit in equity by the Long-Bell Lumber Company against Walter Moses. Decree for complainant, and defendant appeals. Reversed.

This is a suit in equity, brought by the Long-Bell Lumber Company, a Missouri corporation, against Walter Moses, a citizen of Louisiana. For convenience, the appellee will be referred to as the plaintiff, and the appellant as the defendant. The subject of the controversy is the timber on 120 acres of land.

The purpose of the bill is to establish by decree the plaintiff's title to the timber, enjoin the defendant who is in possession, from cutting the timber, and to enjoin him from preventing the plaintiff from cutting the timber. The questions involved in the case can only be made clearer by a condensed statement of the facts alleged in the bill.

On November 14, 1895, Susie L. Wellborn made a homestead entry of the land in question, and on October 4, 1901, having made the necessary proof, she received a final certificate. On January 11, 1902, she, for a valuable consideration, conveyed all the timber on the land to the plaintiff. On August 29, 1903—1 year 10 months and 25 days after the issuance of the final certificate to Susie L. Wellborn—James Moser "reported" to the Commissioner of the General Land Office that Susie L. Wellborn had never resided on the land. This communication of James Moser is not copied in the bill, but it is referred to in the opinion of the Secretary of the Interior—made a part of the bill—as a "protest" filed by James Moser "within two years" from the issuance of the final certificate. On September 21, 1903, the Commissioner of the General Land Office directed a special agent to investigate the entry in reference to Moser's protest. On August 6, 1904, Abel Simms filed a contest, which was "allowed," but was afterwards dismissed on December 14, 1905. On December 30, 1905, Simms presented a second contest; but this affidavit was rejected by the Commissioner for the reason that, "unless canceled as a result of the investigation ordered by office letter P, dated September 21, 1903, the entry is confirmed by the proviso to section 7, Act March 3, 1891." On August 2, 1906, an adverse report was submitted against the Wellborn entry by a special agent, and on September 4, 1906, the entry was suspended, and the local officers were instructed to proceed against the entry under the circular of February 14, 1906. Notice was served on Susie L. Wellborn. She denied the charges and applied for a hearing. On January 18, 1907, a contest of the entry was filed by William A. Moses, and he was allowed to intervene and become "a party to the contest," and the Land Department instructed the local officers to entitle the case "The United States of America and William A. Moses, Plaintiffs, v. Susie L. Wellborn and the Long-Bell Lumber Company, Defendants." On May 28, 1908, testimony was submitted on both sides, and on September 14, 1908, the Register and Receiver of the General Land Office found that Susie L. Wellborn had not resided on the claim during the life of the entry and that the improvements were not habitable, and recommended the cancellation of the entry and final certificate. Susie L. Wellborn and the Long-Bell Lumber Company appealed to the Commissioner of the General Land Office, and the local decision was affirmed by the Commissioner. The Long-Bell Lumber Company then appealed to the Secretary of the Interior, and, on September 14, 1909, the Secretary of the Interior affirmed the decision of the Commissioner. The opinion of the Secretary of the Interior shows, as before stated, that the protest of James Moser was filed within two years of the date of the final certificate. The opinion concludes by saying that "the department has carefully considered the record in this case, and is of the opinion that the conclusions reached by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the local officers and your office are correct." The plaintiff, the Long-Bell Lumber Company, made efforts to review this decision canceling the entry of Susie L. Wellborn, but it was adhered to by the Secretary of the Interior.

On December 16, 1909, the defendant, Walter Moses, made application to enter the land, William A. Moses having waived his right, and on that day Walter Moses was allowed to enter the land as a homestead, and an original certificate of homestead entry was issued to him. He is in possession of the land, claiming and cutting the timber thereon, and refusing to let the plaintiff go on the land and cut the timber.

The United States has not intervened in the case, and Susie L. Wellborn is not a party to the suit.

The defendant, Walter Moses, demurred to the bill.

After overruling the demurrer, the District Court, on the averments of the bill, decreed:

"That the defendant, Walter Moses, holds the timber upon the land [describing it] as trustee for the Long-Bell Lumber Company, and that the timber upon said land belongs to said plaintiff, the Long-Bell Lumber Company, and that the title to said timber be, and the same is hereby, vested in plaintiff, the Long-Bell Lumber Company. * * *

"That the defendant, Walter Moses, be, and he is, hereby enjoined and restrained from interfering with, cutting, transferring, selling, or in any manner disposing of any of the timber upon the above-described lands, or from taking possession of any of said timber.

"And the said defendant, Walter Moses, be, and he is, hereby ordered and directed to permit the plaintiff, the Long-Bell Lumber Company, to cut and remove the timber upon and from said land."

Walter Moses, the entryman in possession of the land, and sole defendant, appeals to this court, and assigns, with various specifications, that the District Court erred in the decree rendered.

Frank E. Powell, of De Ridder, La., for appellant.

William R. Thurmond, of Kansas City, Mo., W. H. Scheen, of Shreveport, La., and Leon Sugar, of Lake Charles, La. (Baker, Botts, Parker & Garwood, of Houston, Tex., on the brief), for appellee.

Before SHELBY, Circuit Judge, and NEWMAN and GRUBB, District Judges.

SHELBY, Circuit Judge (after stating the facts as above). The claim asserted by the plaintiff to the timber is that of a purchaser from a homestead entrywoman holding a final certificate, which certificate, subsequent to the purchase, was canceled. The claim and possession of the defendant are based on the allowance by the Land Department of his application to enter the land as a homestead, and an original homestead entry certificate issued to him after the cancellation of the entry and final certificate of the plaintiff's vendor. The legal title to the land remains in the government, no patent having ever been issued. The plaintiff contends that it was entitled to the relief prayed for in the bill, and granted by the decree, because: (1) Susie L. Wellborn, by reason of the issuance of the final certificate to her, was the owner of the land, and had the right to sell and convey it, and the right to sell and convey the timber, and that, by the conveyance to the plaintiff, the plaintiff now has the right to cut and remove the same; (2) that the plaintiff, having paid her \$2,000 for the timber, relying on her right, as shown by the final certificate, to sell the same, and having no knowledge of any fraud on her part, or defect in her claim, is entitled to the protection of the court as an innocent pur-

chaser for value; and (3) that the Land Department had no right to cancel the final certificate issued to Susie L. Wellborn, after the lapse of two years from its issuance, because such cancellation is in conflict with section 7 of the act of March 3, 1891 (26 Stat. 1098).

[1] 1. The final certificate is issued on an ex parte showing of improvements, cultivation, and occupancy. The certificate does not confer title. The legal title remains in the government till the issuance of the patent. The final certificate only confers an equity. If it be made to appear that the entry was fraudulent, and the proof offered to obtain the certificate was false, the Land Department may vacate the entry and cancel the certificate. The holder of the certificate has no right not subject to the proper review and control of the Land Department. *Orchard v. Alexander*, 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737. That the equitable right conferred by the certificate is entirely within the jurisdiction and control of the Land Department, and that the courts, as a general rule, will not interfere with the procedure of the Land Department before the issuance of the patent, is reaffirmed by the Supreme Court in *Plested et al. v. Abbey et al.* (April 7, 1913) 228 U. S. 42, 33 Sup. Ct. 503, 57 L. Ed. —, and *United States ex rel. v. Lane* (March 17, 1913) 228 U. S. 6, 33 Sup. Ct. 407, 57 L. Ed. —.

The bill shows that James Moser reported to the Commissioner of the General Land Office that Susie L. Wellborn had never resided upon the land. The Commissioner directed a special agent to investigate the entry. Another contestant was permitted to intervene in the same case. Notice was given to Susie L. Wellborn, and her vendee—the plaintiff here—also became a party to the contest. Evidence was offered by both parties. On the trial the entry and certificate were canceled, and on appeal, finally to the Secretary of the Interior, the cancellation was affirmed. The Land Department had jurisdiction of the controversy, and the bill affirmatively shows that it was not acting in an arbitrary manner. This decision deprived the entrywoman of all interest in the land, and necessarily deprived her vendee of any apparent interest in the timber. The legal title remaining in the government, the controversy was necessarily within the jurisdiction of the Land Department, and, its action not being illegal or arbitrary, the District Court could not have interfered in behalf of the entrywoman, for so long as the legal title remained in the government the Land Department was the proper tribunal to settle the controversy. *Cosmos Co. v. Gray Eagle Co.*, 190 U. S. 301, 23 Sup. Ct. 692, 47 L. Ed. 1064. It is clear, therefore, that if the controversy here was between Susie L. Wellborn, the entrywoman, and the defendant, who entered the homestead after the cancellation, the legal title still remaining in the government, the District Court could not properly interfere to decide which of the two entries was valid. It certainly could not divest the title out of the government, cancel in effect the second entry, and deprive the Land Department of its statutory jurisdiction to settle such controversies. 10 Ency. of U. S. Sup. Ct. Reps. 265, 266.

[2] 2. The plaintiff, therefore, is constrained to contend that, although the entrywoman may have lost her rights and be without rem-

edy in the District Court, it is entitled to protection as a bona fide purchaser for value without notice.

We cannot see how the plaintiff, as the vendee of Susie L. Wellborn, can have any better title than she had. It must be remembered that throughout these transactions the government had, and now has, the legal title to the land as matter of law, and that the plaintiff, purchasing from one who holds, not a patent, but a final certificate, was chargeable with notice that the legal title was in the government, and that the certificate, for cause, was subject to cancellation.

If the legal title to land is in A., and he contracts to convey it to B., on the payment of a certain sum by a fixed date, retaining the right to cancel the trade for nonpayment, and B., holding such contract, sells the timber on the land to C., who is chargeable with notice of the title, and B., when the time arrives, fails to pay A. for the land, and A., as authorized by the terms of his contract, cancels the trade with B., C. has no equitable or legal claim on the timber as against A. or his subsequent vendee. C., having bought the land from a holder of a mere equity, chargeable with notice that another has the legal title, has no remedy except a suit for breach of contract against his immediate vendor.

The same rule, we think, should apply here. The holder of the final certificate had a claim *prima facie* entitling her to title, but subject to cancellation by the government for cause. She sells the timber on the land to one charged with notice of the character of her claim. The certificate is canceled. The buyer, we think, has no claim on the timber, because he has no better title than his vendor. He has no claim on the government or its subsequent patentee. He has no contract with either. His remedy is an action against his vendor. It is decided in *Hawley v. Diller*, 178 U. S. 476, 20 Sup. Ct. 986, 44 L. Ed. 1157, that an entryman holding a final certificate acquires only an equity, and that a purchaser from him, the entry being subsequently canceled, cannot be regarded as a bona fide purchaser. This case is in direct conflict with the plaintiff's contention; but it is argued by counsel that a later case, *United States v. Detroit Lumber Co.*, 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499, establishes the contrary rule. In a decision handed down to-day, this court has expressed the opinion that there is no conflict between the two cases, and that a purchaser from an entryman whose entry and certificate are subsequently canceled cannot defend as a bona fide purchaser, although the rule is different, as held in the latter case, where the entry and certificate are not canceled, but confirmed by a patent. *United States v. Kennedy*, 206 Fed. 47.

[3] 3. The third contention of the plaintiff is, as we have said, based on the proviso to the seventh section of the act of March 3, 1891:

"That, after the lapse of two years from the date of the issuance of the receiver's receipt, upon the final entry of any tract of land under the homestead, timber culture, desert land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him."

The contention is that, after the lapse of two years from the issuance of the receiver's receipt, the Land Department cannot lawfully cancel a homestead entry. It will be observed that the limitation, by the very words of the statute, applies only when "there shall be no pending contest or protest against the validity of such entry." It appears from the bill that a contest or protest of the entry was filed within the two years, and several such contests were subsequently presented. We concur in the opinion of the Secretary of the Interior, copied in the bill, that:

"The directing of an investigation by a government special agent within two years from the time final proof had been submitted and certificate issued was sufficient to bar the operation of the proviso."

Especially is such direction sufficient when it is made because of a protest filed within the two years, as is shown by the averments of the bill, and also by the opinion of the Secretary of the Interior. If the bill, a condensed statement of which we have given, did not make it plain that a contest was filed within the two years and was pending till it led to the cancellation of the entry, the decision of the Land Department that such was the case would not be subject to review in this action on the averments of the bill. The contents of the "protest" or "contest" and the letter directing an investigation are not before us.

Whether or not the paper filed by Moser and the order made thereon was a contest or protest was a question for the decision of the Land Department, a special tribunal on which Congress had conferred jurisdiction to decide such questions, and we are of the opinion that the District Court would be without jurisdiction to interfere with or reverse its decision of that question, on the averments of the bill; it failing to show the contents of the protest or to allege arbitrary or illegal action by the special tribunal. See *Fisher, etc., v. United States ex rel. Grand Rapids Timber Company* (Ms. opinion of the Court of Appeals of the District of Columbia, November 6, 1911).

No view that can be taken of this case would give the plaintiff any right to the timber, the subject of the suit, unless the Land Department should cancel the homestead entry of the defendant, and reinstate that of Susie L. Wellborn, and issue to her a patent. She is not a party to this litigation, and there is nothing in the record to show that she is asserting, or will ever assert, any claim to the land, or that she could assert such claim successfully.

We are unable to see that the averments of the bill entitle the plaintiff to any relief in the District Court.

The decree is reversed, and the cause remanded, with instructions to sustain the demurrer.

UNITED STATES v. UNION NAVAL STORES CO.
(Circuit Court of Appeals, Fifth Circuit. June 2, 1913.)

No. 2,329.

In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Action at law by the United States against the Union Naval Stores Company. Judgment for defendant, and the United States brings error. Reversed.

Wm. H. Armbrecht, Sp. Asst. Atty. Gen., of Mobile, Ala., and R. C. Lee, U. S. Atty., of Jackson, Miss.

J. I. Ford, of Pascagoula, Miss., and Richard Wm. Stoutz, of Mobile, Ala. (W. A. White, of Gulfport, Miss., on the brief), for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

SHELBY, Circuit Judge. This case was argued and submitted with United States v. G. M. Kennedy, 206 Fed. 47, which has just been decided. The pleadings in both cases raise the same questions. On the authority of the opinion in the Kennedy Case, the judgment of the District Court in this case is reversed, and the cause remanded, with instructions to sustain the demurrer to the second plea.

HARRISON et al. v. FOLEY.

(Circuit Court of Appeals, Eighth Circuit. May 20, 1913. Rehearing Denied Aug. 25, 1913.)

No. 3,759.

1. GIFTS (§ 62*)—CAUSA MORTIS—DELIVERY.

Delivery by decedent of the key to his safety deposit box to plaintiff, as part of a gift of the contents causa mortis, constituted a sufficient symbolical delivery of the contents of the box to sustain the gift, notwithstanding such key would not give access to the box, except in conjunction with the key retained by the safety deposit company.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 122-132; Dec. Dig. § 62.*]

2. JUDGMENT (§ 570*)—DISMISSAL OF ACTION—RES JUDICATA.

Where, after judgment for plaintiff in a state court action to recover the subject of a gift causa mortis, the state Supreme Court affirmed an order granting a new trial on the ground that the evidence was not sufficient to prove a gift, whereupon plaintiff dismissed and instituted a new suit for the same relief in the federal court, there was no judgment in state courts that could be pleaded as res judicata, but the whole matter was subject to trial anew in the federal court, without reference to the state court proceedings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028-1034, 1036-1040, 1042-1045, 1165; Dec. Dig. § 570.*]

3. COURTS (§ 99*)—LAW OF THE CASE—STATE AND FEDERAL COURTS.

The doctrine of the law of the case in its customary sense does not run from state to federal jurisdiction, or vice versa; its general application being to a second appeal in the same appellate court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 340; Dec. Dig. § 99.*]

4. COURTS (§ 99*)—FEDERAL COURTS—STATE COURT DECISION—EFFECT.

Where, in an action to recover the proceeds of a gift causa mortis, the state Supreme Court affirmed an order granting defendant a new trial,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and held that the evidence was insufficient to prove a gift, after which plaintiff dismissed and instituted a suit for the same relief in the federal court, the state court decision was but an estimate of the probative effect of certain evidence, and as such was only persuasive, and not conclusive on the federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 340; Dec. Dig. § 99.*

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468; *Converse v. Stewart*, 118 C. C. A. 215.]

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Action by Elizabeth Foley against J. S. Harrison, individually and as administrator of the estate of John Medley, deceased. Judgment for plaintiff, and defendants bring error. Affirmed.

Jacob L. Lorie and W. S. Cowherd, both of Kansas City, Mo. (Cowherd, Ingraham, Durham & Morse, of Kansas City, Mo., on the brief), for plaintiffs in error.

W. F. Guthrie, of Kansas City, Mo. (L. C. Boyle and A. F. Smith, both of Kansas City, Mo., on the brief), for defendant in error.

Before HOOK and SMITH, Circuit Judges.

HOOK, Circuit Judge. Mrs. Foley sued Harrison, the administrator of Medley, deceased, in a state court in Kansas City, Mo., to recover the contents of a safe deposit box consisting of mortgage securities and money. She claimed they were given her by Medley in anticipation of his death, which soon followed, and that the gift was accompanied by the delivery to her of his keys. A verdict in her favor was vacated, and a new trial was awarded, by that court. On her appeal to the Supreme Court of the state the order was affirmed. *Foley v. Harrison*, 233 Mo. 460, 136 S. W. 354. When the case went back for retrial, she dismissed it without prejudice, and at once commenced the present action for conversion in the federal court. A trial in that court also resulted in her favor, and Harrison prosecuted this writ of error. The questions here are whether, assuming the evidence for plaintiff to be true, the delivery of the contents of the safe deposit box, necessary in gifts mortis causa, could be effected by handing over the keys, and whether in this case there was sufficient evidence of the fact of gift.

[1] The general doctrine of the common law as to gifts mortis causa is recognized by the Supreme Court of Missouri as prevailing in that state, and in *Foley v. Harrison*, supra, it was held that a delivery of the keys was an effective symbolical delivery of the contents of the box. The latter conclusion was reached after an exhaustive review of the decisions of the courts and the views of text-writers from a very early date, and we think it is correct. True, the keys given to Mrs. Foley would not have opened the box without the assistance of the safe deposit company and the guard key which it retained; but in this respect the case is not different from one of a gift of a deposit in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a savings bank by delivery of the pass book. The pass book alone, without affirmative action by the bank officials, would be unavailing, yet a delivery of it is upheld as sufficient. *Pierce v. Boston Savings Bank*, 129 Mass. 425, 37 Am. Rep. 371; *Tillinghast v. Wheaton*, 8 R. I. 536, 5 Am. Rep. 621, 94 Am. Dec. 126; *Hill v. Stevenson*, 63 Me. 364, 18 Am. Rep. 231. It does not affect the sufficiency of the delivery that the possession and presentation of the pass book is not a full compliance with the rules and regulations of the savings bank respecting the right of another than the depositor to draw the funds. By delivering the keys of the safe deposit box the donor parted with all the means of access in his possession at the time and placed them in the hands of Mrs. Foley. His action was in harmony with his condition and the situation of the property. The money and securities being elsewhere under lock and key, and not susceptible of manual transfer, he gave the keys, which at the time and place were, more than anything else, the physical symbols of dominion. It was the best he could do. The cases of delivery of a key of an ordinary receptacle are in point. *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848; *Debinson v. Emmons*, 158 Mass. 592, 33 N. E. 706; *People v. Benson*, 99 Ill. App. 325; *Jones v. Brown*, 34 N. H. 439, 445; *Marsh v. Fuller*, 18 N. H. 360. See, also, *Stephenson's Adm'r v. King*, 81 Ky. 425, 50 Am. Rep. 173. The present state of the law of gifts mortis causa, as regards both the subjects and the methods of making them, is a natural adaptation to modern customs and usages. We appreciate that the ancient barriers to fraud and perjury have been weakened, but believe the remedy is for the legislatures, not the courts.

[2] There is a preliminary phase of the contention regarding the sufficiency of the evidence. It is said the proof in favor of Mrs. Foley before the state courts was at least as strong as it was before the court below, and, since the highest court of the state expressly declared upon full consideration that it was insufficient to prove a gift mortis causa, we should regard its decision as the law of the case, and therefore controlling. The appeal to the Supreme Court of Missouri was from an order of the state court of first instance granting a new trial. When the Supreme Court affirmed the order, and held the evidence was not sufficient to prove a gift, the case went back for a new trial. If a retrial had been had in the first court, it would have been open to Mrs. Foley to strengthen her case, if she could; but, failing, the decision of the Supreme Court would have been binding as the law of the case, and would necessarily have resulted in her defeat. But when she dismissed the case there, and brought the present one in the federal court, the whole matter was at large. There was no judgment in the state courts which could be pleaded as *res adjudicata*, nor was the decision of the Supreme Court of the state a construction of a local statute or the establishment of a local rule of property.

[3] The doctrine of the law of the case in its customary sense does not run from state to federal jurisdiction (*Gardner v. Railroad*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107), or conversely. Its application is generally to a second appeal in the same appellate court (*Guarantee Co. v. Insurance Co.*, 59 C. C. A. 376, 124 Fed. 170; *Mu-*

tual Reserve Fund Life Ass'n v. Ferrenbach, 75 C. C. A. 304, 144 Fed. 342, 7 L. R. A. [N. S.] 1163; Great Northern Ry. Co. v. Western Union Tel. Co., 98 C. C. A. 193, 174 Fed. 321), and of course to the courts inferior to that which first ruled.

[4] The decision of the Supreme Court of Missouri was but an estimate of the probative effect of certain evidence, and as such persuasive in other jurisdictions, but not conclusive. It is also apparent that the question now before us is quite different from that before the court in Missouri. There the trial court had already set a verdict aside. The case here comes with a verdict and judgment, and the single question, which is one of law, not of fact, is whether there was any substantial evidence in favor of the prevailing party. That there was such evidence cannot be denied. Whether it would have convinced us, had we been the triers of the facts, is beside the case. The credibility of the witness upon which the case depended, considering his age, his relation to Mrs. Foley, etc., was for the jury under the guidance of the trial court, and they, the court and jury, with better opportunities for judging, were satisfied with the result. We see no error of law in the record.

The judgment is affirmed.

LUDWIGS v. PAYSON MFG. CO.

PAYSON MFG. CO. v. LUDWIGS.

(Circuit Court of Appeals, Seventh Circuit. April 15, 1913.)

Nos. 1937, 1938.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SASH-LOCK.

The Payson patent, No. 623,620, for a sash-lock, was not anticipated and discloses invention; also *held* infringed.

2. COURTS (§ 263*)—JURISDICTION—INFRINGEMENT OF PATENT—INCIDENTAL UNFAIR COMPETITION.

Where, in a suit in equity for infringement, the evidence which proves infringement also establishes that defendant made the infringing article in imitation of the patented device in form and appearance, such imitation, while constituting unfair competition, is in a fairer aspect an aggravation of the infringement, and damages therefor are recoverable in the same suit, regardless of the citizenship of the parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 799, 800; Dec. Dig. § 263.*]

Jurisdiction of federal courts in suits relating to patents, see note to Bailey v. Mosher, 11 C. C. A. 313.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Suit in equity by the Payson Manufacturing Company against William A. Ludwigs. From the decree, both parties appeal. Reversed in part, and modified in part.

Payson Company, an Illinois corporation, is the owner of patent No. 623,620, issued on April 25, 1899, to Joseph R. Payson, for a sash-lock. "Incidentally,"

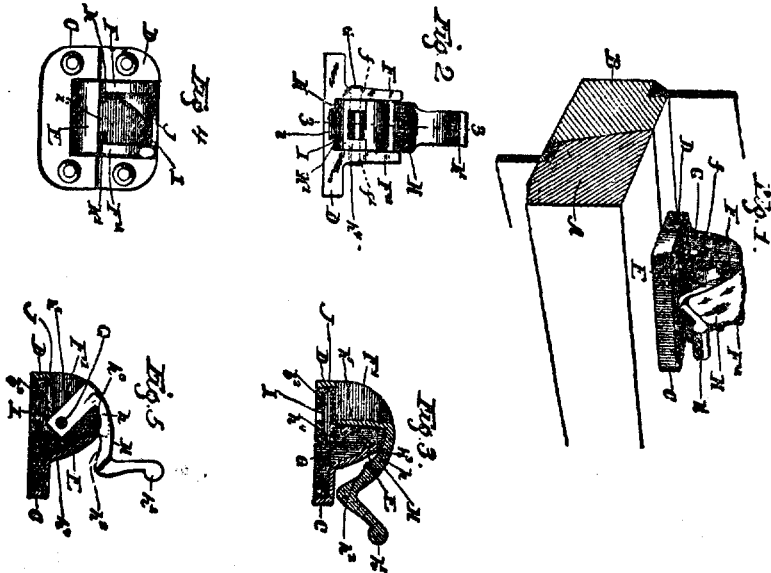
*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the patent states, "the invention aims to cheapen the manufacture, and bring the lock into compact and ornamental shape or form." Payson Company has built up a large trade in this lock, particularly for use in buildings, like schoolhouses, where the lock cannot be reached from the floor except by the use of a window pole; has embodied the mechanical principles of the invention in the "ornamental shape" pictured in the drawings of the patent; and, to identify its product, has stamped the word "Payson" on the locks.

Ludwigs, a citizen of Illinois, is a dealer in hardware. For a time he filled his orders for Payson locks by purchasing genuine ones from Payson Company. Later he procured a brass-founder to cast for him spurious ones by using the genuine as a pattern. Material, color, form, and marks of the genuine were reproduced in the spurious. Thereafter Ludwigs filled orders by mixing a few genuine with many spurious which he passed off as genuine.

Payson Company's bill set up the patent and Ludwigs' sales, and charged that the sales infringed trade as well as patent rights. On pleadings and proofs the court decreed that the patent was void for lack of invention, but further decreed that Ludwigs be enjoined not only from selling or offering to sell the counterfeits, but also from making or using them, and ordered an accounting of Ludwigs' profits and Payson Company's damages by reason of Ludwigs' interference with Payson Company's exclusive right to make, use, and sell. Both parties have appealed, and the questions are the validity of the patent and the right to count on trade damages in a patent suit between citizens of the same state.

Drawings, description, and claims of the patent follow:



"My invention relates to certain improvements relating to a sash-lock adapted for use upon the meeting-rails of window-sashes and the like, the objects of the invention being to provide a lock that can be securely fastened by merely pulling forward a locking-arm without any secondary or additional movement or locking device, also one that can be unlocked by merely pushing backward said locking-arm, and also one that indicates at a glance by the appearance of the lock and the position of the parts thereof whether the sashes are locked or not.

"Incidentally, of course, the invention aims to cheapen the manufacture and bring the lock into compact and ornamental shape or form.

"To such end the invention consists in certain features of novelty and improvement which will be fully described and claimed in the following specification.

"The invention is illustrated in the drawings by means of five figures, of which—

"Figure 1 is a perspective of the preferred form of my improved sash-lock, showing the same in position upon portions of the meeting-rails of two window-sashes. Fig. 2 is a front elevation of the back plate of the lock and the parts connected therewith, showing said parts in the position assumed by them when the lock is unlocked. Fig. 3 is a vertical section in line 3 3 of Fig. 2, showing the locking parts in their locked position and showing the front plate in co-operative relation thereto. Fig. 4 is a top plan of the front and back plates and a spring held in the back plate; and Fig. 5 is a view similar to Fig. 3, with the exceptions that the locking-arm is shown in side elevation and in a position intermediate between the locked and unlocked positions.

"In the drawings the meeting-rail of the lower sash is lettered *A* and that of the upper sash *B*.

"*C* is a plate adapted to be attached to the rail *A* and commonly called the 'front' plate.

"*D* is a plate adapted to be attached to the rail *B* and commonly called the 'back' plate. Upon the rear portion of the front plate *C* is a substantially vertical lug or flange *E*, approximately parallel with the meeting-rails, and upon the back plate are two vertical tongues or lugs *F F'*, substantially at right angles to said meeting-rails and arranged parallel to each other and having their outer surfaces preferably in the planes of the opposite ends of the flange *E*. The tops and rear edges of the lugs *F F'* are joined by a curve substantially concentric about an axis indicated by pivot-holes *f f'* in the two lugs and a pivot *G*, secured in said holes. Upon this pivot is secured a swinging-arm *H*, extended into a segmental hook *h*, which terminates in a handle *h'*. The segmental hook has an internal curved surface substantially parallel with the pivot *G* and preferably having a portion *h²* eccentric to said pivot and a portion *h³* concentric therewith. The portion *h²* diverges from said pivot toward the end of the hook, and the internal surface of the hook as a whole is intended to engage with the upper portion of the vertical flange *E*, the movement of the eccentric or camshaped portion *h²* over the top of the flange being adapted to draw the back plate upward and forward and the function of the concentric portion *h³* being to permit the final forward movement of the hook to be made without further motion of the meeting-rails. This is of double advantage. In the first place it removes any possibility of picking the lock or of its unlocking itself because of any jarring or shaking, however prolonged, and in the second place it makes the final forward movement of the handle easier than the prior movement, enabling the operator to tell readily when the sashes are securely locked.

"The top of the vertical flange *E* is arranged as nearly as possible in the plane of the pivot *G* and some little distance above said pivot, so that the upward movement of the lower sash or the downward movement of the upper sash cannot disengage the lock. As a result of this arrangement the insertion of a tool and the pressing upward with the same against the internal curved surface of the hook also has no tendency to unlock the swinging-arm. It is of course impossible to put the top of the vertical flange and the pivot in the same vertical plane, as in that case it would be impossible for the two sashes to be moved one past the other, which is often necessary in cleaning. The degree of approximation toward the same vertical plane is not material, except that it shall be sufficient to accomplish the result above referred to. This arrangement of the pivot and the point of engagement between the arm and the vertical flange does not interfere with the holding of the sashes against lateral movement with respect to each other, because such movement necessarily draws down the hook upon the flange, tending to crowd down the lower sash or crowd up the upper sash, which is not permitted by the window-frame.

"The pivoted end of the locking-arm is preferably squared about the pivot, so that the extreme end may have a horizontal under surface *h⁴* when the

sashes are locked and an adjacent surface h^5 , which becomes substantially horizontal when the sashes are unlocked. In a suitable recess b^2 in the back plate a horizontal spring I is placed, arranged to press upward upon the pivoted end of the locking-arm, thus tending to assist the final movement of said arm into either the locked or unlocked position and to hold said arm in either of said positions. A U-shaped spring is here shown held against horizontal movement between the two lugs $F F'$, a flange J rising from the rear of the bottom plate between said lugs, and two projections $K K'$ upon the forward edge of the bottom plate and adjacent to the inner surfaces of said lugs. The spring I is seen in Fig. 4, the upper portion being broken away to show the lower. Said lower portion has a tongue i extending forward between the projections $K K'$ to prevent the rear portion of the spring from being raised by the downward pressure of the locking-arm as the latter is swung forward or backward.

"The principal advantages of this sash-lock are its compact form, its neat and pleasing appearance, its great simplicity, making it easy and economical to manufacture and durable and not likely to get out of order when in use, and especially the great ease and simplicity of its operation and the evident and distinctive difference in the appearance of the lock in its locked and unlocked positions. To lock the parts, the lever is simply pulled forward, and to unlock the same it is thrown backward. In the locked position the lever as seen from the inside of the window lies within the outlines of the other portions of the lock and is not noticeable, whereas in the unlocked position it extends directly upward from the remainder of the lock and constitutes the most prominent feature thereof. It is practically impossible for any person, even if possessed of no mechanical talent whatever, to forget that when the lever is thrown backward and upward the lock is unlocked and that when it is thrown forward and downward the lock is locked. This makes it possible to determine at a glance whether the windows are fastened or not, which the average person cannot do if the only difference is caused by swinging the handle from right to left, or vice versa.

"It is obvious that the specific form, construction, and arrangement of the various parts of the lock may be varied greatly without departing from the essential features thereof, and I therefore desire not to limit myself to the preferred construction herein shown and described in any of these particulars.

"I claim as new and desire to secure by letters patent—

"1. A sash-lock having a back plate provided with a locking-arm pivoted near its front edge to swing forward in a plane substantially transverse to the meeting-rails of the sash, and a front plate provided with a vertical flange upon its rear edge extending upward to a point above and approximately in the vertical plane of the pivot when the arm is locked, said locking-arm being formed with a segmental hook having an under curve substantially parallel to its pivot and adapted to engage when locked with the top of the vertical flange; substantially as described.

"2. In a meeting-rail sash-lock the combination with a front plate having a vertical flange upon its rear edge, of a back plate having a locking-arm pivoted to swing forward in a plane substantially transverse to the meeting-rails and upon a pivot below and approximately in the vertical plane of the top of the flange upon the front plate, said locking arm being provided with a hook having an internal surface substantially parallel with the arm-pivot and curved in the plane of the arm's movement, the rear portion of said curved surface being substantially concentric with the arm-pivot and the forward portion being eccentric thereto and receding forwardly therefrom; substantially as described.

"3. The combination with the plate, D , having the swinging arm, H , provided with a squared lower end pivoted to said plate near the front thereof, of the spring, I , bearing upon said squared surfaces alternately and held in a socket in the plate formed by vertical flanges or lugs thereupon on the sides and in the rear and by the lugs, $k k'$, in front, said spring, being formed with a tongue, i , extending between said lugs $k k'$, and giving a more forwardly-extending bearing for the spring upon said plate; substantially as described."

Frederick Benjamin and Benjamin T. Roodhouse, both of Chicago, Ill., for appellant.

George P. Barton and George E. Folk, both of Chicago, Ill., for appellee.

Before BAKER AND KOHLSAAT, Circuit Judges, and ANDERSON, District Judge.

BAKER, Circuit Judge (after stating the facts as above). [1]

1. Patents that show locking levers operable in a horizontal plane need not be reviewed, for if the Thompson British patent, No. 2060 of 1876, with a lever moving in a vertical plane, as does Payson's lever, neither anticipates the Payson combination nor teaches the mechanic how to modify and reconstruct the Thompson into the Payson device, certainly those others do not.

Thompson's figures 1 and 2 are here reproduced:

Fig. 1

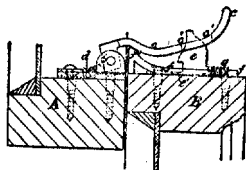
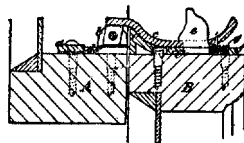


Fig. 2



Construction and intended operation are thus described in the specification:

"I form the fastener in two parts, one of which is fixed to the lower bar of the upper sash, and the other to the upper bar of the lower sash, as heretofore. I form one part thereof with a hinged lever, the knuckle of which is formed with flat sides which by the aid of a spring *d*, act to keep the said lever either in a vertical or horizontal position. The outer end of the said lever is formed with a slot, *c*', which is so arranged as to permit a sliding catch, *e*, on the other part of the fastener to pass therethrough when the lever is pressed down into a horizontal position, then by sliding the said catch it is caused to pass over the metal at the end of the slot and thereby securely hold the two parts together. The lever is formed to act in combination with a projection or fulcrum on the other part of the fastener in such manner as to ensure the proper closing of the sashes by the simple depression of the lever. If desired the sliding catch may be made self-acting (by means of the spring, *g*) to lock the parts together."

It seems quite clear to us that Thompson had no conception of a device in which the pulling forward or pushing backward of a lever in a vertical plane would lock or unlock the sashes "without any secondary or additional movement or locking device." He relied upon the lever and the opposing flange only to bring the sashes together laterally, and to his sliding catch he wholly ascribed the function of locking. So the Thompson patent is not an anticipation; and this virtually is confessed by Ludwigs' reliance on Thompson modified by omitting the catch.

But the modified Thompson structure is not a part of the prior art. *Topliff v. Topliff*, 145 U. S. 156, 161, 12 Sup. Ct. 825, 36 L. Ed. 658. It has been produced in the light of Payson's teachings. It is a sub-

sequent art brought into being in the endeavor to defeat Payson. If, however, the sliding catch be omitted, what results? A locking device in which the locking function is lost with the removal of the locking element. For a glance at the drawings will show, what was demonstrated by tests of the model in court, that the pivot on which the lever is hinged and the top of the opposing flange on which the lever bears are so nearly in a horizontal line that a slight effort is effective to throw off the lever and raise the sash; while in the Payson lock the lever and the opposing flange are designedly so formed, and the pivot and flange are so nearly in a vertical line, that the practical art has been given what Payson promised, "a lock that can be securely fastened by merely pulling forward a locking arm without any secondary or additional movement or locking device." If the mechanics of the case left any doubt, it should be resolved in favor of invention by reason of the lock's filling a special need, its success in commerce, the general acquiescence of the trade, and the tribute of Ludwigs' faithful imitation.

[2] 2. Counsel for Ludwigs cite several cases in support of their contention that under no circumstances can damages from unfair competition be lawfully included in patent litigation between citizens of the same state. *Illinois Watch-Case Co. v. Elgin National Watch Co.*, 94 Fed. 667, 35 C. C. A. 237; *Keasby & Mattison Co. v. Philip Carey Mfg. Co.* (C. C.) 113 Fed. 432; *King v. Inlander* (C. C.) 133 Fed. 416; *Cushman v. Atlantis Fountain Pen Co.* (C. C.) 164 Fed. 94; *Mecky v. Grabowski* (C. C.) 177 Fed. 591; *Johnston v. Brass Goods Mfg. Co.* (D. C.) 201 Fed. 368. Whether or not such damages are cognizable if two separate and distinct matters or transactions are offered for investigation, or if, one matter alone being in evidence, the patent fails, we need not consider. For here the patent is found to be valid and infringed. Evidence of sales to prove infringement of the mechanical principles of the patent establishes also that Ludwigs unlawfully took the livery of Payson in order to make the sales. Under such circumstances (whether the compactness for cheapness of manufacture and the ornamental form are within the protection of the claims or not) a federal court of equity in granting relief for the infringement of the mechanism ought not to remit the complainant to another forum to mete out the damages which necessarily appear in proving the infringement and which, though in one aspect arising from fraud in trade, in a fairer aspect are aggravations of the infringement. *Globe-Wernicke Co. v. Fred Macy Co.* (C. C. A. 6th Circuit) 119 Fed. 696, 56 C. C. A. 304; *Adam v. Folger* (C. C. A. 7th Circuit) 120 Fed. 260, 56 C. C. A. 540; *Woods Sons Co. v. Valley Iron Works* (C. C.) 166 Fed. 770; *Onondaga Indian Wigwam Co. v. Ka-Noo-No Indian Mfg. Co.* (C. C.) 182 Fed. 832; *Ross v. Geer Co.* (C. C.) 188 Fed. 731; *Saxlehner v. Eisner & Mendelsohn Co.*, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60; *Siler v. Louisville, etc., R. Co.*, 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753.

Consequently Ludwigs should respond fully for his wrongful conduct as shown in this record. In addition to being enjoined, he should be held to account, first, for the profits he has made by his infringe-

ment; second, for any additional profits Payson Company would have made if it had filled the orders for which Ludwigs supplied spurious locks; and, third, for any further damage Payson Company may have suffered in reputation and loss of trade resulting from the appearance of the spurious goods in the market.

Though the decree as entered respecting unfair competition must be modified, it is evident that Ludwigs gains nothing by his appeal. So the costs thereof, as well as of Payson Company's appeal, should be taxed against him.

The decree is vacated and the cause remanded, with the direction to enter a decree in favor of Payson Company in consonance with this opinion.

HOLMES et al. v. BURNETT.

(District Court, N. D. Illinois, E. D. July 16, 1913.)

No. 30,754.

1. PATENTS (§ 280*)—SUIT FOR INFRINGEMENT—EQUITY JURISDICTION.

That a patentee has assigned an interest in his patent, including the right of recovery for past infringements, to his co-complainants, since the acts of infringement charged in the bill, does not deprive a court of equity of jurisdiction, where the alleged infringing article was made by defendant under a patent to himself, and he claims the right to make, use and sell it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 439; Dec. Dig. § 280.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DENTAL APPLIANCE.

The Holmes patent, No. 900,541, for a dental appliance for taking wax impressions, is valid, of a primary character, and is entitled to a reasonably broad construction; also *held* infringed by the device of the Burnett patent, No. 984,796.

In Equity. Suit by Erwin E. Holmes and others against Ira E. Burnett. On final hearing. Decree for complainants.

Minturn & Woerner, of Indianapolis, Ind., for complainants.

John H. Whipple, of Chicago, Ill., for defendant.

SANBORN, District Judge. Bill for injunction and accounting for infringement of patent No. 900,541, to Erwin E. Holmes, dated October 6, 1908. The defenses interposed are want of jurisdiction in equity, lack of novelty, and no infringement.

[1] The first defense was raised by demurrer, which was overruled; and it is renewed in the answer, and by motion to dismiss the suit on the ground that the remedy at law is adequate. It appears that the only act of alleged infringement proved was the sale of defendant's device September 1, 1911. At this time Mr. Holmes was the sole owner of the patent. About six weeks later he assigned to Ida A. Holmes, George E. Coburn, and Grant H. Clay, his co-complainants, the undivided three-fourths of all right, title, and interest in the patent, one-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fourth to each, including the right of recovery for past infringements. It further appears in the evidence that defendant took out a patent upon his device, and claims the right to make, use, and sell it.

It will thus be seen that no specific act of infringement is shown after the assignment, and it is therefore insisted that no cause of action in equity can exist as to three of the complainants; their rights being wholly legal in their character. It appears, however, that all persons interested in the patent are before the court, and that Holmes, who owned the whole interest at the time of the alleged infringement, and still owns a quarter interest, had at the time of infringement, and still has, the right to an injunction and an accounting, if there has been infringement and the patent is valid. All interested persons being parties, the whole controversy can be settled in this suit. Under these circumstances, it would be unjust to turn the parties over to a court of law, which cannot give adequate relief.

[2] The patent in question relates to a device for taking impressions of the mouth for the making of artificial teeth. It appears that it is difficult to obtain a correct impression, for the reason that the patient, in closing the mouth, holds the lower jaw too far forward. This is due to the jaw having acquired an abnormal position by reason of its being so loosely joined to the cranium, and when mastication must be done on one side of the mouth, thus wearing down the teeth on that side, and throwing the jaw out of its proper position. When impressions are made under these circumstances, the false teeth will not fit. Dentists overcome this condition by manually pushing the lower jaw backwards into its sockets while taking the wax impression, and later find the proper position of the teeth by fitting them into the wax in the patient's mouth before the plate is made. To avoid this, and enable busy dentists to complete the plates without the presence of the patient, devices of the kind made by complainants and defendant are required.

The difficulty which has always existed in dentistry is to find the position of the lower jaw in normal relation to the upper, at the time of taking the wax impression. Prior to Holmes' discovery, there was only one device in the prior art by which this difficulty was attempted to be solved. That was the invention patented by Huber June 9, 1903, No. 730, 658. His plan was to have the patient close his mouth on the wax, which had been placed on the "bite-taker," and then direct him to relax the muscles, thus tending to restore the lower jaw more or less into a normal position; the lower blade of the device, with its wax impression, being thereby pulled back, either into the proper position, or towards that position, by such relaxation. Holmes was the first, however, to produce a device which of itself does this by pushing the jaw backwards without the volition of the patient himself.

The invention consists of two plates joined together by a hinge pivoted at each end, so that the plates may be slightly separated, and the lower one slid forwards, or towards the back of the mouth, in the very act of taking the impression, thus carrying the lower jaw back into its normal position, and also placing it into proper sidewise or lateral relation to the upper, which is always rigid, being part of the cranium itself.

Holmes, being the first to fully solve the difficulty presented, was awarded a somewhat broad claim for so simple a device. His first claim reads:

"A dental appliance for taking wax impressions or bites, consisting of a primary and a secondary plate, means on said plates adapted to force the secondary plate to travel longitudinally when moved toward the primary plate and to limit said longitudinal travel, and a lug on said primary plate to limit the longitudinal travel of said secondary plate in the direction to open the appliance."

Defendant was given one of the patented devices, which he kept for about a year. He seems to have improved upon it to some extent in making and procuring a patent upon his own, which is No. 984,796, dated February 21, 1911. His "bite-taker" is more attractive in design, and easier to operate; possibly more efficient. But it contains all the elements of the Holmes invention in a different position. The mode of operation is nearly the same. In view of the fact that Holmes was the first to meet the difficulty of the abnormal bite of the toothless jaw, he is entitled to a reasonably broad construction of his claims, the first three of which are held infringed.

Injunction and accounting as prayed should be decreed. Whether complainants are entitled to damages by reason of not having marked the devices will be considered on application for decree.

SIMMONS MFG. CO. v. KINNEY, RODIER CO. et al.

(District Court, N. D. Illinois, E. D. July 18, 1913.)

No. 29,295.

PATENTS (§ 328*)—INVENTION—SPRING BED.

The Gail patent, No. 639,223, for a spring bed, is void for lack of invention in view of the prior art.

In Equity. Suit by the Simmons Manufacturing Company against Kinney, Rodier Company and others. On final hearing. Decree for defendants.

Offield, Towle, Graves & Offield, of Chicago, Ill., for complainant.
Peirce, Fisher & Clapp, of Chicago, Ill., for defendants.

SANBORN, District Judge. Bill for infringement of patent No. 639,223, to John F. Gail, dated December 19, 1899, and assigned to complainant. Since this patent was held narrowly valid in *Simmons Mfg. Co. v. Southern Spring Bed Co.* (C. C.) 131 Fed. 278, affirmed 140 Fed. 606, 72 C. C. A. 174, it has been found (in this case) that an additional defense exists in the shape of the Tinkham patent application. Mr. Gail testifies that Tinkham approached one step nearer to the patent construction than any of the other inventors.

Gail's device is a most worthy one. It combines just the elements essential and desirable in a spring bed. I have no doubt that it required much study and experiment to produce so neat and attractive

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and practical a structure. I should much prefer to sustain the patent, which has only a short time to run, if it were fairly possible to do so, but cannot find any invention in it, in view of what went before.

Bill dismissed for want of equity.

UNIVERSAL FILM MFG. CO. v. COPPERMAN et al.

(District Court, S. D. New York. June 6, 1913.)

COPYRIGHTS (§ 71*)—SUIT FOR INFRINGEMENT—IMPOUNDING OF INFRINGING ARTICLE—RIGHT TO RETURN.

Where, after the impounding of an article alleged to infringe a copyright, under Act March 4, 1909, c. 320, § 25, 35 Stat. 1081 (U. S. Comp. St. Supp. 1911, p. 1480), defendant has moved for and obtained the execution of a new and larger bond by complainant, he is not entitled to a vacation of the writ of seizure and a return of such article.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 84; Dec. Dig. § 71.*]

In Equity. Suit by the Universal Film Manufacturing Company against S. Copperman, doing business as Thalia Music Hall, and A. Polacoff, doing business as Special Film Company, Limited. On motion to vacate writ of seizure and for return of article seized. Motion denied.

Isaac B. Owens, of New York City, for complainant.
Samuel F. Frank, of New York City, for defendants.

WARD, Circuit Judge. April 25, 1913, this bill was filed, alleging that the Nordisk Company, the complainant's assignor, being the owner of a motion picture or photograph called the "Great Circus Catastrophe," filed a copy thereof November 14, 1912, in the office of the Register of Copyrights at Washington, and received a certificate of registration, and that subsequently the defendant exhibited a moving picture film of the said photograph. Upon the same day, upon an affidavit of a clerk in the office of the complainant's solicitor, and upon a bond in the sum of \$100, the court ordered the United States marshal to seize the said film, which he did.

April 29th the defendant, under rule 7 of the Supreme Court (172 Fed. v), adopted in accordance with the authority given in section 25 of the act, excepted to the amount of the bond and the sufficiency of the sureties, which proceeding resulted in the court's ordering a new bond in the sum of \$500, which was given in accordance with the requirements of the rule. May 6th the defendant answered, denying the complainant's rights and setting up several defenses. May 20th the defendant obtained an order to show cause why the writ of seizure should not be vacated, on the ground that it was contrary to law, and filed an affidavit that it had purchased the film in question in September, 1912, at London, from one who had purchased it in the open market of the Nordisk Company, and had imported it into this country before the complainant's assignor had applied for copyright.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Congress evidently intended under section 25 to give a very summary remedy to the copyright owner in the first instance, and the Supreme Court by its rules thought it sufficient to protect the interests of the parties, respectively, by requiring bonds adequate in amount and with sufficient sureties, all questions on the merits to be subsequently determined in the usual way. The procedure is that the articles alleged by the complainant to infringe his copyright are to be delivered up to the marshal upon the complainant's giving security to indemnify the defendant (rule 7) and upon the defendant's alleging that the articles seized are not infringements, they may be returned to him upon his giving adequate security to abide the order of the court (rule 9 [172 Fed. v]).

The defendant has availed itself of the right to have a larger bond, and is now in no position to complain of the seizure or to demand the return of the alleged infringing articles. I think the procedure prescribed by the rules of the Supreme Court constitutes due process of law, and that it is not obnoxious to the fourth amendment to the Constitution of the United States, which applies only to criminal cases. The defendant might have raised some of its objections by motion to dismiss the bill; but, having answered, its remedy is to defeat the complainant, if it can, upon a trial on the merits.

The motion is denied.

DE VILLENEUVE v. MORNING JOURNAL ASS'N.

(District Court, S. D. New York. May 5, 1913.)

DEPOSITIONS (§ 25*)—LETTERS ROGATORY—FEDERAL COURTS.

A federal court has power to issue letters rogatory to obtain the testimony of witnesses in foreign jurisdictions, which refuse to compel the attendance of witnesses under commissions; and where it is shown that the witnesses are unwilling, the examination may be oral.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 36; Dec. Dig. § 25.*]

At Law. Action by Raimond De Villeneuve against the Morning Journal Association. On motion for letters rogatory. Motion granted.

Chas. S. Aronstam, of New York City, for plaintiff.

C. J. Shearn, of New York City, for defendant.

WARD, Circuit Judge. Letters rogatory have very rarely issued in this circuit. The statutes of the United States confer no general power upon the courts to issue them. Section 875, Rev. Stat. U. S. (U. S. Comp. St. 1901, p. 667), does treat of letters issued in cases in which the United States is a party or has an interest, and this has been thought evidence of an intention upon the part of Congress to restrict the inherent power of the court. However, as we execute letters rogatory coming from foreign countries, and as this method of getting testimony is most necessary in countries which refuse to compel the attendance of witnesses under commissions, I think we ought not to suppose that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Congress intended to limit the power of the court. The subject has been considered in various aspects in Spanish Consul's Petition, 1 Ben. 225, Fed. Cas. No. 13,202; In re Pacific Railway Commission (C. C.) 32 Fed. 241, 256; Re Letters Rogatory (C. C.) 36 Fed. 306; Gross v. Palmer (C. C.) 105 Fed. 833; Benedict's Admiralty, § 456. This case is one in which a number of the witnesses are likely to be unwilling, so that the examination should be oral, though that is a most unusual method, and not upon written interrogatories.

Motion granted.

In re MALSCHICK & LEVIN.

(District Court, E. D. Pennsylvania. June 27, 1913.)

No. 3,915.

BANKRUPTCY (§ 228*)—REVIEW—FINDINGS OF REFEREE.

Orders and proceedings of a referee in bankruptcy are presumed to be correct, unless clearly proved to be erroneous.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Malschick & Levin. On certificate of a referee denying an application of the bankrupts for a rehearing of the proceedings and re-examination. Affirmed.

Wessel & Arons, of Philadelphia, Pa., for bankrupts.

Julius C. Levi, of Philadelphia, Pa., for trustee.

J. B. McPHERSON, Circuit Judge. The only question raised by this certificate is whether the referee (Richard S. Hunter, Esq.) erred in "not granting the motion of the bankrupts for a rehearing of the proceedings and re-examination of the bankrupts." Manifestly it must often be impossible for the District Court to know what has taken place before the referee. Statements and arguments are often made that do not get upon the record, although they may have been important and may have influenced or even determined the action of the referee. For this and for other reasons the orders and proceedings before a referee are ordinarily presumed to be correct unless they are clearly proved to be erroneous. In the present case the referee distinctly states that the case had been closed, and that he denied the bankrupts' motion on that ground. As I can find nothing in the record to show that this statement is incorrect, I accept it as true and sustain the exercise of the referee's discretion.

The order of April 24, 1913, is affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CITY OF POCA TELLO v. MURRAY et al.

(District Court, D. Idaho, E. D. May 16, 1913.)

1. WATERS AND WATER COURSES (§ 189*)—CONSTRUCTION.

A franchise granted by a city to construct and maintain waterworks for the public and to lay and maintain mains in the streets is subject to the rule that where, on a fair reading of the instrument, reasonable doubts arise as to the intent of the parties, such doubts must be resolved in favor of the public.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 272; Dec. Dig. § 189.*]

2. WATERS AND WATER COURSES (§ 189*) — PUBLIC WATER SUPPLY — FRANCHISES—CONSTRUCTION.

Defendant, under a prior ordinance, having been granted a franchise to construct and maintain waterworks for the use of complainant city, which required him to furnish a sufficient supply both for public and private use of the city and its inhabitants and to convey the same from "Mink creek" and another stream, was granted a new franchise containing provisions beneficial to him and onerous to the public. This ordinance recited that the water furnished was deemed "inadequate for present and future needs, and that defendant agreed to bring in the waters of Mink creek and to make all extensions of street mains warranted by the growth of the city," etc. *Held*, that the new ordinance did not limit defendants' obligation to the bringing in from "Mink creek" only so much water as was necessary, but that he was bound to bring in all the water from such creek; the same being necessary to afford an adequate supply.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 272; Dec. Dig. § 189.*]

3. WATERS AND WATER COURSES (§ 189*) — PUBLIC WATER SUPPLY — FRANCHISES—CONSTRUCTION OF PIPE LINE.

Where a waterworks franchise not only required defendant to bring in the waters of "Mink creek" to be used as a source of supply but also provided for the construction of a pipe line by which such result was to be accomplished, the work to be commenced within 90 days after the approval of the ordinance and carried to effective speedy completion without unnecessary delays, interruptions, or discontinuances, defendant was bound to construct a completed pipe line at once and was not entitled to construct it in installments at such intervals as he deemed proper.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 272; Dec. Dig. § 189.*]

4. WATERS AND WATER COURSES (§ 189*) — PUBLIC WATER SUPPLY — FRANCHISES—EXTENSION—SUFFICIENCY OF SUPPLY.

Where an ordinance, extending a waterworks franchise, recited that the present supply was insufficient and required defendant to bring in the waters of a certain creek and construct immediately a certain pipe line for that purpose, the ordinance was conclusive of the issue that the present supply was insufficient for such needs as then existed or was likely to arise in the immediate future.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 272; Dec. Dig. § 189.*]

5. WATERS AND WATER COURSES (§ 189*)—PUBLIC WATER SUPPLY—APPROPRIATION—CONTRACT.

Where the sources of a city's water supply, which could be obtained under a gravity system, were limited to the waters of certain creeks,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the city was authorized to contract for the protection of such supply by the appropriation of all the waters of a creek by an ordinance granting defendant a franchise to continue the maintenance, operation, and extension of his waterworks system constructed under a prior franchise.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 272; Dec. Dig. § 189.*]

6. **WATERS AND WATER COURSES (§ 190*)—PUBLIC WATER SUPPLY—APPROPRIATION—EXTENT.**

A present appropriation of the entire waters of a creek for the use of a city was not against public policy because the supply was greater than the city's immediate needs; the rule that an appropriator has a reasonable time to apply the water appropriated to a beneficial use being applicable with even greater liberality to the superior and more elastic needs of a growing municipality.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 268; Dec. Dig. § 190.*]

7. **WATERS AND WATER COURSES (§ 190*)—PUBLIC WATER SUPPLY—EXCESSIVE APPROPRIATION.**

Where a city's appropriation of the entire waters in a stream for a public water supply is greater than the immediate necessities of the city, the appropriation would nevertheless be consummated and the right held intact by a temporary application of any surplus waters to other beneficial uses.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 268; Dec. Dig. § 190.*]

8. **WATERS AND WATER COURSES (§ 189*)—FORFEITURE—BREACH OF CONTRACT.**

Where the grantee of a waterworks franchise has committed a substantial breach of his contract to furnish the city an adequate water supply and to bring in all the waters of a certain creek therefor, the franchise is subject to forfeiture at the suit of the city, provided it comes into court with clean hands and is willing to do equity.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 272; Dec. Dig. § 189.*]

9. **WATERS AND WATER COURSES (§ 189*)—FORFEITURE—VIOLATION OF CONTRACT.**

Where defendant received and accepted from a city a water franchise requiring him not only to furnish an adequate water supply but also to bring into and render available for the use of the city and its inhabitants all the waters of a certain creek, and defendant, after the expiration of a reasonable time, did neither, but instead installed reducers in the supply pipes to consumers and promulgated a series of unreasonable regulations for the use of water by consumers to reduce the use, the franchise was subject to forfeiture.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 272; Dec. Dig. § 189.*]

10. **WATERS AND WATER COURSES (§ 189*)—PUBLIC WATER SUPPLY—FLAT RATE.**

Where defendant, to whom a waterworks franchise had been granted, contracted for the flat-rate system of distribution, and also bound himself to furnish an adequate supply, he would be presumed to have contemplated such extravagance of use as was ordinarily and necessarily incident thereto.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 272; Dec. Dig. § 189.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

11. WATERS AND WATER COURSES (§ 189*)—PUBLIC WATER SUPPLY—ADEQUACY—REASONABLE USE.

Whether the holder of a waterworks franchise has furnished an adequate water supply as required by his franchise must be determined with reference to the rule of reasonable use.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 272; Dec. Dig. § 189.*]

12. WATERS AND WATER COURSES (§ 203*)—PUBLIC WATER SUPPLY—MINIMUM CHARGE.

While a water company, furnishing water to a city under franchise, may provide a minimum charge for meter service, such charge must be reasonable in amount and uniform in application.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.*]

13. WATERS AND WATER COURSES (§ 202*)—PUBLIC WATER SUPPLY—USE—REGULATION.

Where a defendant furnished water to a city under franchise requiring an adequate supply, rules prohibiting the use of water for sprinkling except between the hours of 6 and 8:30 o'clock p. m. and limiting such use to sprinkling through a hose with a nozzle one-fourth of an inch in diameter, and then only when held in the hand, were unreasonable.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 276; Dec. Dig. § 202.*]

14. WATERS AND WATER COURSES (§ 189*)—PUBLIC WATER SUPPLY—USE OF WATER—SPRINKLING GARDENS.

Where, though a waterworks franchise did not in terms provide for the sprinkling of gardens, flower or vegetable, the schedule rates provided for "lawn sprinkling" at so much "a lot," defendant was required to furnish water for gardens.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 272; Dec. Dig. § 189.*]

15. WATERS AND WATER COURSES (§ 189*)—PUBLIC WATER SUPPLY—FRANCHISES—FORFEITURE—REMEDY.

Provision of an ordinance granting a franchise to construct and maintain a city water plant, containing a stipulation that in case defendant did not furnish a sufficient amount of water the city might bring in an additional supply, did not constitute an exclusive remedy precluding the city from maintaining a suit to forfeit the franchise on defendant's failure to furnish an adequate supply, etc.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 272; Dec. Dig. § 189.*]

16. WATERS AND WATER COURSES (§ 189*)—FORFEITURE—NOTICE.

Notice of a city's intention to institute suit against the grantee of a waterworks franchise to cancel the same because of his failure to perform and to furnish the city an adequate supply of water was not a necessary element of the city's right to maintain the action.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 272; Dec. Dig. § 189.*]

17. WATERS AND WATER COURSES (§ 189*)—FORFEITURE—REMEDY.

It was no defense to a city's suit to forfeit a waterworks franchise that the city might rescind by resolution; such remedy not being necessarily adequate.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 272; Dec. Dig. § 189.*]

In Equity. Suit by the City of Pocatello against James A. Murray, doing business as the Pocatello Water Company, and another. Decree for complainant.

See, also, 173 Fed. 382.

D. Worth Clark and P. C. O'Malley, both of Pocatello, Idaho, for complainant.

N. M. Ruick and J. H. Hawley, both of Boise, Idaho, for defendants.

DIETRICH, District Judge. The suit is brought for the cancellation of a franchise, granted to the defendant June 6, 1901, and relating to the furnishing of water for the use of the plaintiff and its inhabitants, as appears from its ordinance numbered 86. A copy of the ordinance is attached to the amended bill, and on its face, as well as from the averments of the pleadings, it is shown that at the time of its passage the defendant owned and was operating the system by which the city was supplied with water, under a former ordinance, numbered 59 (passed June 8, 1898), which was in favor of the Pocatello Water Company, a corporation, and confirmed and continued in it as assignee certain rights and privileges theretofore conferred upon the defendant and his then associates, F. D. Toms and John J. Cusick, by ordinance numbered 46 (passed January 4, 1892). The Pocatello Water Company later assigned all of its rights under both ordinances to the defendant.

The city contends that defendant has violated the provisions of ordinance 86 in material respects and for that reason seeks a decree relieving it from any further obligations thereunder. With one possible exception, the substantial defaults alleged and relied upon all relate to the adequacy of the amount of water supplied by the defendant, and the controlling question therefore is whether the defendant has fulfilled his obligations in this respect.

In the main the city and its inhabitants are dependent upon the defendant's system. The Oregon Short Line Railroad Company supplies its needs from a plant of its own, and there are a few private wells; and there has recently been constructed an open ditch, from which, by the use of pumps and other devices, water may be procured for irrigation purposes in certain quarters. Other than the railroad supply, however, these exceptions appear to be unimportant, if not wholly negligible.

The water delivered by the defendant is procured from three small mountain streams, referred to in the record as Mink, Gibson Jack, and Cusick creeks. The flow of the first named during the dry season of each year may be roughly stated as three cubic feet per second, of the second as two cubic feet, and of the last as a small fraction of a second foot. A pipe line about six miles in length, and with a theoretical capacity of approximately .75 of a second foot, diverts water from Mink creek and discharges it into Gibson Jack. Pipe lines from Gibson Jack and Cusick creek discharge into what is known as the upper reservoir, which serves not only to impound, and thus to equalize, the supply of water, but also to free it from silt and other sedimentary

matter. From this reservoir pipe lines lead to the middle and lower reservoirs, which are connected by a pipe line, and from both of which mains lead to the city distributing system, which, so far as appears, is of the usual type. The reservoirs are situated on the "bench" or mesa near the city, with a sufficient elevation to give ample pressure, and are substantially built. At the time of the passage of ordinance 86 no water was being used from Mink creek; the pipe line from that stream was built shortly thereafter; and later the middle reservoir was constructed and the lower one was remodeled.

The water is used by the municipality for street sprinkling and for protection against fire and by the inhabitants for domestic and manufacturing purposes and during the summer season for their lawns, trees, and gardens. Since the passage of the ordinance, as appears both from the United States census and other evidence in the record, the population of the city has about doubled, it now being approximately 10,000; and it is fair to conclude that the needs for which water is required have increased at least 100 per cent. Admittedly the water is wholesome, and the supply thereof is ample except during the summer season, when large quantities are used for street sprinkling and lawns, and during that season there has been complaint nearly every year for the last nine or ten years. As early as 1905 it appears that the situation was thought to be so acute that the city officials, taking cognizance of criticism by citizens and the public clamor because nothing was being done to compel the defendant to furnish a greater supply, called a mass meeting for the purpose of discussing ways and means of improving the conditions and, if possible, of devising a remedy. In the year 1911 all the reservoirs ran practically dry, and as a consequence the city was without adequate fire protection. Much bitterness prevailed, and finally, either as the result of a judicial proceeding or of threats by the city authorities to commence such a proceeding (it is not clear which), an arrangement was made by which the management of the plant was temporarily taken out of the hands of the defendant's superintendent. With the exception of the small volume of water that may be stored in the middle reservoir, the capacity of the system to supply the summer needs of the city has not been increased since the construction of the Mink creek pipe line. No meters have ever been installed, but "flat" rates are charged in accordance with a schedule thereof incorporated in the ordinance itself.

The provisions of ordinance 59 are not highly material to the present consideration. As already stated, it reaffirmed the grant of ordinance 46, and it also established a schedule of water rates and required the water company to substitute a steel pipe for the wooden flume by which the waters of Gibson Jack creek were carried to the reservoirs. It contains nothing else of importance.

Ordinance 46 grants to defendant and his associates the right generally to lay pipes in the streets of, and to supply water to, the city of Pocatello and its inhabitants for the period of 50 years. Certain conditions are imposed: (1) The grantees were to complete the plant and be ready to deliver water within a certain specified period; (2) the water supplied was to "be conveyed from the creeks on the Ft. Hall

Indian reservation, known as Mink and Gibson Jack creeks," and was to be "sufficient to supply both the public and private use and purpose of the citizens and inhabitants of the town of Pocatello," and was to "be of pure and healthful quality"; (3) the water was to be conveyed to, and confined in, "a suitable and substantial reservoir or reservoirs," at a point above the town, so as to furnish a pressure of at least 150 pounds. The immediate laying of certain prescribed mains and laterals for the distribution of water is required, and it is added that "thereafter main pipes and laterals may be laid as the occasion or consumption demands." There are no other material provisions.

Turning now to ordinance 86 and analyzing it in the light of the conditions thus briefly sketched, what obligations does it impose upon the defendant, and has he substantially fulfilled them? In one aspect the question turns upon the construction of the contract itself, the material facts being undisputed; and in another upon the view which may be taken of facts touching which the testimony is, in its implications at least, highly conflicting.

[1] Undoubtedly the ordinance falls within the general rule applicable to grants of franchises that where, upon a fair reading of the instrument, reasonable doubts arise as to the intent of the parties, such doubts must be resolved in favor of the public. *Stein v. Bienville Water Supply Co.*, 141 U. S. 67, 80, 81, 11 Sup. Ct. 892, 35 L. Ed. 622. There is nothing in *Bellevue Water Co. v. City of Bellevue*, 3 Idaho (Hasb.) 739, 35 Pac. 693, or *Jack v. Village of Grangeville*, 9 Idaho, 291, 74 Pac. 969, to the contrary. One of the reasons generally assigned for the rule is that such instruments are usually drafted by able counsel representing the grantee, and strong internal evidence is not wanting that the present agreement was so prepared. But, be that as it may, the rule of construction is so well established that the reasons upon which it rests need not be discussed.

[2] The only provisions of the ordinance purporting to be onerous to the defendant, or to impose upon him obligations with which he was not already charged under pre-existing franchises, are found in a paragraph of the preamble, which reads as follows:

"Whereas the present supply of water furnished by said water system [the existing one] is deemed inadequate for the present and future need of said city [Pocatello], and said James A. Murray agrees to bring in the waters of Mink creek, and to make all extensions of street mains warranted by the growth of said city, thereby necessitating the laying of several miles of pipe, at a large additional expenditure of money."

The substantive part of the instrument is all beneficial to the defendant: It declares that his existing rights and privileges are confirmed and continued in effect; that the then existing water rates were fair and should not be altered for a period of five years, and then only upon certain conditions and in the manner therein specified; that no other person or corporation should be granted a franchise upon more favorable terms; that the city itself should not construct or operate its own system in competition with the defendant until it should have first in good faith offered to purchase his plant at a price to be fixed by a board of engineers in the manner expressly prescribed, the purchase to be made under conditions with which the city could not com-

ply without the greatest difficulty, if at all; and that the city should rent and pay for at the scheduled rates at least 45 fire hydrants. Sections 6 and 8, which doubtless relate to the paragraph already quoted from the preamble, are as follows:

"Section 6. Within ninety days from and after the passage and approval of this ordinance, the said James A. Murray shall commence or cause to be commenced the improvements mentioned in the preamble hereto, and shall carry the same to effective and speedy completion, without unnecessary delays, interruptions or discontinuances, such compliance with this ordinance shall entitle said James A. Murray, his successors or assigns, to the benefits of its provisions, as in virtue of an executed contract; but if more than ninety days shall elapse without such commencement this ordinance shall be and the same is hereby declared null and void."

"Section 8. If at any time the said James A. Murray, or his successors or assigns, fails to supply sufficient water for the needs of the city of Pocatello and the inhabitants thereof, then it shall be optional with the city of Pocatello to secure a further supply of water from any other source, directly or indirectly, without reference to the provision of this ordinance: Provided, however, that said James A. Murray shall have a reasonable time in which to complete the improvements contemplated by this ordinance, or such further improvements as may hereafter become necessary to supply sufficient water as aforesaid before the provisions of this section shall apply."

The agreement of the defendant to "make all extensions of street mains warranted by the growth of" the city imposed upon him no new obligations; the duty so to do was clearly implied by ordinance 46. Under it, as we have seen, the grantees were bound to furnish water to the city and its inhabitants, and they were given the privilege of laying pipes in the streets for its proper distribution. Certain mains and laterals were deemed to be indispensable and immediately necessary, and these they were required to lay at once. As to other pipes and laterals which might become necessary to enable them to fulfill their primary obligation of delivering water to the city and its inhabitants, the city waived the right of having them laid in advance of any actual need therefor and consented that they might be provided from time to time "as the occasion or consumption demands." If, therefore, the city received any consideration at all for the onerous terms of ordinance 86, it consisted solely and exclusively of such new obligation, if any, as was imposed upon the defendant by his agreement "to bring in the waters of Mink creek"; and whether this clause does or does not create a new obligation depends upon whether we adopt the construction contended for by the city or that urged by the defendant. By the city it is said the defendant thus agreed to bring in all the waters of Mink creek, and by the defendant only such portion thereof as might be reasonably necessary from time to time to supply the public needs. In any view that may be taken of the issue of fact touching the shortage of water, relative to which the evidence is conflicting, what, under this clause of the ordinance and upon the undisputed facts, is the defendant's position? Admittedly the pipe line from Mink creek is of a capacity little, if any, more than sufficient to carry one-fourth of the flow of Mink creek, even in the low-water season, and therefore if his agreement was to bring in all the waters of the stream he has in a vital matter substantially failed to perform. If, upon the other hand, in accordance with his contention,

it be held that by this provision he was required to bring in only such water as was reasonably necessary, then the ordinance must be held to be ineffective and nonenforceable, for in that view it is wholly without any consideration whatsoever, a mere nudum pactum. Before it was passed the defendant, by virtue of ordinance 46, stood expressly obligated to furnish water "sufficient to supply both the public and private use and purpose" of the city and its inhabitants and to convey the same from *Mink creek* as well as Gibson Jack. Such a construction would therefore be fatal to the entire defense, for under it the ordinance becomes a nullity and ineffective either to confer any right upon the defendant or in any respect to bind the plaintiff.

But it is thought that such a view of the meaning of the stipulation cannot be maintained. It is not to be presumed that either the city authorities or the defendant intended to perpetrate a fraud upon the public. It is conceded upon behalf of the defendant that the language of the ordinance is susceptible to the construction urged by the city. Indeed, it can hardly be controverted that such is the natural import of the language; the defendant agreed, not "to bring in *water from Mink creek*," but to "bring in *the waters of Mink creek*." The stream is a small one, and it may be readily conceived that both parties were of the opinion that the entire flow was required to supply needs which, if not wholly instant, were so near at hand that immediate provision should be made therefor.

[3] The phraseology is wholly inappropriate to convey the limited meaning for which the defendant contends; nor is the language in any other part of the instrument favorable to such a construction. There is no intimation that the necessary conduit was to be added to or increased from time to time as there might be need. Not only were the "waters of Mink creek" to be brought in, but the construction of the pipe line by which this result was to be accomplished was to be commenced within 90 days after the approval of the ordinance and carried "to effective and speedy completion without unnecessary delays, interruptions, or discontinuances." Such language leaves no room for the theory that pipe lines were to be constructed in installments at such intervals as the defendant might deem to be proper. Force is added to this view by the present strenuous contention of the defendant that the waters of Gibson Jack and Cusick creeks not only were at the time of the passage of the ordinance, but still are, more than sufficient to supply all of the plaintiff's needs.

[4] If that be the case, and if we adopt the defendant's theory of the meaning of the ordinance, it necessarily follows that the waters of Mink creek never have been needed, and that therefore defendant never has been under any present obligation to construct a pipe line, either large or small, and that he may at his option, without violating any of the rights of the plaintiff, tear up the line which he did build. It is reasonable to infer that one of the purposes of the ordinance was to put at rest the question of the sufficiency of the supply, and to forestall and prevent just such a controversy as has here arisen, by definitely providing that the waters of Mink creek, which were admittedly sufficient for such needs as then existed or were likely to arise in the immediate future, should be made available and put at the service of

the city. Moreover, in the light of experience, and of facts in the record, and of what other municipalities have been doing, such was the course dictated by prudence and reasonable foresight. It appears that the sources from which a gravity supply for the plaintiff can be procured are limited, and of these the streams hereinbefore named are the most desirable.

[5] Under the system of water appropriation which prevails in this state, rights of private individuals might be initiated and become vested in the waters of Mink creek at any time. The city's present and future interests, therefore, demanded that any claim which the defendant at that time had the right to make or to initiate, to the waters of Mink creek, should be perfected and protected by the construction of the requisite means for the diversion and application of the water to a beneficial use. It was competent for the city to contract for such protection, and its desire so to do, it is reasonable to presume, was one of the moving considerations for submitting to the conditions imposed upon it by the ordinance.

[6] The contention that it would have been against public policy for the defendant to have appropriated more of the public waters than was necessary to supply the immediate needs of the city, and that therefore the construction of a larger conduit would have been a vain thing, is without merit. Under the law of the state an appropriator has a reasonable time to apply the water which he has appropriated to a beneficial use, and if such rule may be invoked in the case of an appropriation for agricultural purposes it should, and doubtless would, be applied with even greater liberality to the superior and more elastic needs of a growing municipality.

[7] Besides, if not required for the immediate necessities of the city, the appropriation could have been consummated and the right held intact by a temporary application of any surplus to other beneficial uses. Upon this branch of the case, the conclusion is unavoidable that the defendant's failure to bring in and make available for the uses of the plaintiff the waters of Mink creek constitutes a substantial breach of his contract.

[8] It remains to consider whether, upon such breach, and in the light of the other facts of the case, the plaintiff is entitled to the relief prayed for. That under proper conditions equity will declare forfeit and cancel a contract of the character of that under consideration is well settled. *City of Columbus v. Mercantile Trust Co.*, 218 U. S. 645, 31 Sup. Ct. 105, 54 L. Ed. 1193; *Farmers' Loan & Trust Co. v. Galesburg*, 133 U. S. 156, 10 Sup. Ct. 316, 33 L. Ed. 573; *City of St. Cloud v. Water, Light & Power Co.*, 88 Minn. 329, 92 N. W. 1112; *Capital City Water Co. v. State*, 105 Ala. 406, 18 South. 62, 69 L. R. A. 743; *Grand Haven v. Water Works*, 99 Mich. 106, 57 N. W. 1077; *Water Co. v. Jackson*, 73 Miss. 598, 19 South. 774; *Palestine Water Co. v. City of Palestine*, 91 Tex. 540, 44 S. W. 814, 40 L. R. A. 203; *Ennis Water Works v. City of Ennis* (Tex. Civ. App.) 136 S. W. 513. Upon the other hand, forfeitures are not favored at the law, and a party seeking equitable relief must come into court with clean hands and be willing to do equity.

[9] Bearing in mind these principles, we may briefly consider the

issues of fact, and especially the general question of the sufficiency of the water which the defendant has supplied. The most striking feature of this branch of the case is the meagerness of available data. Incredible as it may seem, it appears to be the fact that in the face of the more or less continuous complaint, during a period of nine or ten years before this suit was commenced by the citizens and the city officers, of a shortage of water, no effort appears ever to have been made by the defendant to measure the amount of water he was actually delivering into the city. An experiment was made with the Mink creek line soon after its construction for the purpose of determining its capacity, which, if we assume that the pipe is always entirely free from obstructions, and that there are no leaks, should give a result approximately correct. The velocity of the flow was ascertained by putting into the water, a short distance below the intake, a harmless stain and then observing the length of time required for the water so discolored to pass through the entire length of the pipe. Thus, having the size of the pipe and the velocity of the flow therein, it required only a simple mathematical calculation to ascertain the theoretical discharge, which, according to the testimony of the defendant's superintendent, who made the experiment, was .78 of a second foot. But of course it does not follow that such is the actual delivery, averaged during the season, or, indeed, at any given time, and especially when we consider the length of time which has elapsed since the pipe was laid. It is of sheet steel, the life of which under various conditions is uncertain, and is approximately six miles in length, with numerous lateral angles and curves, and going over hill and down dale. Silt settles in the lower parts to such an extent that it is necessary at such points to maintain valves or gates through which at intervals the water may be "blown off" or wasted in such a manner as to carry with it the accumulated sediment. Air valves are maintained upon the high points which must be opened and closed by hand, and it seems, when many of these are open, the water will not flow through the pipe at all, and the opening of any considerable number greatly curtails the flow. Moreover, in a pipe of this character and of such length, it would seem to be unavoidable that leaks should develop from time to time, and, with no means of measuring the actual intake and discharge from day to day, these might well wholly or at least for a considerable length of time escape discovery. It is therefore obvious that the actual discharge of the pipe never reaches the theoretical discharge and at times is likely to be only a fraction thereof. If the pipe at any point is half full of sediment, the discharge will be proportionately curtailed, and it is apparent that nearly all the time the capacity of the pipe is thus measurably contracted, for in the nature of things the process of blowing off cannot be continuous, but must be only at intervals, when the daily increment has resulted in a considerable deposit of silt. In fact, the process of "blowing off" itself necessarily diminishes the serviceable capacity of the pipe to the extent of the amount of water so wasted. And the record leaves no doubt that the amount of the actual delivery is likely at all times to suffer some diminution by reason of leaks and open air valves. In view of these considerations, I am in-

clined to think that the box measurements of the water discharged from the pipe into Gibson Jack creek made by engineers acting for the city in the summer of 1911 are, while meager, the most accurate and reliable data which we have touching the actual capacity of the line, and I therefore find that the amount of water brought by the defendant from Mink creek and commingled with the waters of Gibson Jack is .56 of a second foot. True, it is sought to cast doubt upon the accuracy of these measurements by the suggestion that at the time they were taken some of the air valves in the line were open and that consequently the flow was materially impeded, but such a theory rests upon nothing more substantial than hearsay testimony on the part of the superintendent, which was to the effect only that he was informed that such was the fact; he had no knowledge thereof.

The only other measurement anywhere upon the system at any time was made about the time this suit was commenced and covered all of the water coming into the defendant's reservoirs. The facts pertaining thereto rest exclusively upon the uncorroborated testimony of the superintendent. He states that the pipe line carrying the water from Gibson Jack creek and discharging it into the upper reservoir was left open, and the outlets of the reservoir were closed, and thereupon an observation was taken of the length of time required to raise the level of the water a certain distance. Thus, having ascertained the length of time required for the discharge of a given volume of water, the discharge per second could be easily calculated. Assuming the measurements of the reservoir to be correct, and that the time was carefully noted, there could be no question of the practical accuracy of the result, which, as stated by the superintendent, was about 3.15 second feet.

The testimony of the plaintiff's engineers tends strongly to show that when their measurements were taken in the summer of 1911 the total flow of Gibson Jack and Cusick creeks, supplemented by the water brought from Mink creek, amounted to 2.56 second feet. But, even if we should accept the figures of the defendant's superintendent as being fairly accurate, we are still without data of the most important character to enable us to answer the ultimate question whether an amount of water reasonably sufficient for the needs of the city has been actually delivered to consumers. During the trial it developed that ordinarily in water systems such as this there is an enormous loss through leakage in conduits between the source of supply and the point of use. The superintendent of the San Francisco water system, called as an expert by the defendant, testified in effect that in his experience he had found such loss to be approximately 50 per cent. His testimony stands undisputed, and the record throws no light upon the question whether in this manner the defendant's system wastes more or less than this percentage. Service meters have never been installed, and therefore we are wholly without direct information touching the amount of water actually delivered to consumers, and for want of measuring devices anywhere in the mains or principal laterals we have no means of ascertaining even what quantity is delivered at the city limits. Indeed, so far as appears no provision is made in the defendant's system for the detection of leaky joints, and therefore great loss

might go on indefinitely without discovery. In the absence of data touching such loss, it is apparent that whether we take the measurements of the plaintiff's engineers of the amount delivered into the upper reservoir, or that of the defendant's superintendent, or if we strike an average between the two, we are still wholly unable to make even a fair approximation of the amount actually delivered to consumers. Is the waste through leakage 50 per cent, as in San Francisco, where efforts are made to detect and stop the leaks, or is it 60 per cent. or 25 or 40; it is a matter upon which we can only guess or conjecture. With the record in that state, any deductions at all as to the sufficiency of the water supply would seem to be unwarranted; but, if any such deduction were to be made, we should, for the want of a better or more reasonable course, be under the necessity of assuming the loss by leakage to be approximately 50 per cent. Upon that theory, and if, as is reasonable to assume, the duty of water for lawns is no greater than for agricultural crops, the supply would scarcely be sufficient to sprinkle the lawns, which aggregate in excess of 100 acres, leaving nothing for other uses.

Other factors necessarily entering into the calculation of the sufficiency of the supply are left in equal uncertainty. If the contrary were not here conclusively shown, it would be reasonable to presume the existence of a standard of usual consumption of water per capita approved by experience, at least for ordinary domestic and municipal purposes, and exclusive of use for lawns and gardens, but the published data disclose the most astonishing diversity, and admittedly there is no recognized standard. As to the amount required for lawns, gardens and trees, there is apparently no recorded experience at all, and, except in so far as such use may be found analogous to the irrigation of agricultural lands, the question is left almost entirely to conjecture. Definite and credible information is furnished touching the area of lawns and gardens watered from the defendant's system, but the testimony is strikingly conflicting as to the number of people who depend upon it for domestic uses. One fact is put beyond all peradventure: Justly or unjustly, the inhabitants of the city, with remarkable unanimity, entertain the view that during the summer season the water supply is radically deficient. The fact is established by overwhelming evidence, and even two of the three citizens called by defendant for the apparent purpose of establishing a different view upon cross-examination reluctantly made admissions strongly tending to corroborate the witnesses for the plaintiff. It is abundantly shown that to a degree lawns frequently become parched and trees lose a part of their leaves in the middle of the summer; and that during certain years for a considerable period of time the water has been entirely shut off from the city for several hours each day. To meet the apparent shortage, when it first began to be serious, the defendant, instead of enlarging the intake and bringing in the waters of Mink creek as by his contract he was required to do, went to the expense of thoroughly equipping the system with what in the record are referred to as "reducers," a device by which the one-half inch opening from the main into the service pipe of each consumer was reduced to one-fourth of an inch, and the two-inch goosenecks from which water was deliv-

ered into the city sprinkling carts were reduced to about one-half of an inch. Conceding his inability at times to maintain the required pressure for fire protection, and that during the summer season there is a measure of inconvenience and suffering for want of sufficient water, the defendant asserts that the shortage is due to a wasteful use, apparently not by all of the citizens, but by a small percentage thereof. There is, however, no substantial evidence of abnormal waste. Some waste there is bound to be where there are so many consumers, even under a meter system, and it may be fairly assumed that where, as here, flat rates are charged, there is a much greater percentage of waste than where meters are used. Where economy in the application of water is unsupported by considerations of self-interest on the part of the consumers, the general tendency is of course toward liberality, if not extravagance, of use, and then there are always, in every community, people who, even to the injury of others, will waste when the waste is without cost to them.

[10] But the defendant, having contracted for the flat-rate system, must be presumed to have contemplated such extravagance of use as is ordinarily and necessarily incident thereto. He agreed to furnish a sufficient supply of water under a system which he must have known is everywhere and always attended with a use less economical than where the charge is based upon the amount consumed. It must therefore be held that he anticipated that the more prodigal use would necessarily prevail, and assented thereto, and he cannot now be heard to say that he has fulfilled his contract obligation because, while the amount supplied is insufficient under the system with respect to which the obligation was expressly assumed, it might be sufficient under some other system. I am not to be understood as directly or indirectly sanctioning the wasteful use of water; that is to be deprecated and, if persisted in, should not only be condemned but appropriately punished. But we must consider conditions as they are and not as we would like to have them to be. Unfortunately the flat-rate system was contracted for, and neither party can make the substitution of a better system without the consent of the other, and thus far negotiations to that end have been without result. While admittedly there is substantially no direct evidence of abnormal waste, it is contended that the implications from the testimony of hydraulic engineers called by the defendant are strongly to that effect. Incidentally it may be stated that testimony of a similar character adduced by the plaintiff strongly implies an insufficient supply. But it must be apparent that this so-called expert testimony, both of the plaintiff and the defendant, is of little weight. Admittedly there is no recognized standard of reasonable per capita consumption anywhere or under any conditions. It is also conceded that published experience of the amounts of water actually furnished to and consumed by municipalities fails to approach a reasonable degree of uniformity and is therefore of little value. Indeed, it is not pretended by the witnesses for the defendant that their opinions upon the per capita amount reasonably required are based upon actual use; and, generally speaking, their views seem not to be in harmony with such experience as is disclosed by the reported data. They simply state to us what in their opinion the consumption ought

to be. So far as appears, none of these witnesses ever made or observed any systematic tests or experiments whatsoever. One of them, the defendant's superintendent, measured the water which during a single season was consumed at his home in Pocatello, and another one, acting in like capacity for the company that supplies water to the town of Clarkston, in the state of Washington, made a similar experiment. While they are all hydraulic engineers, that fact in itself implies no special fitness to judge of the amount of water required to irrigate a lawn or to supply the domestic needs of an ordinary family. Possibly the duty of water for such purposes may at some time be properly classified as a branch of the science of hydraulics, but plainly it cannot be so considered now, for the very good reason that in the absence of scientific data the subject cannot be classified as a science at all under any head, and in the absence of such data I see no reason for holding that an intelligent householder is not quite as well qualified to express an opinion touching the amount of water which he reasonably requires to supply the needs of himself and family as is an engineer, especially if the latter be not a householder. How, for instance, can an engineer speak with authority upon the question of the amount of water required for a lawn if both his books and his experience are absolutely silent upon the subject? While the two experiments, the one at Clarkston and the other at Pocatello, are of some value, they are too meager, and the exact conditions under which they were made are too little known to entitle the reported results thereof to be accepted as a criterion.

[11] They were made by persons who were necessarily acting in the interests of water companies, not of consumers, and doubtless it is quite possible in an exceptional case to make a showing wholly out of accord with the results of everyday experience of consumers generally who use water freely and yet without abnormal waste. It must be borne in mind that the question is not how little water a family can get along with and survive; and while we should discourage waste we should not adopt a rule that would make the saving of water by the citizen the paramount object of his existence. People are accustomed to use water freely, and even where the meter system prevails the average man doubtless does not always stop to consider just how little water is absolutely indispensable for his bath or wait until the grass begins to turn brown before sprinkling his lawn. Trees may be merely kept alive with much less water than is required for a luxuriant growth. Individual standards of sufficiency will doubtless be found to differ widely, and even under the meter system, where the incentives for reasonable use are the same with one man as another, what to one consumer may appear to be a generous supply will by another be regarded as wholly insufficient to cover his reasonable needs. Asserting waste as he does, why has the defendant not brought before us substantial and credible data of reasonable use? A controversy over the sufficiency of the supply of water has been going on more or less continuously for ten years, during the most, if not all, of which time the defendant has contended that there was waste in certain quarters; but, as has already been stated, not only has he failed to measure and record the amount of water he was actually deliver-

ing to the city from time to time, but, saving the experiment at the home of his superintendent, he has apparently never made any attempt, intelligent or otherwise, to ascertain the reasonable duty of water in the plaintiff city.

Upon the opening of the case, my first impression was that the city and its inhabitants had been unwilling to give any assistance in solving the problem, by the use of meters, and had obstinately resisted defendant's efforts to that end, but when the facts are all considered the contrary is shown to be the case. It being conceded, as it must be, that generally during the summer season the defendant has in fact been unable to supply all reasonable needs, it necessarily follows that he must assume the burden of showing that the shortage in some quarters has been due to waste in others. In the exercise of reasonable prudence and foresight he must have anticipated that sooner or later, if he would relieve himself of responsibility for the shortage, he must produce satisfactory evidence of waste. Now so far as appears he has never contended, at least not until about the time this suit was instituted, that all or even the larger proportion of the citizens of Pocatello were wasteful in their use of water. In a letter dated October 1, 1907, his superintendent estimated that 10 or 15 per cent. of the users were guilty of waste, and in regulations promulgated and published as late as the year 1912 reference is made to the waste of water by "some of the residents" to the detriment of others whose rights were of equal dignity. Here, therefore, were hundreds of consumers who were presumably making a reasonable use of the water. There were doubtless among them those who had large families, and others having small families, some having comparatively large areas of lawn and trees, and others small. Surely out of all of these the defendant could have made fair selections, and by installing meters, and thus accurately measuring the water consumed by 50 or 75 of such representative patrons for two or three seasons, he could have furnished us with facts which would be highly illuminating and without which we are left to conjecture and surmise. In like manner he could have measured the water consumed by those who, he had reason to believe, were guilty of the most flagrant waste, and with such data we could possibly make some intelligent estimate of the extent of the waste. Clearly it was at all times within the right and power of the defendant to make such tests, if he so desired, without the consent and without regard to the wishes either of the city or its inhabitants; no one could have objected. Nor does it appear that any one was ever disposed to object, or that defendant ever really desired that such tests be made. Some light is thrown upon his attitude by a letter written by his superintendent to a committee appointed by the mayor in the summer of 1905 to secure improved water service and printed as a part of a pamphlet or open letter gotten out by the superintendent a little later. While in the communication itself it is conceded that at least "many" of the committee were personal friends of the superintendent, and therefore presumably not inclined to be unfair, their request that they be permitted to test the amount of water which the defendant proposed to measure to consumers, apparently to supply the amounts

to which they were severally entitled under the flat-rate schedule, was ridiculed and sarcastically declined.

At various times, as early as 1905 and as late as 1911, apparently upon advice that he had the power so to do, defendant adopted and publicly promulgated rules to the effect that in every case of waste he would assume the right to meter future service to the offending consumer, but no meters were ever installed. The only reason assigned for not carrying such rules into effect is the difficulty in determining what amount of water the consumer is entitled to receive for the flat-rate charge, and therefore in determining when an additional charge may properly be made upon the assumption of excessive use. But that is the precise difficulty we have here to meet, and with little, if any, more light upon the subject than was at all times available to the defendant. If, as already suggested, he had followed a rational course, if he had complied with the request of the water committee above referred to, or if upon his own initiative he had installed a number of meters here and there and made tests of the water consumed by those who admittedly were making a reasonable use thereof, he would have had, and we now would have, substantial data in the light of which a line could be drawn with some degree of certainty between ordinary use at least and flagrant waste. It further appears that while ostensibly the defendant was seeking the substitution of a meter system for the flat-rate system, he was in fact unwilling that such substitution should be made upon reasonable conditions. It is to be borne in mind that by virtue of ordinance 86 a contract obligation rested upon the defendant to furnish water at the flat rates therein provided for and to furnish a sufficient supply. If, as we may assume, he found that the flat-rate system of charges operated badly and tended to a wasteful use of water, and thus increased the burden of his obligation, and if for that reason he desired the substitution of a more rational system, he should have consented to meter rates which would operate fairly both ways, but this he was apparently unwilling to do. Both his attitude and that of the city officers upon the subject are disclosed by two proposed ordinances, one of which he caused to be drafted and asked to have passed, and all the provisions of which he apparently insisted upon, and the other of which the city council indicated a willingness to pass. So far as appears, neither party had at the time any information or data from which there could be even an intelligent approximation of meter rates which, upon the assumption of a reasonable, and not a wasteful, use, would be the equivalent of the existing flat rates. The ordinance proposed by the city purported to confer authority upon the defendant to install and maintain meters for the measurement of all water service, both public and private, "at reasonable rates and without distinction of persons." It contained some other conditions, which, however, added practically nothing to the then existing obligations of the defendant. Upon the other hand, the ordinance proposed by the defendant did not purport merely to cover the matter of substituting metered service for the flat-rate service, but contained several provisions radically changing the relations of the parties in other material respects. The life of the defendant's franchise was to be extended, the right of the city to receive water for city purposes was to

be modified, the minimum rate of interest which the defendant was to receive upon his investment was raised from 5 to 6 per cent., and an arbitrary valuation of \$600,000 was placed upon the plant; such valuation to serve both as a basis for fixing rates in the future and for the sale of the plant should the city desire to purchase. There were other provisions which it is unnecessary to specify in detail; sufficient has been said to indicate that the ordinance extended beyond the mere matter of substituting a meter system. It prescribed certain definite meter rates, but whether these were in themselves reasonable or unreasonable does not appear, nor does the record disclose their relation to the flat-rate schedule of ordinance 86. But certain conditions were attached which were unreasonable upon their face. It was provided, for instance, that it would be optional with the defendant whether or not in the case of any consumer a meter would be installed, and that, in the event he should not see fit to install a meter, the consumer would continue to be charged at the old rates, thus leaving it within the power of the defendant to make discriminatory charges. And in that connection it was further provided that in no case should the minimum monthly charge for water delivered by meter measurement be less than the then existing flat rates. In other words, with such an ordinance in effect the consumer might expect to have a larger rate to pay, but would have no hope of securing a lower rate, however economical he might be in the use of water. Such a proposition was clearly unreasonable. I do not mean to say that under a system of meter rates a minimum charge may not be reasonably made. A water company must connect up its system with the service pipe, install a meter, from time to time read the meter, and keep individual accounts—services which are necessarily rendered whether the amount of water consumed be large or small—and it is therefore entirely proper that a minimum charge should be made.

[12] But such minimum charges should be reasonable in amount, and they should also be uniform in their application, because such indispensable services are uniform in their burden. The inequitable operation of the provision here referred to may be illustrated: Under the schedule of ordinance 86 the basis charge for a residence or private house is a dollar and a half per month, which was probably intended to cover kitchen supply, lavatory, etc., but if there be a bath in such private residence there is an additional charge of 50 cents, and if a water-closet another charge of 25 cents, so that the minimum charge per month for the ordinary residence with a bath and water-closet is \$2.25. Now even if such householder, with one bath and one water-closet, should not use the amount of water which under the proposed meter rates he would be entitled to use for \$2.25 a month, he must not only pay the \$2.25 but if, for convenience, he installs another bathtub, and uses practically no more water, and therefore imposes no greater burden upon the water company, he must still pay an additional 50 cents per month. That such a system of minimum charges is unjust seems too plain to require discussion, and the refusal of the city council to accept such a scheme and adopt the proposed ordinance does not signify a disposition to be unfair or unreasonable.

It is further said that in 1912 the defendant promulgated certain

sprinkling rules, and there was little, if any, complaint during that year of a shortage of water, and it is concluded that therefore the shortage in previous years is to be imputed to wide-spread waste. But such a contention is entirely devoid of merit. In the first place, no relation is shown between the assumed sufficiency of the supply in 1912 and these rules, and the conclusion is therefore a mere non sequitur. It does not appear that the rules were observed or enforced, and besides it is shown that during the critical months of July, August, and September of 1912 the rainfall in Pocatello was 3.74 inches, as against 1.08 inches for the same period in 1911. Apparently, therefore, to Providence rather than to the sprinkling rules should be ascribed the credit for such relief as prevailed in 1912.

[13] But in the second place the rules are not thought to be reasonable, and their enforcement could not therefore be recognized as a legitimate means of increasing the normal duty of an insufficient supply of water. It must not be assumed that a rule of practice is desirable or justifiable merely because its observance will result in a saving of water; while water is valuable, it is not the only thing of value; nor must all other considerations give place to that of its conservation. Economy in the use of water, as economy anywhere else, is a relative term, and when the cost of saving a gallon of water is greater than the expense of bringing in an equal amount from an available source the saving is a relative waste, and any rule which imposes upon the plaintiff and its inhabitants a loss of time or of money, in saving water, financially greater than the outlay required to bring from an available source an additional supply should not and cannot be sustained. As we have already seen, the defendant some years ago reduced the apertures through which the water passes from the mains into the service pipes to a quarter of an inch. Now consider that under the rules of 1912 the amount of water which, with a free flow, would pass through such a small opening was further cut down for lawn purposes by the requirement that, after suffering the loss of force or current necessarily due to friction in passing through the requisite length of hose, the water should be sprayed through a nozzle not to exceed one-fourth of an inch in diameter. Again, it was required that all sprinkling in the city must be done between the hours of 6 o'clock and 8:30 o'clock p. m., so that, owing to the limited size of the mains, when the great majority of consumers were using water at the same time, as under such a regulation was bound to be the case, the pressure was materially reduced, thus substantially diminishing the delivery into the service pipes. Add to these restrictions the most noteworthy provision of the rules, and that which is thought to be especially objectionable, namely, the requirement that "the hose through which the water is supplied must be held in the hands of the operator while the sprinkling is being done," and we have a set of conditions which are thought to be highly unreasonable. I do not mean to say that under no conditions could such a regulation be permissible. Doubtless water can be more effectively applied by holding the hose in the hand than by the employment of any of the many patented sprinkling devices designed for the saving of labor and made familiar to us by their common use, and if all available water were being supplied, and the amount were barely

sufficient to meet the needs of all, when applied in the most economical manner, such a stringent rule would doubtless be warranted; but we are not here dealing with emergencies or famine conditions. Or, possibly, if the consumer had the privilege of applying the water at any hour of the day and were furnished with a stream of sufficient volume to enable him to water his lawn expeditiously, the restriction might be tolerated. Here two hours and a half per day are by the rules allowed to the householder for watering his lawn. Presumably for the larger lawns at least all of this time is required; but, if we assume that it requires upon the average only an hour and a half each day, an enormous amount of time in the aggregate is necessarily consumed. Now it is obvious that if the citizen could draw three times the volume of water he could do the required work in one-third of the time, and, if the defendant is to be permitted to insist upon the highest possible efficiency for the water he furnishes, surely he must furnish it under conditions making its efficient application reasonably practicable; if he would benefit by rigid economy of use, he should share in the burdens necessarily incident thereto. According to the testimony of one of the defendant's employes, water is furnished for approximately 850 lawns, each embracing one or more lots. Assuming that it requires upon the average an hour and a half a day to water a lawn, it follows that each day while these rules are in force the inhabitants of the plaintiff city contribute the equivalent of 1,275 hours of time for one man to the conservation of water, or the whole time of more than 150 men, working continuously for eight hours each day, or, estimating such labor to be worth 25 cents an hour, the equivalent of \$318.75 per day, or over \$18,000 for a period of two months, which, upon a basis of 6 per cent., would cover the annual interest upon an investment of more than \$300,000. Clearly the necessity for such a waste of time would not exist if the defendant would bring in the available supply of water in Mink creek and would in part be obviated if the conduits by which the present supply is brought in and distributed were of a sufficient capacity to enable consumers more quickly to procure and apply the amounts to which admittedly they are severally entitled. True, the calculation which I have made involves uncertain factors, and the result is at best but a rough approximation, but it is reasonably conservative and fairly illustrative, and I am unwilling to assent to a policy which seems to have been persistently pursued by the defendant, as evidenced both by the reduction of the capacity of service pipes and the stringent sprinkling rules, of casting upon consumers the entire burden and expense of meeting a condition which he himself could obviate in whole or in part by a reasonable outlay expended in increasing the capacity of his conduits.

[14] The further contention made by the defendant that his contract imposes no obligation upon him to furnish water for gardens may be summarily disposed of. While the ordinance does not in terms expressly provide for the watering of gardens, either flower or vegetable, it is not to be presumed that when it was passed either party thereto contemplated that water would not be used for such purposes. Neither is there any express mention of trees, and if flowers and vegetables can be denied water, by a parity of reasoning trees must also be ex-

cluded. The schedule provides for "lawn sprinkling" at so much a "lot," and doubtless both parties contemplated such use as is ordinarily made of water upon town lots, which common observation teaches us to some degree embraces trees, flowers, and vegetables. No more water is required to cover the cultivated part of a lot than an equal area in grass. So far as appears, prior to the commencement of this action no objection to such use was ever made, and the defendant delivered water and collected for it as for "lawn sprinkling." The long-continued practical construction placed upon an agreement by the parties thereto is of great weight in construing its terms and should prevail here. Plainly the contention is a mere afterthought and is without force. My conclusion upon this branch of the case is that the supply of water furnished by the defendant has generally, during the summer months, been insufficient for the reasonable needs of the plaintiff city and its inhabitants.

[15] Certain technical objections are urged against the maintenance of the suit, but they cannot be sustained. The stipulation in the ordinance to the effect that in case the defendant did not furnish a sufficient amount of water the city might bring in an additional supply was plainly not intended to be an exclusive remedy. Otherwise, immediately upon the passage of the ordinance, the defendant could have accepted it and then sat down and done nothing, and still could hold the city to all of its agreements except the one by which it bound itself not to install a system of its own. Such a construction would render the contract both unreasonable and unconscionable.

[16] Now as to want of notice, if it were true that prior to the commencement of the suit defendant had no warning of the plaintiff's intention to seek a judicial cancellation, the point would be immaterial. No obligation in law rested upon the city to give such notice, and there is nothing inequitable or unfair in the institution and maintenance of the suit. It is not a case where one party has permitted the other in good faith to assume that his acts of performance are satisfactory; the defendant had good cause to know, and did know for years, that the city claimed that he was not fulfilling his obligations. Moreover, the record leaves little room for doubt that through the newspapers, if not otherwise, his superintendent had actual notice of a resolution passed by the city council September 7, 1910, declaring that he had failed to keep his contract, and giving him until April 1, 1911, for performance, in default of which the ordinance was to be held to be null and void. It is not pretended that the water system was in any respect improved subsequent to the date of this resolution, and the defendant has at no time, either before or after the commencement of this suit, offered to meet the plaintiff's demands.

[17] The further objection that the suit is unnecessary, and that if the plaintiff's contentions are well taken the city could rescind by resolution, is not one that defendant can successfully urge. The right of the city may be conceded, but the remedy is not necessarily adequate. Such a resolution would not be legally binding upon the defendant, and sooner or later, unless he were content to abandon the contract, the controversy would have to be litigated in the courts, where only a final adjudication could be had, and until such judicial determination the

rights of both parties would necessarily remain in doubt. It is therefore thought that the course pursued is the more orderly, and hence the preferable one.

Finally the suit was duly authorized. By regular resolution dated August 17, 1911, the mayor was directed to employ special counsel to take action in the courts against defendant for such relief as was available under the law.

Other points raised have been duly considered, but the discussion should not be further prolonged. The defendant having through a series of years persistently declined to carry out the plain provisions of his contract, and having failed to furnish a supply of water sufficient even for immediate needs, has forfeited his right to insist upon performance by the city; and the latter, being free from fault, is entitled to the relief prayed for. It is suggested that it is within the power of the court to enter a conditional decree providing that the contract shall be canceled unless the defendant shall, within a reasonable time to be prescribed, comply with certain specified conditions. Assuming that such power exists, it is not thought that the case is a proper one for its exercise. The defendant has done nothing and made no outlay in excess of what was already required under the original franchise, and surely if, as is confidently asserted by his counsel, the cancellation of ordinance 86 will leave ordinance 46 intact, to grant the relief prayed for will entail upon him no substantial loss or real hardship. By the Supreme Court of the state it has already been finally held that one of the material provisions of the agreement is no longer operative, and upon the whole I am inclined to think that no injustice will be done and the ultimate interests of the parties will be best subserved if it is entirely dissolved. The record is not without abundant evidence that as between the parties there has for a long time been and now is a total want of mutual confidence, seemingly amounting to a temperamental incompatibility, and in the absence of such confidence I am not inclined to undertake the onerous, if not hopeless, task of satisfactorily directing and supervising the performance of an agreement which, by reason of changing conditions and its continuing character, must ever remain executory.

The relief prayed for will be granted; counsel for the plaintiff are directed to prepare a proper form of decree.

EDMONDS v. SPANISH RIVER PULP & PAPER CO., Limited.

(District Court, E. D. Wisconsin. April 3, 1913.)

1. VENDOR AND PURCHASER (§ 44*)—RESCISSION FOR FRAUD AND MISREPRESENTATION—SUFFICIENCY OF EVIDENCE.

Evidence considered, and *held* not to sustain the allegation of a bill for rescission that complainant was induced by fraudulent misrepresentation and suppression of facts by defendant and its officers to enter into a contract for the purchase of a large pulpmill and water power in Canada, together with certain concessions or leases from the provincial government giving defendant the right to cut pulp wood from crown lands, but, on the contrary, to show that at the time the contract was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ratified by defendant's stockholders and complainant accepted and made a payment on the same he had full knowledge of all the facts affecting defendant's property and title, which made the contract binding upon him.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 69-76; Dec. Dig. § 44.*]

2. CANCELLATION OF INSTRUMENTS (§ 57*)—RELIEF—RECOVERY OF PAYMENT—STIPULATION FOR FORFEITURE AS LIQUIDATED DAMAGES.

Complainant entered into a contract for the purchase from defendant of manufacturing property and water power for the price of \$2,150,000, on which he made a payment of \$100,000. The contract provided that, in case of default in further payments, it should terminate, and the sum paid be forfeited to defendant as ascertained and liquidated damages. Complainant made default, and was notified by defendant to perform by a time stated or the contract would be terminated. He made no request thereafter for further time, nor offer of performance, but repudiated the contract, and brought suit for its rescission on the ground of fraud. *Held*, that on a decision holding the contract valid complainant was not entitled to be relieved in equity from the provision for retention of the payment by defendant as liquidated damages.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 114-118; Dec. Dig. § 57.*]

In Equity. Suit by Edward Ames Edmonds against the Spanish River Pulp & Paper Company, Limited. Decree for defendant.

The complainant filed his bill in the circuit court for Outagamie county, Wis., the same having been removed to this court, wherein he alleges:

First. That on April 20, 1907, the parties to the suit entered into an agreement, the complainant being induced to enter into said agreement in reliance upon the truth of certain material representations made by the defendant, and but for which he would not have entered into the same.

Second. That on the date mentioned the defendant represented that it had acquired certain interests, rights, privileges, and advantages from the government of the province of Ontario, Canada, referred to in said agreement as a concession or agreement, dated September 21, 1899, and a supplemental agreement dated December 1, 1904, both of which were in writing, copies thereof being attached to the bill.

Third. That the complainant, before entering into the agreement, had visited and inspected the defendant's pulpmill at Espana and the water power there situated, whereby said mill is operated and upon which it is dependent for power. That the defendant's officers and agents falsely represented that the defendant was the owner in fee absolute of a large part of lot 8 (hereinafter referred to, but upon which defendant's mill and power was alleged to be situate), and of that part thereof through which flows the Spanish river, whereon was created and maintained by means of a dam built across said river the water power mentioned and described in the agreement between the parties to the suit. That the defendant falsely and fraudulently represented to the complainant that it had the absolute right to maintain in perpetuity the water power as and of the height then maintained, to wit, of about 60-foot head or flow, and that it had acquired and would transfer to the complainant title of the land overflowed by the maintenance of said dam, when, in truth and in fact, the defendant had acquired title to but a part of the lands so overflowed, and had no title or privilege to a large portion of the land so overflowed, except a license or privilege from the government of Ontario. That said license or privilege was for but a short period of time, to wit, 13 years, and was granted to the defendant upon consideration of an annual fee or rental. That the defendant fraudulently concealed from the complainant the fact that any of the lands so overflowed were being thus overflowed by virtue of license or permit from said government, or otherwise than by virtue of the defendant's right as owner in fee.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Fourth. That at some time after entering into the agreement, and prior to July 11, 1907, when such agreement was by the shareholders of the defendant ratified, the complainant was informed, as the fact is, that there is grave doubt as to the validity of the defendant's title, if any it has, to the water power and bed of the stream of the said Spanish river, whereon is constructed and maintained the water power mentioned in the agreement. That said water power and the right to maintain it for all time, subject to no controversy or adverse claim of title, was a principal inducement to the complainant to enter into said agreement, and but for it the complainant would not have so entered into the same. That being informed of the doubt as to the validity of the defendant's title and ownership of the water power, and of its want of authority and right to maintain said water power as then existing and maintained, the complainant immediately raised the question with defendant's officers and agents, and advised said officers and agents that plaintiff would recede from said then unratified agreement, if defendant's title and ownership of the said water power and the bed of the stream whereon said water power was located was less than the absolute and unquestioned fee simple title and ownership. That thereupon defendant expressly, falsely, and fraudulently represented and guaranteed to the complainant that it had unquestioned, perfect title in fee simple to said water power and the bed of said river whereon the same is situated, and falsely and fraudulently represented that the government of Ontario, the then owner in fee of said title, if defendant was not such owner, then did and would make no claim whatsoever to the title and ownership of said water power and bed of said stream whereupon said power was constructed and is maintained. That defendant's officers and agents further represented that it would guarantee to make said title perfectly satisfactory to complainant, in lieu of which it would not hold the complainant to their said agreement, but would return to the complainant the \$100,000 then on deposit in trust to be paid to defendant upon their ratification of said agreement. That thereupon, relying upon said false promise and false representations, complainant thereafter, on July 11, 1907, permitted and assented to the payment to the defendant of the said \$100,000.

Fifth. That, after the ratification of the agreement and the payment of the \$100,000 to the defendant, complainant learned that the government of the province of Ontario had at all times, then did, and now does, assert a claim to own in fee simple absolute the title and ownership to said water power and the bed of the Spanish river whereon said water power was constructed and is now maintained, and that said government claims never to have parted with said title or ownership. That, after repeated attempts by the defendant's officers and agents to secure some assurance from said government that it did and would make no claim to the said title and ownership, defendant failed to secure such assurance or any concession equivalent thereto, and wholly failed to secure for complainant satisfactory title to the bed of said stream and the water power mentioned and agreed to be conveyed.

Sixth. That although defendant's pulpmill referred to had been completed about two years prior to April 20, 1907, the defendant had taken no steps to erect the paper mill as provided in the concession agreement referred to. That it would appear that by reason of such failure defendant had incurred and was subject to forfeiture of all of its rights under such concession agreement, whereupon complainant inquired of defendant's officers and agents while negotiating the agreement whether said government had waived its rights to insist upon such default and forfeiture, and the defendant's officers and agents falsely and fraudulently stated and represented to the complainant that it, said government, had so waived its right to so insist upon said forfeiture, when in truth and in fact it had not done so. That complainant did not learn of the attitude of said government until some time subsequent to the ratification of said agreement and the payment of said \$100,000, when he learned, as the fact is, that said government had not waived its said rights to insist upon forfeiture, and it refused to give the complainant any assurance that it would not insist upon such rights of forfeiture under such concession agreements, and that but for said false and fraudulent representa-

tions to the effect that said government had waived said default the complainant would not have entered into said agreement.

Seventh. That the defendant falsely and fraudulently represented to the complainant before it entered into said agreement that it had on hand ready for use \$20,000 of pulp wood in excess of what it had in fact had or possessed. That it also fraudulently and falsely represented that it had during negotiations added to this stock of the value of \$10,000, wherefore the consideration of the contract was increased by \$10,000, but for which false representations complainant would not have agreed to pay the consideration fixed therein.

Eighth. That among the assets of the defendant which it agreed to sell and transfer to the complainant by the agreement are a large number of so-called trade contracts, made for delivery of large quantities of pulp to mill proprietors in other states, which contracts were supposed to be, and were if valid and enforceable, valuable assets, and the same constituted a principal inducement to complainant for entering into said agreement. Such contracts are believed to aggregate \$400,000, but are null and void for the reason that the defendant failed and neglected to comply with the laws of said several states respecting conditions to be complied with by foreign corporations doing business therein. That the complainant was unaware of such invalidity, or of the facts out of which the same arose, and that such facts were falsely and fraudulently suppressed and concealed from the complainant, and such contracts were falsely and fraudulently represented as being of great value.

Ninth. That the so-called concession agreements are too vague, uncertain, and indefinite to be specifically enforced, or to furnish a basis for damages, and are lacking in mutuality, and are void. That complainant's agreement with the defendant as to the interest in said property and the extent conveyed thereof is uncertain and incapable of being ascertained and determined, and the consideration for such agreement has in great part failed.

Tenth. That, after the discovery of the false and fraudulent representations, facts, things, and circumstances, above recited, the complainant refused to further perform or recognize said agreement as binding upon him, and refused to make the payment therein required to be made upon the first day of January, 1908, and that thereafter, to wit, on January 20, 1908, the defendant caused to be served upon the complainant a notice, in substance, to the effect that the defendant required the complainant on or before February 15, 1908, to perform all the terms and conditions of the contract referred to. That time is made of the essence of such contract and such notice, and that in default of complainant fulfilling the terms and conditions thereof the defendant will forfeit and take to its own use the \$100,000 paid by the complainant, declare the contract terminated, and will claim further and other damages, etc. Such notice was dated January 10, 1908.

Eleventh. The defendant did on or about February 15th wrongfully declare the said \$100,000 paid on said contract forfeited to the use and benefit of the defendant, and now refuses the return thereof to the complainant, and denies his right thereto. The complainant has had no profit, benefit, advantage, or interest result from said alleged contract with the defendant.

The prayer is for judgment "rescinding the said agreement between the complainant and defendant, and for the recovery of the sum of \$100,000 together with interest thereon at 6 per cent. since the 11th day of July, 1908, and for the costs and disbursements of this action, and for such other and further relief as may be equitable and just."

The defendant answers as follows:

First. The execution of the contract of April 20, 1907, is admitted.

Second. Denies the making of any of the false and fraudulent representations set forth in the complaint, or any false or fraudulent representations whatsoever, with respect to any of the property rights or interests involved in said contract, or with respect to any matter connected with or affecting the same, and likewise denies that any of its officers or agents made to the complainant at the time of the execution of the contract, or at any other time, any guaranty, warranty, representation or assurance, other than is embodied in the contract; but, on the contrary, alleges that such contract thoroughly and fully expresses the entire agreement of the parties.

Third. Admits that on or about the 11th day of July, 1907, complainant paid to defendant the sum of \$100,000 "in pursuance of the terms of said contract." That at all times, and up to and including the 15th day of February, 1908, it has been ready, willing, and able to carry out the contract according to its terms, and to convey to the complainant all of the property specified therein, but that the complainant has omitted and refused to carry out the same on his part. That both prior to and after the making of said contract complainant visited the property and plant embraced therein, and personally examined into the condition of said property, and made inquiry and investigation, not only of the physical property, but also of the character of the rights and titles included in the contract, and was fully advised and informed by the defendant in the premises, and not only so, but in the execution of said contract was given by the defendant the personal supervision and direction of the property and plant agreed to be purchased by him, subject to the control of the defendant, and familiarized himself with the details of the business, and continued in the direction thereof until about the 16th day of December, 1907, and long after he had become acquainted with all the facts in his possession at the present time.

Fourth. Admits the execution of the concession agreements, and the correctness of the copies thereof attached to the bill, and alleges that the original agreements were exhibited to the complainant prior to entering into the contract with the defendant as defining the measure and extent of such concessions and of the defendant's rights thereunder.

Fifth. Alleges that at the time of the making of the agreement with the complainant it was, and since has been, and is, the owner of a large part of lot 8, described in said agreement, and of that part thereof through which flows the Spanish river, and that the water power referred to in the agreement between the parties was created and maintained by means of a dam built across said river. Denies that it represented that it had any other rights to maintain said dam except such as arose from its title as riparian owner on both sides of said river, and under certain rights of flowage of land by reason of said dam, including the right mentioned in the second clause, paragraph fourth of the complaint, to wit, a license from the government of Ontario, and that all the facts in relation to such flowage rights were thoroughly and correctly stated to said complainant at and before the making of the agreement between the parties.

Sixth. Denies that there is doubt as to the validity of defendant's title to the water power, or to any of the other property agreed to be conveyed, or that there is any valid adverse claim of title to the same on the part of any person or corporation whatsoever; but that it has and had a good title to all of the property which, under the terms of said contract, it had agreed to convey to complainant, including the rights of flowage referred to.

Seventh. Alleges that it is true that it has not yet erected the paper mill referred to in the concession agreement, but that, according to the terms of the latter, the time within which said mill is required to be erected will not expire until December 1, 1909, and that the complainant fully understood the terms of such concession agreements and entered into the agreement with defendant fully apprised of, and consented to, the same, well knowing that at such time no paper mill had been erected under such concessions.

Eighth. Alleges that no false or fraudulent or other representations were made by the defendant to the complainant, as to the amount of pulp wood on hand; that such amount was investigated, examined, and estimated by both parties; that the facts were within their equal information, opportunity to investigate, and means of knowledge.

Ninth. The defendant further alleges that the complainant was fully informed as to the nature of the trade contracts referred to in the bill, and of the fact that the defendant had not undertaken to comply with the laws of the several states; further, that all of such contracts covered transactions constituting interstate commerce, all valid and enforceable notwithstanding the omission of the defendant to qualify under the foreign corporation laws of the several states; that said contracts did, in fact, constitute valuable assets in the hands of the defendant, and have been substantially carried out, the pulp delivered, and the purchase price paid therefor; that

by reason of the facts alleged the forfeiture clause of the contract became operative.

On September 29, 1899, the province of Ontario granted to individuals, predecessors of the defendant company, a concession, the terms of which are:

The company (predecessors of the defendant) is the owner of lot No. 8 in the sixth concession of the township of Merritt, through which flows the Spanish river, which at a certain point therein "has formed a very valuable water power, which the company intends to utilize for the purpose herein-after set forth. It proposes to construct and operate upon such lot and in connection with the water power, extensive pulp and paper mills, and to expend a large amount of capital in connection therewith and with the operation thereof, and from time to time to extend the same, and is therefore desirous of obtaining from the government the right to cut from and upon certain crown lands, pulp and other woods necessary to carry on the enterprises. This agreement is entered into for the purpose of insuring the performance of its obligations herein contained," and of securing to the company a continuous supply of wood for the purpose of its business, and upon the terms and subject to the conditions and stipulations specified; it being further contemplated that the company (the parties of the second part to said agreement) propose forming a joint-stock company for the purpose of acquiring the land previously referred to (lot 8), assuming the concession agreement, both as to benefits and obligations, and of carrying on and operating the undertaking referred to as follows:

(a) The parties of the second part shall form a joint-stock company, and shall immediately convey the land described, together with the concession agreement and all benefit and advantage to be derived therefrom to such company. The latter shall assume their liabilities under the concession agreement, etc.

(b) Such company shall proceed with the erection, construction, and equipment of a pulpmill on the land in connection with the water power, expending therefor at least \$500,000, and will operate the same as specified.

(c) In consideration of the expenditure and of the contracts and engagements thus entered into, the government grants to the company, for use in said business, the right, for a period of 21 years from the date thereof, to cut and remove wood at the localities particularly therein specified. The company, however, may select and delimit or set out 50 square miles of unoccupied and unlicensed public lands from the territory, but under the restrictions specified; and the government will from time to time grant permits to cut elsewhere within the territory than on the 50 miles under the restrictions specified. The price per cord is fixed; the right to revoke the license or permit in case of default in compliance with its terms is reserved; only the right to cut is sold under the concession, and not the soil or any part thereof nor any interest therein, except so far as may be necessary to cut and remove the wood. There are other specifications not pertinent to the questions presented in the case. Such concession agreement is signed and entered into provisionally by the commissioner of crown lands, but subsequently became absolute through approval by resolution of the legislative assembly of the province of Ontario.

On December 1, 1904, a supplemental agreement was entered into which after reciting that, in view of circumstances beyond the control of defendant, the latter having become the assignee of the concession agreement as originally contemplated, and delay having been occasioned in the compliance with the terms of the previous agreement respecting the development of the water power, the construction of the pulpmill, etc., by reason of which it has been unable to reap any of the benefits of such concession agreement, stipulated as follows:

(1) That the company had expended under and within the terms of such original agreement \$500,000, and had complied therewith up to the present time; that it shall urge a prosecution of the work upon said dam, and shall do everything in its power to insure the completion thereof and operation of said pulpmill within the time contemplated. And immediately after the pulpmill has been put into operation it will commence the erection of a

paper mill, complete and equip the same so that it shall be in operation within five years from the date of such supplemental agreement at an expenditure of at least \$250,000 in addition to the expenditures provided for in the principal or original agreement. In consideration thereof, the right to cut and remove woods as provided in the original agreement is declared to be 21 years from the date of the supplemental agreement, provided that in all respects the company shall comply with the covenants of the principal agreement respecting the manufacture, annual output, and amount of wage labor to be employed in said mills.

The company so long as it shall proceed with convenient dispatch with the development of said water power and the completion of the pulpmill, shall not be deemed in default under the said principal agreement in respect to its covenant to erect and operate the mills.

On March 27, 1902, the province of Ontario granted to the defendant two parcels of land containing $38\frac{1}{4}$ and 37 acres, respectively, described by metes and bounds, which in the case have been referred to as flowage lands; the purpose of the grant being to secure to the defendant for the time therein limited "the right to pen or dam back the water of the Vermillion and Spanish rivers to such a height as will give a head of 60 feet at the mills of the said lessees on lot No. 8 in the sixth concession of the township of Merritt and no further, notwithstanding that such penning or damming back of the waters of said river may affect the falls of the Spanish river on lot 12 in the sixth concession of the township of Foster, or the falls on the Vermillion river on lot 10 in the fifth concession of the said township." Such grant, which is designated as a lease, was for a term of 21 years from April 1, 1902.

The defendant was thus possessed of the following lands, property, and appurtenant rights:

(1) Its mill and water power property situate on lot numbered 8 in the sixth concession of the township of Merritt, with other lands owned in fee, aggregating approximately 2,000 acres. There is no controversy in the case respecting these, excepting the water power claimed to be appurtenant to the land through which the Spanish river flows.

(2) The two parcels of so-called leased lands acquired under the provincial lease dated March 27, 1902.

(3) The rights acquired under the concession agreement dated September 21, 1899, and the supplemental agreement dated December 1, 1904.

(4) Personal property.

The facts are further detailed in the opinion.

C. G. Cannon, of Appleton, Wis., P. H. Martin, of Green Bay, Wis., and Miller, Mack & Fairchild, of Milwaukee, Wis., for complainant.

Quarles, Spence & Quarles, of Milwaukee, Wis., and Leighton McCarthy, of Toronto, Canada, for defendant.

GEIGER, District Judge (after stating the facts as above). [1] Upon the trial the complainant urged his right to relief upon three grounds:

First. That the defendant had falsely and fraudulently misrepresented to him its title and ownership of the water power appurtenant to its mill property—in substance, that it represented absolute ownership, when in truth and in fact it did not own it, but that the title to said water power rested in the provincial government of Ontario.

Second. That the defendant falsely and fraudulently represented that it had the right to flow or flood the lands covered by the provincial lease dated March 27, 1902, and thereby to maintain its dam to the height of 60 feet, in perpetuity, and suppressed the fact that it had

such flowage privilege for the limited term of 21 years from April 1, 1902.

Third. That the defendant wrongfully declared a forfeiture of the rights of the complainant under the contract of April 20, 1907.

At the conclusion of an exhaustive argument, I expressed the opinion that the complainant had failed utterly to establish his allegations of fraud, fraudulent representations, or concealment. A further examination of the evidence has satisfied me of the correctness of such opinion. While there is conflict between the witnesses on certain points, such conflict is reconcilable with other undisputed facts in the case; so that the application of certain elementary principles of law can be made readily, and to the exclusion of doubt.

The situation of the defendant company being as indicated, the complainant, with Brown and Edmonds, entered into negotiations with the defendant company in the month of November, 1906. These were conducted orally, not evidenced by memorandum other than the following:

"Toronto, December 10, 1906.

"Messrs. The Spanish River Pulp & Paper Co., Orillia, Ont.

"Gentlemen: We agree, subject to being able to finance the proposition by the first of March next, to purchase the entire assets, free from encumbrance, of your property, with the exception of your book accounts and bills receivable, for the sum of \$2,150,000, payable in cash on or before the above date, and agree to take over all contracts you have made in connection with the business of the company.

[Signed] A. W. Brown.

"E. A. Edmonds.

"A. D. Daniels.

"We hereby accept the within proposition on behalf of the Spanish River Pulp and Paper Co.

W. J. Shepard.

"James B. Tudhope, Secretary and Treasurer."

Brown and Daniels assigned their rights under this memorandum to the complainant. They had all visited the plant and property of the defendant, inspected the same, and doubtless talked with the officers of the defendant in a general way respecting the property, the extent of the holdings, and probably the character of the titles. No doubt, the defendant having the concession agreements, having lands in fee, the parties discussed as business men would the subject-matter of the memorandum, with a view of reaching the general conclusion of purchase and sale therein expressed. The deal was not consummated, probably because of the inability of complainant to "finance it," but during the time that it was pending under this memorandum he received a complete list and description of all of defendant's holdings which became the subject-matter of the later contract entered into. He endeavored to interest persons to co-operate with him in carrying out the purchase, and his solicitor had drawn a form of mortgage or trust agreement upon which he proposed to borrow the money for that purpose. Although it was a matter of sharp controversy, there is no doubt but complainant was apprised with reasonable certainty of just what the defendant professed to own. It is urged by the complainant that, when this original memorandum was entered into, he and his two associates, either upon inquiry or upon the volunteer statements of officials of the defendant company, learned that the latter owned the

water power appurtenant to the land upon which the mill is situated, also, the so-called flowage rights. He therefore claims that, although the contemplated purchase under the memorandum of December 10, 1906, was never carried out, the representations made at that time, the information obtained in his negotiations, were not renounced or modified by the defendant company or by any of its officers, but in truth relied upon by him when he personally resumed negotiations with the defendant company's officers, which resulted in the making of the contract herein under date of April 20, 1907, set out at length in the bill. It is immaterial whether negotiations were resumed at the solicitation of the complainant or of the defendant, but it is noteworthy that such formal engagement contains certain provisions, doubtless inserted for the protection of defendant, but respecting whose meaning there can be no doubt.

First. That the defendant company sell to the complainant its pulp-mill, "together with all its freehold *and leasehold lands* and water power now owned by the company" as of the 1st day of March, 1907.

Second. That the purchaser (complainant) "acknowledges that he has examined the property of the company and the concession agreement aforesaid and accepts the same and the company's title thereto as it stood on said first day of March, 1907, the company agreeing only to transfer to the purchaser such title as they possess."

Third. That such agreement was subject to approval by the shareholders of the defendant company to be obtained with dispatch, and in case of nonapproval purchaser's cash payment to be returned to him.

Fourth. That in the event the purchaser failed to carry out the agreement and make the payment agreed to be made January 1, 1908, the cash payment of \$100,000 shall be forfeited to the company as ascertained and liquidated damages, the agreement terminate with no liability on the part of the defendant to account for the operation of the business and for any profit made therein.

The agreement thus dated April 20, 1907, having been executed at or about the same time, complainant very soon thereafter prepared to carry it out by, among other things, causing examination to be made of the company's titles, and assuming direction of defendant's business pursuant to clause 2 of said contract. The defendant claims to have given to complainant's solicitor full information respecting the titles, delivering him its title deeds and papers, and he proceeded with such work of examination. Within a short time a discussion arose between complainant and defendant through their respective solicitors respecting the one phase of the title of the water power, suppression of the facts whereof is the gravamen of complainant's claim of fraud upon which he bases his right to rescind. The water power in question is found in the Spanish river, where it traverses a tract of land owned by the defendant, which tract it obtained from its predecessors in title, the provincial government having originally granted the land on either side of the stream by one patent. Apparently, by virtue of such grant, the defendant and all its predecessors had assumed and enjoyed unquestioned title to the bed of the stream, and the consequent ownership of the water power created and developed as stated in the case. It appears, however, that in October, 1906, a decision had been ren-

dered by the high court of the province of Ontario, a court of general jurisdiction, in two cases which are referred to in the record as the "Kenora Cases." The decision, in effect, declined to follow what was supposed to be the common-law rule then in force in the province, that, where a grant is made by the government of lands on either side of a stream, the full riparian rights vested in the grantee, that is, that the bed of the stream passed with the grant. It was held that, while at common-law such was the presumption, it was not the law of Ontario respecting streams tributary to the Great Lakes, and hence, unless the terms of the grant from the government, or other attending circumstances, disclosed an intention on the part of the sovereign to relinquish the title to the bed of the stream and the riparian rights, the presumption was against such intention. It may be admitted, as the fact was, that the decision occasioned surprise, and doubtless caused some apprehension respecting the stability of titles to which water power and riparian rights had theretofore been deemed to be appurtenant.

Soon after commencing his work of examination of titles, complainant's solicitor, in a letter to complainant, exhaustively discussed the Kenora decision and its pertinency to the subject-matter of complainant's proposed purchase of the defendant's water power; but, although he apparently advised the making of a requisition on the defendant which would clear the doubt created by such decision whether well or ill founded, he seems to have concurred in the attitude of defendant's solicitors that the doubt was wholly eliminated by the supplemental contract made by the province of Ontario with the defendant in 1904, and the provincial lease of the so-called flood lands made March 27, 1902, both of which give unequivocal recognition to defendant's ownership of the water power, and confer rights which could not be conferred except upon the hypothesis of ownership. Such letter is dated June 13, 1907. The complainant in a letter to his solicitor acknowledging the receipt of the former seems to fully appreciate the subject-matter thereof. The solicitor wrote a similar letter to the president of the defendant company, also its solicitors, making a formal requisition on the latter for a confirmation of defendant's title.

In this situation, the only question between the parties was respecting the applicability of the so-called "Kenora" decision. That it was discussed between the parties is no doubt true; but it is equally true that the defendant and its officers from the inception of negotiations with the complainant in the fall of 1906 at no time represented or claimed the situation to be other than it in fact was, namely, the ownership of the water power by virtue of the ownership of the lands to which it was appurtenant, recognized as such by the government. In other words, the claim was made that, because the defendant owned pursuant to a grant conveying both sides of the stream, it owned the water power. This situation continued until July 11, 1907, on which day there was convened the shareholders' meeting to act upon the ratification of the contract made with complainant. At this time each party recognized fully and precisely the subject-matter of the proposed contract, each conceded the title to the water power to be good, the complainant having suggested the possible doubt, which each regarded as remote, arising out of the "Kenora" decision. It appears without

substantial dispute that on or before the date of such shareholders' meeting the complainant and his solicitors had been and were urging the defendant's officers and solicitors to submit to such shareholders the question respecting the title as affected by the "Kenora" decision, doubtless for the purpose of reserving to the complainant the right to cause the defendant to respond to him in the event that the government should at any time in the future succeed in assailing the title to the water power. This, however, was steadfastly refused; defendant's officers and solicitors insisting that the title was good. They prevailed in their purpose, fully disclosed to the complainant, not to submit the matter of doubt arising out of the "Kenora" decision, and entertained by him, but not by them, to the shareholders in any form whatsoever; and complainant in such situation permitted the contract to go before the shareholders for ratification, which was done, and thereupon the \$100,000 which complainant had theretofore placed in escrow with the bank at Toronto, to be turned over upon ratification, was paid to the defendant.

At and prior to this time the complainant had assumed direction of the defendant's business under the terms of such contract, and continued therein until about December 16, 1907. The matter of the doubt respecting the title to the water power received attention in various ways. The defendant's officers, while protesting that the title was good, offered, in order to enable complainant better to promote the scheme for financing his undertaking, to assist him in prosecuting with the commissioner of crown lands of Ontario, an application for a patent or grant confirming the title. It is claimed by the complainant that the government officials, on the strength of the "Kenora" decision, declined to admit full title in the defendant company, but that they expressed a willingness to give a long time lease, provided the government's ultimate title to the bed of the stream were concurrently confirmed. Defendant's officers, however, refused to entertain any such proposition, because by doing so they would give recognition to an infirmity of their title. It does not appear that the defendant or its officers presented any such matters before the government, other than as stated, by way of assisting the complainant.

The testimony shows that, after the ratification of the contract, complainant devoted much of his time toward promoting the ultimate consummation of his contract, by endeavoring to raise the money through mortgage or trust agreements, but that success did not attend his effort. On November 29, 1907, doubtless having represented his inability to raise the funds necessary to make the payments maturing on January 1, 1908, he induced the defendant to agree to a modification of the terms of the original contract, whereby the deferred payment, instead of being in cash to the amount specified in the contract, was to be covered by a large amount of second-mortgage bonds to be taken in lieu thereof, and the cash balance was in other respects modified as to terms. Such proposed modifying agreement was in writing, and in all other respects expressly ratified the original agreement. It was mailed to complainant, who, on December 7, 1907, acknowledging receipt, wrote to one of the defendant's officers:

"I feel that it is not wise for me to accept the agreement sent me as it is worded, and this makes it necessary for me to endeavor to arrange with you some other method of extension of the present agreement. I hope this can be done without delay and to our mutual advantage."

Accordingly, on or about December 21, 1907, after a conference, in which complainant, defendant, and their respective solicitors participated, a further and different proposed extension agreement, reduced to writing, was left with complainant for signature and acceptance; this also in express ratification of the first agreement, particularly with reference to the property to be conveyed, provided for a modification of the time of performance, the terms of payment of the cash balance increasing by a very considerable amount the deferred payments to be accepted by the defendant secured by second mortgage on the property. Doubtless the parties agreed upon the terms, but without any explanation discoverable in the record, complainant, having this assurance from defendant thus to modify the agreement, suddenly terminated all further connection with the management of the business, and on January 1, 1909, failed to respond in any way to the terms of the original contract, or to enter into the proposed modified contract, assented to as stated. Thereupon, on or about January 10, 1908, the defendant served him with a notice requiring that he meet the terms of the contract of April 20, 1907, by February 15, 1908, in default of which his rights thereunder would be declared forfeited; doubtless intending thereby to assert its rights under clause 7 of such original contract.

It is to be noted that during all this time complainant not once claimed or suggested to the defendant or its officers that it or they had been guilty in any manner of misrepresentation or suppression of facts. On the contrary, as hereinafter noted, he maintained the attitude of performance, doubtless requesting and receiving defendant's agreement to modify the terms of payment to enable him to meet the stress of financial situation in which he found himself, or expected to find himself January 1, 1908. No response was made by the complainant to the demand for performance served upon him, but immediately thereafter, and on or about January 16, 1908, complainant's solicitor addressed a letter to defendant's solicitors inquiring whether the defendant would be able to convey a fee-simple title to the water power on February 15th, as stated in the notice theretofore served. To this defendant's solicitor replied that it would be ready on the day mentioned, as it always had been, to comply with all the terms of the contract entered into April 20, 1907. In the meantime, however, and during the months of December and January, as late as January 31, 1908, complainant, although having ignored defendant's assurances that it would accede to his request for a modification of the terms of payment, was nevertheless in communication with various persons interested in the paper and pulp business, soliciting and importuning them to become associated with him in his venture, and giving in detail estimates of the advantages of the same. It may be noted that in these communications, written when he was in actual default (except for the period of grace given him by defendant's notice), he represent-

ed to third persons that his then existing rights under the contract were in fact such as they *would have been* and *as it was sought to confer* upon him by the extension agreement which he had ignored and refused to sign. No request was made of defendant for further time, no intimation that, because of the financial situation, further indulgence should be granted him; but, on the contrary, the defendant was wholly ignored, excepting by the letter of complainant's solicitor above referred to. It further appears that on January 22, 1908, the so-called "Kenora" decision was reversed by the appellate judicial tribunal of Canada, and that the complainant learned thereof within a day or two.

In May, 1908, without further intercourse between complainant and defendant, this suit was started, the bill in which, apparently for the first time, conveyed to the defendant any claim of fraud or suppression of facts respecting the subject-matter of the contract. Granting that there is a possibility of spelling out of the evidence in the case a failure on the part of the defendant's officers originally to disclose the precise situation respecting its title to the water power because it failed to communicate to the complainant the doubt growing out of the "Kenora" decision, the material and conclusive fact against the complainant is that long before the contract had become operative he was fully apprised of the situation. The contract did not become operative, so far as he was concerned, because of his reliance upon the non-existence of a situation such as he now claims was credited by the "Kenora" decision. Knowing and appreciating it fully, and knowing that the proposed contract was tentatively entered into, with the disclaimer on the part of the officers of the defendant company of authority to enable its execution by them on the defendant's behalf, it seems to me absurd for the complainant now to assert that whatever representations were made by such officers prior to ratification should be imputed to the defendant when, to the knowledge of complainant, the ratified contract was intended to be and is repugnant to such representations. It seems idle to contend that the defendant's officers, disclaiming authority to bind the defendant to the written stipulations of the contract which provide for a conveyance merely of the defendant's interest, could still bind it by their oral representations that such written provisions would not be insisted upon after ratification. Complainant has indicated in no way the possibility of removing this incongruity, and it seems to me to be conclusive against his contentions of suppression, misrepresentation, or overreaching. He was precisely informed respecting the situation as it went to the shareholders of the defendant company, and by his own acquiescence foreclosed complaint against the terms of the contract.

With respect to complainant's second contention, that the defendant concealed the fact that certain of the so-called flowage rights were held only under a lease, it is urged that not only was the fact of such lease suppressed, but also the fact that through such lease, for a limited period, the company was enabled to maintain its dam at a greater height than without such lease, and hence the maintenance of the dam at a 60-foot head was dependent very substantially upon a mere leasehold.

The facts are in my judgment as clear and free from doubt as are those respecting the title to the water power dependent upon ownership of the bed of the stream. After complainant and his associates Brown and Daniels entered into the memorandum of December, 1906, and particularly during the month of January, 1907, complainant's solicitor, although disclaiming making an examination of titles, was put in possession, as defendant insists, of all the title papers of the latter company. It was sharply disputed in the case whether such solicitor obtained knowledge of the so-called lease of flowage rights until the day after the meeting of shareholders in July, 1908. I am satisfied that he learned of the state of all the defendant's titles as early as January, 1907. In the latter month complainant, in his endeavors to finance the deal, had opened negotiations with third parties looking to the execution of a trust deed or mortgage to raise the requisite funds to carry it out. His solicitor at that time prepared a proposed trust deed which contained accurate descriptions of all of the lands of the defendant company which it was then contemplated should be transferred under date of March 1, 1907. The description and phraseology respecting titles therein are identical with the language of title papers testified to have been given complainant's solicitor in January, 1907, and, under the system of registration of titles, such description as pertained to mortgages of water-power lands could have been obtained from no source excepting from papers in the possession of defendant's solicitor and claimed to have been given to complainant's solicitor. In a letter addressed to complainant under date of June 13, 1907—a month prior to the ratification of the contract—in discussing defendant's claims respecting title to ownership of the water power because it owned both sides of the stream, that the province of Ontario by supplemental agreement and lease, had fully recognized such ownership, the solicitor states:

"The company (defendant) found on examination of engineers, etc., that they required to build a dam to increase the power at the falls, and in order to do so would have to flood certain lands further up the river, and in fact it has affected certain falls on the Vermillion river claimed by the Manitoulin & North Shore Railway. The government in dealing with that matter felt that in order for the undertaking to be carried out by the present company (defendant) these grants and right to flow lands further up the river should be granted, and although there was opposition to that by parties interested, the government granted these privileges to the present company, thus showing that at all times they treated this water power as belonging to the present company, and that the present company should be protected and encouraged in their undertakings."

In the mortgage prepared by the complainant's solicitor in January, 1907, the lands thus referred to in his letter are described by him in the language contained in the former mortgage made by the defendant company, and particularly *as a lease, giving the right to pen up and dam back the waters*, notwithstanding that it might affect the Vermillion Falls. In a letter written by him to defendant's solicitors under date of July 18, 1907—and which would be six days after July 12th, when it was claimed he for the first time learned of the existence of the so-called lease, he says:

"In reference to the lease with the crown of the lands in the township of Foster, or the right to dam or pen back the river giving the company a head of 60' at their mills, we may say that we examined this crown lease in your office some time ago and in writing Mr. Shepard and Mr. Tudhope in reference to the defect in title, we pointed out to them that we considered the rights given in that lease to be the strongest claim which the company had the government to force them to give absolute title as in that lease they have practically recognized the company's title to the water power."

The testimony shows that the correspondence with Shepard and Tudhope, last before referred to, was approximately at the date of the complainant's solicitor's letter dated June 13, 1907.

It was not until January 18, 1908, and after defendant had served a notice on complainant requiring him to perform his contract, that any intimation or claim was ever made of suppression of knowledge of defendant's actual rights under this so-called lease or the existence thereof. The letters written by complainant's solicitor to defendant's solicitor under date of December 14th and January 18th, wherein it is assumed, apparently without foundation, that the defendant was proceeding in the discharge of some obligation to perfect titles, are strongly at variance with the complainant's own silence toward the defendant and with his letters to third parties seeking their co-operation and interest in promoting the venture. I think his contention is clearly an afterthought, and there is no testimony whatever to support it, much less to overcome the positive provisions of the contract requiring him to purchase the interest of the defendant company as it stood on March 1, 1907.

[2] Complainant's third contention, in substance, is that, the defendant being guilty of an attempted wrongful forfeiture, he thereby has the right to rescind the contract and to have the payment made by him restored. It is urged that the \$100,000, which the complainant paid, should be treated as security, and hence, although the contract provided that the amount could be retained as ascertained and liquidated damages, a court of equity should relieve as against a forfeiture, and limit the defendant to actual damages. But the amount paid by the plaintiff was not security—it was a part payment on the contract to purchase the defendant's property—and the mere fact that the defendant notified him after he was in default that, unless he would perform within a stated time, it would treat the contract as at an end, did not transform the payment of \$100,000 into anything else. It was an escrow, and became an actual, part payment for the use of the defendant, upon ratification of the contract; and the pleadings, complainant's testimony, his correspondence with third parties whom he importuned to assist in promoting the venture, treat it as such and nothing else. That the loss of \$100,000 is burdensome to the complainant may be conceded; that the defendant's right to retain it is unconscionable is an entirely different question. We know of no rule in the construction or enforcement of ordinary contracts of sale which gives to the vendee the right to recover payments made by him whenever he is in default and the vendor seeks to enforce the contract, either by insisting upon its terms, or by proceedings to foreclose. The complainant here did not seek to be relieved from the terms of the

contract and to have the defendant's damages assessed. He did not seek the aid of a court of equity to enable performance after he was in default. Even after he had defaulted, and after defendant demanded that he perform, he took the position with third persons of asserting his rights under the contract as though he were not in default. But, when he finally failed in his efforts to finance the deal, he severed all relations with the defendant, and some months later instituted this suit, seeking to rescind the entire contract upon the ground of a fraud, which on the face of the bill was none other than a deliberate deceit and suppression of facts. He was not in a position, not having offered to perform or to do equity, to face about when he found that the facts did not substantiate his bill, and to complain because the defendant adopted the course which his own conduct compelled it to adopt. He has urged that the defendant, although offering to perform, could not perform because the title to the water power still remained defective—the so-called lease being nonassignable—without the assent of the province. He did not, however, on that ground, refuse to perform. He did not demand performance, but, on the contrary, ignored defendant's offer to perform. In any event, there is nothing to show that defendant was not able and willing at the time fixed to perform fully the contract which it had made with complainant.

A decree may be entered dismissing the bill.

CENTRAL OF GEORGIA RY. CO. v. WRIGHT, Comptroller
General of Georgia.

(District Court, N. D. Georgia. March 18, 1913.)

No. 29.

1. TAXATION (§ 124½*)—RAILROADS—CHARTER EXEMPTION—EFFECT OF LEASE.

Under the law of Georgia, a lease of a railroad and equipment in ordinary terms does not pass any estate in the property to the lessee, but it becomes a tenant with the right to possession and use only, and such lease does not affect a provision of the lessor's charter limiting the right of taxation by the state to a certain percentage of its annual income.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 224-226, 240-242, 260-263, 272; Dec. Dig. § 124½.*]

2. TAXATION (§ 124½*)—RAILROADS—CHARTER EXEMPTION—TRANSFER OF LESSEE'S INTEREST.

A sale under foreclosure of the leasehold interest of the lessee in such a lease and a new lease or renewal executed by the lessor to the purchaser under a general power to lease conferred on it by statute did not affect the title to the property, which remained in the lessor as before with the right to the limited taxation given by its charter, although the lease required the lessee to pay the taxes assessed against the lessor or its property under its charter.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 224-226, 240-242, 260-263, 272; Dec. Dig. § 124½.*]

In Equity. Suit by the Central of Georgia Railway Company against William A. Wright, Comptroller General of the State of Georgia. Decree for complainant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Little & Powell, of Atlanta, Ga., and Lawton & Cunningham, of Savannah, Ga., for complainant.

T. S. Felder, Atty. Gen., and John C. Hart and Samuel H. Sibley, both of Union Point, for defendant.

NEWMAN, District Judge. [1] This case involves the right of the Comptroller General of the state of Georgia to assess ad valorem taxes against the Augusta & Savannah and the Southwestern Railroads as the property of the Central of Georgia Railway Company. The Augusta & Savannah Railroad was originally chartered as the Augusta & Waynesboro, its name having been changed in 1856 by an act of the Legislature (Laws 1855-56, p. 194). Under the original charter dated December 31, 1838 (Laws 1838, p. 174), it was enacted (section 13):

"That the said railroad and the property of said company shall not be subject to be taxed higher than one-half of one per cent. on its annual income; and no city or town corporation shall have power to tax the stock of said company, but may tax any property, real or personal, of said company within the jurisdiction of said city or town, in the same ratio of taxation of like property."

The Southwestern Railroad Company was chartered by an act of the General Assembly in 1845 (Laws 1845, p. 132). In that act (section 14) it was provided:

"That said railway, and its appurtenances, and all property therewith connected, shall not be subject to be taxed higher than one-half of one per cent. upon its annual net income."

By an act of the Legislature of Georgia, approved January 22, 1852 (Laws 1852, p. 119), the Central Railroad & Banking Company of Georgia, the Augusta & Savannah Railroad (then known as the Augusta & Waynesboro Railroad), and the Southwestern Railroad Company were authorized to enter into leases of the two last-named railroads to the former. The act is entitled:

"An act to authorize the Central Railroad & Banking Company of Georgia to lease and work such railroads as now connect, or may hereafter connect, with the Central Railroad, and to authorize the board of directors of such railroad companies as now have or may hereafter have their respective railroads connecting with the said Central Railroad to make leases thereof for a term of years, or during the continuance of their respective charters."

The Augusta & Savannah Railroad was leased to the Central Railroad & Banking Company of Georgia by an instrument dated May 1, 1862. The language of the lease, so far as material for the purpose now in mind, is as follows:

"That, whereas, in and by an act of the General Assembly of the state of Georgia, passed on the 22nd day of January, 1852, express authority was granted to the said Central Railroad & Banking Company of Georgia, to lease the Augusta & Waynesboro Railroad, and all roads connecting with the Central Railroad, and, whereas, also it is provided in the charter of the said Augusta & Savannah Railroad, formerly the Augusta & Waynesboro Railroad, that said company may rent or farm out all, or any part of their exclusive right of transportation of freight or conveyance of passengers to any other company; and, whereas, the said the Augusta & Savannah Railroad has agreed to lease to the said the Central Railroad & Banking Company of

Georgia, their railroad, leading and running from Millen to Augusta, with all their locomotive engines, cars and material of any kind and description, and their right to carry freight and passengers, and to collect the money therefor. Said lease to begin the day of the date of these presents, and to run and continue during the whole charter of the said Augusta & Waynesboro and of the said Augusta & Savannah Railroad. That is to say, in perpetuity, at a rent of seventy-three thousand dollars per annum, payable as follows: Annually."

"Now this indenture witnesseth: That the said the Augusta & Savannah Railroad, formerly Augusta & Waynesboro Railroad, hath leased and let, and by these presents doth lease and let and grant, unto the said the Central Railroad & Banking Company of Georgia all and singular the railroad leading and running from the Central Railroad at Millen to the City of Augusta, together with all the engines, locomotive or stationary cars, repair cars, wells, cisterns, sidings, depots, stations, warehouses, fixtures, rights, members and appurtenances, and privileges of every kind and nature whatsoever."

The language of the lease of the Southwestern Railroad to the Central Railroad & Banking Company entered into in writing on June 24, 1869, so far as material here, after reciting that the same was made in accordance with the act of January 22, 1852, authorizing the making of the lease, is as follows:

"That the said the Southwestern Railroad Company, for and in consideration of the covenants, conditions and agreements hereinafter set forth, on the part of the said the Central Railroad & Banking Company of Georgia, to be performed and kept, hath demised, leased, and to farm let, and by these presents doth demise, lease and to farm let all the railroad of the said the Southwestern Railroad Company," etc.

The consideration for this lease is that the Central Railroad & Banking Company will declare and pay to the stockholders of the said Southwestern Railroad Company dividends—

"which shall bear to the dividends declared and paid to its own stockholders the ratio of eight to ten—that is, to say eight dollars to each share of Southwestern Railroad stock for every ten dollars declared and paid to each share of its own stock, and that no semiannual dividend so declared and paid to the stockholders of the Southwestern Railroad Company shall be less than at the rate of seven per cent. per annum on the par value of their stock; and that whenever any stock dividend or division of assets or accumulations shall be declared, paid or made to the stockholders of the said Central Railroad & Banking Company of Georgia a similar dividend or distribution shall be paid and made to the stockholders of the Southwestern Railroad in the same proportion of eight to ten, and that all such dividends and distributions of every sort shall be paid to the stockholders of the Southwestern Railroad Company at Macon and Savannah, as the said company has heretofore paid its dividends, and be free from all taxes to the stockholders."

It further provides as follows:

"It is understood that nothing herein contained is in any wise to affect the corporate character or existence of the said the Southwestern Railroad Company, but it is to maintain its corporate organization, not only until the first day of December next, but at all times thereafter during the continuance of its charter, whether as now framed, or as it may be hereafter extended or amended, to the fullest extent necessary to preserve its said charter and protect the rights of its stockholders."

In considering the effect of the language of the leases from these companies respectively to the Central Railroad, and what relation was created between the lessors and the lessee, we may compare the lan-

guage of these leases with that of the Georgia Railroad & Banking Company to William M. Wadley, predecessor in interest of the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railway Company. The language of the Georgia Railroad & Banking Company's lease, which was under consideration in the case of *Louisville & N. R. Co. v. Wright* (D. C.) 199 Fed. 454, is as follows:

"Hath rented and farmed out to said party of the second part and his assigns, and does by these presents rent and farm out to said party of the second part and his assigns for the full term of ninety-nine years from the first day April, one thousand eight hundred and eighty-one, all its privileges, general and exclusive, of transporting persons, merchandise, produce and every kind of property whatsoever, which is or may become the subject of railroad transportation, over the lines of railroad owned and controlled by the party of the first part, to the full extent that the party of the first part has and enjoys, or is now entitled to have and enjoy, or may hereafter acquire the right to have and enjoy, such privileges, and subject to all the obligations and duties imposed by its charter in this behalf upon the party of the first part.

"And the party of the first part has also rented and farmed out, and does by these presents rent and farm out, to the party of the second part for the aforesaid term of ninety-nine years, as the means of full enjoyment of the privileges hereinbefore rented and farmed out, the following property, to wit:

"The Georgia Railroad from Augusta to Atlanta, and its branches, viz., the branch from Barnett to Washington; the branch from Camak to Warrenton, and the branch from Union Point to Athens, with all the extensions thereof which may be made hereafter to other points; also the Macon & Augusta Railroad, from Warrenton to Macon; together with the rights of way, roadbeds, depots, stations, warehouses, elevators, workshops, wells, cisterns, water tanks, and other appurtenances of said railroad and branches."

It is conceded that it has been held by the Supreme Court of Georgia in the case of the Augusta & Savannah Railroad, and by the Supreme Court of the United States in the case of the Southwestern Railroad Company, that the provisions in the charters of these companies with reference to taxation, as given above, constitute inviolable and irrepealable contracts between the state and the railroads. *Railroad v. State*, 54 Ga. 401; *Railroad Co. v. Georgia*, 92 U. S. 676, 23 L. Ed. 757. The case of *Louisville & N. R. Co. v. Wright*, supra, was carried by appeal from this court to the Circuit Court of Appeals for this Circuit, and the decision of the District Court was affirmed. The effect of the lease by the Augusta & Savannah Railroad and the Southwestern Railroad Company of their property to the Central Railroad & Banking Company on their right to have the scheme of taxation provided for in their charters continued to them and thereby exempt them from any other taxes. This case of *Louisville & N. R. Co. v. Wright* should be controlling here. It was there held that the lessee did not take any estate for years, but came within the statute of Georgia creating the relation of landlord and tenant, and became tenant with the mere right of possession, use, and operation, any taxable interest or other estate subject to taxation remaining in the lessor. There was in the Georgia Railroad Case certain property which, it was held, did not come within the ruling thus made, but that would not affect the question here. There is no material difference between the language used in the Georgia Railroad & Banking Company's lease and the leases now under consideration sufficient to differentiate the latter from the former, so that it may be assumed that the relationship originally existing, after

the execution of these leases, between the lessors and lessee in the case now before the court, was the same which it has been held by this court and the Circuit Court of Appeals existed between the lessor and lessee of the Georgia Railroad.

In addition to this, the question of the effect of the lease of the Augusta & Savannah Railroad was before the Supreme Court of Georgia in *Goldsmith, Comptroller General, v. Augusta & S. R. Co.*, 62 Ga. 468, 472, and in that case the court held, the opinion being by Jackson, Justice, as follows:

"It is said, however, that the road is leased to the Central Railroad for a certain sum, and that this sum is the gross income, the only income that the company receives, and therefore the gross income. The act authorizing the lease does not touch taxation. The state does not alter its power to tax as in the charter expressed. Can the two companies alter that rule of taxation fixed in the charter of one of them without the state's assent? Clearly not, for then they might reduce it to a mere nominal sum and fritter away the tax rate reserved in the charter to little or nothing. The security for the tax due the state is this road and its appurtenances; the tax reserved is the per centum on its gross income; that income is what passage money and freights this road makes each year; of that an account must be rendered, and on that the per cent. must be estimated."

This case went off in the Supreme Court on the ground that the superior court had no jurisdiction to entertain the affidavit of illegality, but the language of the court is quoted to show the view it apparently entertained, that the lease of the road did not affect the question of taxation.

In *Goldsmith, Comptroller General, v. Southwestern Railroad Co.*, 62 Ga. 495, while the case went off on the ground that no proper return had been made by the railroad such as required by the act of 1874 as a condition precedent to remedy by affidavit of illegality in the superior court, and that the court had no jurisdiction to entertain such an affidavit, the opinion of the presiding judge in the superior court is quoted in the decision as follows:

"This case having been referred to me by consent for determination upon the law and facts, it is, after argument, considered and adjudged that the partial immunity from taxation granted in the charter of the Southwestern Railroad Company, as well as that to the Muscogee Railroad Company, in its charter, continues unaffected by merger or lease. I further hold that the extent of this immunity has not been decided by the Supreme Court, but is still an open question."

The use of the last sentence by the court refers to the matter undetermined at that time as to what particular lines of the Southwestern Railroad this partial immunity from taxation covered.

In the case of *Wright, Comptroller General, v. Southwestern R. Co.*, 64 Ga. 783, 794, the court, again speaking through Jackson, Justice, said:

"We hold that it (the Southwestern Railroad) had the right of relief in equity. First, because exactions are pressed upon it, in the form of annual taxes, inconsistent with and violative of its charter rights, and destructive of its franchise; secondly, because the executions might be repeated if these are successful, and suits and costs multiplied."

In the opinion in this last case reference is made to the fact that there is a lease by the Central Railroad & Banking Company of the

Southwestern Railroad, and it is said that, while the Central Railroad & Banking Company may be bound by its contract with the Southwestern Railroad Company to pay the taxes, still that does not release the Southwestern from its obligation to the state for those taxes.

The conclusion must be that prior to the receivership proceedings instituted in 1892 in the Circuit Court of the United States for the Southern District of Georgia the right to the limited scheme of taxation provided in their charters remained in the Southwestern and the Augusta and Savannah Railroads, notwithstanding the leases of the two roads to the Central Railroad & Banking Company.

[2] It appears from the record here that, on March 4, 1892, all of the property and assets of the Central Railroad & Banking Company of Georgia, including its system of railroads and its leasehold interest in the Augusta & Savannah Railroad and in the Southwestern Railroad, passed into the hands of receivers of the Circuit Court of the United States for the Southern District of Georgia.

It further appears that on June 30, 1893, the said receivers being then in possession of the leaseholds of the Augusta & Savannah Railroad and said Southwestern Railroad, and operating the same under the said leases, the receiver was directed by the said Circuit Court of the United States for the Southern District of Georgia to ascertain whether they desired to permit their properties to remain in the hands of the receiver, as representing the lessee company, with the right on the part of said corporations, or either of them, to claim the net results of the operation of their respective properties up to the rental contract, but not beyond, or whether the said respective corporations should receive from the receiver the surrender of the leasehold interests held by him as receiver of the Central Railroad & Banking Company of Georgia, and the court further ordered that, if any of the said companies should make known their option to receive the surrender of the leasehold interest, the said receiver should apply to the court for an order authorizing and directing the surrender of the same, or, should any of the said companies elect to permit the said leasehold interests to remain in the hands of the receiver, said companies should have the right to claim from said court the net results of the operations of their properties by the receiver up to the rental contract price and no more, unless the receiver should, under the order of the court, elect to retain said leasehold interests, and to pay therefor the rental contract price. The Augusta & Savannah Railroad and the Southwestern Railroad Company both elected to permit their respective properties to remain in the hands of said receiver under this order, and the receiver operated said railroads from said date to November 1, 1895, and paid to the Augusta & Savannah and the Southwestern Railroad Company, respectively, the net earnings of their lines of railroad, which in neither case was as much as the rental stipulated for under the respective leases.

It further appears that all of the properties and assets of the Central Railroad & Banking Company of Georgia were sold under foreclosure decrees, and at judicial sales, and were, for the most part, purchased by Samuel Thomas and T. F. Ryan, who had put forth a plan of re-

organization for the acquirement of the properties and assets of the Central Railroad & Banking Company of Georgia, and organized a new company to be known as the Central of Georgia Railway Company, to take over the railroads and properties purchased by them under said reorganization plan. And then it appears that among the assets and properties so sold and purchased were the leasehold interests of the Central Railroad & Banking Company of Georgia in the Augusta & Savannah Railroad and the Southwestern Railroad Company, and possession of the railroads and properties of these companies was delivered by the receiver on the order of the purchasers to the Central of Georgia Railway Company on November 1, 1895.

In the letter of the Comptroller General to the President of the Central of Georgia Railway Company he says this:

"I am advised that these roads (referring to the Augusta & Savannah and the Southwestern Railroads) have been purchased by the Central of Georgia Railway Company at judicial sale under decree of foreclosure against your immediate predecessor in title and under leases in perpetuity."

It is urged, therefore, as I understand the argument, that the title to these roads passed by this judicial sale was changed by reason of the receivership and proceedings thereunder and the official sale, so that the title to this property became vested in the Central of Georgia Railway Company. I am unable to see that that is the result of that proceeding. All that went into the hands of the receivers of the Central Railroad & Banking Company, according to the record here, were the leasehold interests in the Augusta & Savannah and in the Southwestern. Nothing could have been administered in the receivership case or sold in that case beyond the interest in these two roads that went into the receivers' hands, and that, as stated, was the leasehold interest. These two lessor railroads, having the scheme of limited taxation provided for in their charters, and having, by authority of the Legislature, made the leases in 1862 and 1869, respectively, the fact that their lessee was placed in the hands of receivers and its property administered could not in any way affect the rights of the lessors with reference to taxation. They have their scheme of taxation by authority of the Legislature, they made the leases by authority of the Legislature, and the misfortune of the lessee company and the action of the court with reference to it could not, it seems to me, affect the rights granted these lessor companies by the Legislature of the state.

On October 17, 1895, the Central of Georgia Railway Company was incorporated under the general railroad incorporation act of 1892, and the acts amendatory thereof, with all the rights, powers, privileges and immunities enjoyed by the Central Railroad & Banking Company of Georgia under its original charter and amendments thereto, and with all the rights, powers, privileges, and franchises provided in the laws of Georgia and particularly by the act of December 17, 1892, and acts amendatory thereof, and the said petitioners, under said charter and the provisions of the said act under which they were incorporated, were substituted for the original stockholders of the said Central Railroad & Banking Company of Georgia. The said petition for incor-

poration specified particularly that the said Central Railroad & Banking Company of Georgia was endowed with corporate capacity and power under the above-mentioned act of January 22, 1852, to lease and work the Southwestern Railroad, the Augusta & Savannah Railroad, and all other lines of railroad connecting with its own. On October 24, 1895, the Augusta & Savannah Railroad entered into a contract with the Central of Georgia Railway Company, whereby the lease of its railroad to the Central Railroad & Banking Company was modified and renewed to the Central of Georgia Railway Company, the said renewed and modified contract running from the 1st day of November, 1895, for the full term of 101 years, and renewable in like periods upon the same terms forever, the right of renewal to be in conformity to the laws authorizing it, and for the period that the corporate existence of the lessee may be continued.

This lease provides that the lessee shall pay "all federal, state, county or municipal taxes and assessments, ordinary or extraordinary, then resting or thereafter to be lawfully imposed upon the lessor or its property under its charter and the Constitution and laws of the state of Georgia." The lease provides for the annual rental of \$51,145, to be paid semiannually. It is then provided that:

"The said lessee hereby further covenants and agrees to keep in as good order and repair as when it shall receive possession and control of the same, the said lessor's railroads and other property and appurtenances, and in case it shall fail to pay any semiannual amount of the rent as hereinbefore fixed, on the first day of January or July in any year for the space of six months after the same shall become due and payable as hereinbefore provided, and be demanded by the lessor, it shall then be lawful for the board of directors of the said lessor to terminate this lease and enter upon and resume possession of said railroad with the appurtenances and all other of its property hereby demised, and from thenceforth this indenture and the estate, rights and privileges hereby granted and every clause and article herein contained shall cease, determine and be void. And the said lessee will thereupon deliver immediate and peaceable possession to the said lessor of said railroad and other property and appurtenances hereby demised in as good order as it received the same, replacing such as shall have been consumed by use or otherwise disposed of with other similar property of equal value."

On October 17, 1895, the Southwestern Railroad Company entered into a contract with the Central of Georgia Railway Company whereby the lease of its railroad to the Central Railroad & Banking Company of Georgia was modified and renewed to the Central of Georgia Railway Company, the said renewed and modified lease running from the 1st day of November, 1895, for the full term of 101 years, and renewable in like periods upon the same terms forever, the right of renewals to be in conformity to the laws authorizing it, and for the period that the corporate existence of the lessee may be continued.

This lease also provided that the lessee should pay all taxes, as in the lease of the Augusta & Savannah Railroad. It also provided for an annual rental of \$259,555, which was to be paid semiannually. The lease contained the same language, substantially, as the lease of the Augusta & Savannah Railroad above referred to as to the effect of the nonpayment of rent, and the termination of the lease and the right of the lessor to enter for that reason.

These new leases cannot in any way affect the right of the Augusta & Savannah Railroad and the Southwestern Railroad Company to the scheme of taxation provided in their charters. The rights of the Central Railroad & Banking Company either passed by these judicial sales into the purchasers who organized the Central of Georgia Railway Company and thus into the latter company or the effect of the sale was to terminate the leases and put these properties and the right to the possession and control of them in the two lessor companies. In either event there was no reason why the two lessor companies should not either renew their leases with the Central Railroad & Banking Company to the new company or make new leases to the new company; the point about the whole thing being that this right to the scheme of taxation provided for in the original charters remained all the time in the Augusta & Savannah Railroad and the Southwestern Railroad Company. The fact that the lessee company in the original leases and in these new leases was to pay such taxes as the lessor companies might owe the state could not in any way affect the rights of the lessor companies. That was simply an arrangement between the lessors and the lessee for reasons which controlled them in making the contract.

The taxes now assessed against the two railroads, the Augusta & Savannah and the Southwestern, are assessed against the Central of Georgia Railway Company as the property of that Company. These assessments speak of the properties in making the assessment as "that portion of its property known in its system of railroads as the Augusta & Savannah Railroad," and "that portion of its property known in its system of railroads as the Southwestern Railroad." The assessments are against the Central of Georgia Railway Company as the owner of the property, and there is no attempt to assess it for a leasehold estate or anything else in connection with these two properties, it appears, except upon the theory and idea that the Central of Georgia Railway Company has acquired the title by reason of the various things above set forth to these two properties. This cannot be true under any view of the matter. Under the authority of the Georgia Railroad & Banking Co. Case the relation of landlord and tenant only would exist; that is, the right on the part of the Central of Georgia Railway Company to possess, control, and operate the property of the Augusta & Savannah Railroad and of the Southwestern Railroad Company.

But, even if it be conceded that the Central of Georgia Railway Company has a leasehold interest in this property, as distinguished from a mere tenancy, it would not be the owner of the property, having the title thereto as against the Augusta & Savannah Railroad and the Southwestern Railroad Company. There has been no legislative action on this subject; it is simply the conclusion of the Comptroller General that the ownership of the two roads has passed to the Central of Georgia Railway Company. The Comptroller General has been accepting taxes from these roads since 1895, as before, in accordance with their charter scheme of taxation. This action of the Comptroller General in accepting taxes on income, in accordance with the charters of the roads, while no estoppel against him, may be considered by

the court as at least "persuasive authority" as to the proper method of taxation. *L. & N. R. Co. v. Wright* (D. C.) 199 Fed. 454-459. I do not understand that the effect of these leases as they now stand, being for 101 years subject to renewal, distinguishes them materially from that in the Georgia Railroad & Banking Company Case. There is no attempt here to tax any leasehold interest in these two properties, or any other right therein, against the Central of Georgia Railway Company otherwise than as the owner thereof. If an ad valorem tax can be collected against the Central of Georgia Railroad Company as the owner of the two other roads, it would place an additional burden upon the Augusta & Savannah and the Southwestern inconsistent with their charters, which have been held by repeated decisions controlling in the matter, to be irrevocable contracts between these railroads and the state, and violative of their rights under their charters. It is clear that whatever rights the state has, if any, against the Central of Georgia Railway Company in connection with these two railroads, to pay taxes otherwise than as provided in the charters of the two companies, must be enforced in some other way than that proposed here. It cannot be done by assessing the entire value of these railroads for taxes against the Central of Georgia Railway Company as its property.

In view of the foregoing, it is evident that the proposed action of the Comptroller General would result in the impairment of the obligations of the contracts between the state and the Augusta & Savannah Railroad and the Southwestern Railroad Company. This being true, the plaintiff is entitled to the relief asked.

The question is not presented here, as in the Georgia Railroad Case, of certain property being outside of the scheme of taxation provided in the original charters. There is a statement of the manner in which the aggregate value of these two roads was arrived at, but there is nothing to show any property added by the Central Railroad & Banking Company or the Central of Georgia Railway Company which might be taxable, and no facts on which to act in this respect. No opinion is expressed as to whether or not there is something in the way of a leasehold interest or otherwise in these roads, subject to taxation against the Central of Georgia Railway Company as not being within the scheme of taxation contained in the charters. In the case as here made, however, the complainant is entitled to a decree.

In re MERWIN & WILLOUGHBY CO.

(District Court, N. D. New York. June 21, 1913.)

BANKRUPTCY (§ 314*)—PROVABLE CLAIMS—UNACCRUED RENT—PENALTY PROVISION IN LEASE.

Claimant leased to the bankrupt a store service system for the term of 10 years at an annual rental of \$210, payable quarterly. The lease provided that, in case of breach by the lessee or its bankruptcy, the rent for the entire term of 10 years should become immediately due and payable without notice or demand, and also that the lessor might at any time after such a breach enter and take possession of the leased property, "and thereby terminate all rights and interest of the lessee in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said system." The bankruptcy occurred about one year after the lease was made, and the bankrupt was then in default for rent. The receiver used the system until he sold the store and paid rent for such time, and the purchaser used and paid rent for it until claimant entered and removed it. *Held* that, whether the taking of possession was because of the bankruptcy or the prior default of the lessee, it terminated the lease, and that the provision therein giving claimant the unaccrued rent for the entire term after it had retaken the leased property was purely for a penalty, was unconscionable, and that a claim therefor would not be allowed against the bankrupt estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469–473, 478, 483–487, 489, 490; Dec. Dig. § 314.*]

In the matter of the Merwin & Willoughby Company, bankrupt. On review of order of referee allowing claim of the Lamson Consolidated Store Service Company in the amount of \$1,929.65. Reversed.

Grant & Wager, of Utica, N. Y., for objecting creditors.

Baker, Burton & Baker, of Gloversville, N. Y., for trustee.

A. Hosmer Spencer and R. Douglas Boyd, both of Gloversville, N. Y., for claimant.

RAY, District Judge. March 23, 1911, the Lamson Consolidated Store Service Company, the claimant here, leased to Merwin, Kling & Willoughby Company, of Gloversville, N. Y., a Lamson perfection cable cash carrier system for use in the store of the lessee at No. 39–41 North Main street in said city, and which system comprised six lines with fifteen despatching stations, and two carriers for each station. This system composed of certain parts was personal property removable.

The provisions of this lease material here are as follows:

"(2) The lessee agrees to use said system in said premises for the term of ten years from ——— (the date of completion of changes of said system) and for as many successive years after that as the lessee shall elect to extend this lease and unless said lessee shall notify said lessor in writing sixty days before the expiration of the original term of this lease or of any extension hereof to remove said system said lessee shall be considered to have elected to extend this lease for another year. The lessor reserves the right to terminate this lease at any time after said 10 years, upon giving sixty days notice, in writing, to the lessee. * * *

"(3) The lessee agrees to pay on said date of installation rental to the regular quarter day next ensuing and thereafter in advance upon the first days of March, June, September and December in each and every year at the rate of 210.00 dollars for the first year and 210.00 dollars for each succeeding year. Lessee agrees to pay all local taxes levied upon said system. If any installment of rental shall remain unpaid for sixty days after it becomes due the entire rental to the end of this lease shall become at once payable without demand. * * *

"(6) And these presents are upon this condition, that in case of a breach by lessee of any of the covenants or agreements herein, or in case the lessee becomes bankrupt, insolvent or makes an assignment for the benefit of creditors, or discontinues business in the premises for any other reason whatsoever, the balance of rental for the entire term of this lease shall be considered at once due and payable without notice or demand on the part of the lessor; and it is also provided, that the lessor may at any time after such a breach of this lease occurs, enter the premises, take possession of said system and thereby terminate all rights and interest of the lessee in said system."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The Merwin & Willoughby Company succeeded the Merwin, Kling & Willoughby Company, and February 12, 1912, this lease and all rights under it, with the written consent of the Lamson Company (so called for brevity), was assigned by the Merwin, Kling & Willoughby Company to said Merwin & Willoughby Company which took possession of same in said store and used the same until said Merwin & Willoughby Company passed to the hands of a receiver in bankruptcy. Merwin & Willoughby Company was the same corporation as Merwin, Kling & Willoughby Company except in name. On or about March 14, 1912, a petition in bankruptcy was filed against said Merwin Company (so called for brevity), and the bankruptcy court appointed a receiver of all its property, who duly qualified and took possession of same.

May 31, 1912, Bradford H. Arthur was duly appointed trustee in bankruptcy of all the property of the said Merwin Company, and qualified and took the physical possession of same. Said receiver was duly authorized and empowered to continue and carry on the business of the said Merwin Company, and did down to May 11, 1912, when he duly sold all the assets and property of said company, except said lease and the rights of said Merwin Company thereunder, to one Ralph D. Willoughby, and which sale was ratified by the court and trustee. The trustee never sold said lease or leased property or his rights or the rights of the bankrupt estate thereunder. Neither the Merwin, Kling & Willoughby Company nor the Merwin & Willoughby Company ever paid any rent which had accrued due under the terms of said lease. Neither ever has paid any of such rent. On his appointment such receiver took possession of the store and of said leased cash carrier system therein and used same until such sale was made by him. June 10, 1912, said receiver paid the rent for such system during the time he used it, \$35. After the sale to said Ralph D. Willoughby he paid the rent, viz., June 11, 1912, \$11.10, and September 5, 1912, \$52.50, and January 18, 1913, \$59, the balance of the rent from May 11, 1912, to December 1, 1912. In purchasing said property of the bankrupt company said Ralph D. Willoughby entered into no contract or agreement assuming such lease. After said Ralph D. Willoughby purchased said property of the said bankrupt company the said claimant, Lamson Company, by its agents and by correspondence, endeavored, but without success, to induce said Ralph D. Willoughby to enter into a long term lease for the said system similar to the one from which quotations have been made, the lease in question. On or about December 1, 1912, the said Lamson Company, claiming and asserting the right so to do, entered on said premises then being conducted by said Ralph D. Willoughby, and removed the said cash carrier system, and ever since has had and retained the legal custody and control of the same. December 23, 1912, said Lamson Company presented its verified claim, verified December 12, 1912, in bankruptcy, against the estate in bankruptcy of Merwin & Willoughby Company for rent of said cable from the date of such lease or the installation of same, viz., \$2,080.75, giving credits as follows: "June 10, '12, paid by receiver, \$35.00; June 12, '12, paid by Willoughby Co. \$11.10; Sept. 19, '12, paid by Willoughby Co. \$52.50, and to be paid by Willoughby Co. \$52.50"—leav-

ing the claim \$1,929.65, which was the amount of the alleged debt specified in the statement of claim itself. Ralph D. Willoughby carries on business under the name of Willoughby Company.

The claimant, Lamson Consolidated Store Service Company, contends that by virtue of the said lease and agreement it had the right on nonpayment of rent, or on the bankruptcy of the said Merwin & Willoughby Company, or in either event, to elect that the whole rental for the 10 years should be and become due and payable, and that it did become due and payable under the sixth clause quoted without notice or demand, and, less the payments credited or stated above, is a valid and a provable debt and claim against the bankrupt estate. The stipulation of facts filed recites:

"It being claimed by the claimant that under paragraph six of said contract and lease all of the balance of the rental for the entire term of the lease should become due and payable upon the lessee becoming bankrupt."

The creditors and trustee, on the other hand, claim:

(1) That such clause 6, in so far as it provides that on the bankruptcy or insolvency of the Merwin Company "the balance of rental for the entire term of this lease shall be considered at once due and payable without notice or demand on the part of the lessor," is invalid and in the nature of a penalty, and provides for a preference in case of bankruptcy, and cannot be enforced.

(2) That, having taken and removed the leased property from the custody of the trustee because of the bankruptcy, it cannot collect rent therefor for any subsequent time.

(3) That, even if such provision is valid and might have been enforced, the claimant waived the provision by accepting rent from the receiver and from the purchaser of the property sold, Ralph D. Willoughby, and by trying to lease the said cable cash carrier system to said Ralph D. Willoughby before taking possession.

(4) That the agreement that in case any installment of rent, \$52.50, should not be paid when due the rent for the 10 years, \$2,080.75, should all become immediately due and payable, coupled with the right in the lessor to take possession of and remove the leased property, is a provision for a penalty pure and simple, and should not and cannot be enforced. If the property, said cable and cash carrier system, belonged to the claimant and it had the right to take possession and did, then it follows that said Lamson Company had the right thereafter to offer and use its best efforts to lease same. Is the clause referred to valid and binding on the bankrupt estate so as to make it liable for the rent for the entire term of 10 years for the reason it became bankrupt, and was then in default in payment of rent?

It is plain enough that parties to a contract for the loan of money secured by a note or mortgage may provide for the acceleration of payment of the principal in case of default in the payment of interest, or of installments of principal. In such case the consideration has been fully furnished, and the only question is time of payment. But may the lessor of personal property or of real estate contract to rent, say for 10 years, the rent payable in annual installments of say \$200 per annum, and provide that in case of nonpayment of rent when due

the rent for the 10 years, or \$2,000, shall become immediately due and payable, and that the lessor may also at once re-enter and take possession of the leased land or property as his own, and have the use and occupation of such premises or property, and also collect the rent for the full period, and then in case of default in payment of the first year's rent and on the bankruptcy of the lessee, not only take and retain possession of the property or premises, but collect the rent for the entire time? Such an agreement in case of the bankruptcy of the lessee is a way of contracting for a preference and providing a way, a mode of thwarting the provision of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). However, such result would be in accord with the letter of the contract. It is, of course, true that if a lease is made for a fixed term and default is made in the payment of rent, and the lessor takes possession pursuant to the terms of the agreement and relets if he can, such reletting operates for the benefit of the lessee, and whatever sums the lessor secures in this way goes to reduce the damages or liability for rent under the contract for the balance of the term, provided it is so stipulated in the agreement. *Hall v. Gould*, 13 N. Y. 127. Cited and approved in *Lamson Consolidated Store Service Co. v. Bowland*, 114 Fed. 639, 641, 52 C. C. A. 335. The general rule is that the resumption of possession by the lessor of the thing leased operates as a surrender of the lease, and puts an end to the liability of the lessee for future rents, unless otherwise specifically provided by some valid and binding clause in the contract. *Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719, and *Lamson v. Bowland*, *supra*. It was competent for the parties to expressly stipulate and agree in the contract that on default in payment of rent when an installment of rent fell due that the whole rent for the entire term should become due and payable without demand or notice. Notice of election to that end was not necessary. It was, however, competent to waive payments of installments when due, and waive the provision that the whole rent should fall due, and an acceptance of subsequent installments of rent when due would evidence a waiver of that provision. But waiver must, of course, depend on all the facts and circumstances of the case, and the acts must be construed in the light of the agreement under which the parties are operating.

If the lessor in this case took possession because the Merwin Company became bankrupt, then notwithstanding the agreement it cannot recover rent subsequently falling due. This was decided in *Lamson Consolidated Store Service Co. v. Bowland*, 114 Fed. 639, 52 C. C. A. 335, where the lease of one of these systems contained a similar clause as to bankruptcy and the court (C. C. A. 6th Circuit, per Lurton, C. J.) held:

"If the lessor resumed possession because of the adjudication of bankruptcy against the lessee, the lease was determined, and no right to exact future rents would remain."

The Lamson Company did nothing by way of taking possession prior to the bankruptcy or thereafter until it failed to make a lease with the purchaser, and accepted installments of rent when due from

the receiver and from the purchaser of the store. But the receiver paid for the term of his own occupancy only.

Clause 3 referred to provides:

"If any installment of rental shall remain unpaid for sixty days after it becomes due the entire rental to the end of this lease shall become at once payable without demand."

This with the addition of the words "without demand" is the same as the like clause in the contract which was the subject of consideration in *Lamson, etc., v. Bowland*, *supra*. These words were inserted in contracts made after the decision of that case to avoid the force of that decision, or, rather, the ground on which that decision was placed, after the court had intimated there were other grounds fatal to the claim. In that case the court said:

"Unless the appellant can show that this conceded possession (by the lessor) was taken upon some ground which kept the lease alive, the appeal must fail. * * * An adjudication of bankruptcy against the lessee would seem to justify the lessor in recovering possession. But the result would be the surrender of the lease. Thereafter no right to exact future rents would remain. * * * As we have seen, counsel have attempted to justify the possession upon a ground which leaves no foot to stand upon, when asserting a claim to future rents."

This present case comes to the proposition whether, under the provisions in this lease, the full amount of rent for the entire term, less payments made by the receiver and purchaser, can be proved and allowed as a claim against the bankrupt estate, the lessor having tried to rent to the purchaser of the bankrupt estate (aside from the lease) and failed and thereafter having taken possession of the leased property on the ground and because of the fact that the bankrupt corporation was in default in payment of installments of rent at the time of the filing of the petition in bankruptcy. The lease, made March 23, 1911, was assigned to the bankrupt company February 12, 1912, and the bankruptcy occurred March 14, 1912, some 32 days thereafter. The Merwin & Willoughby Company covenanted in the assignment that "all the rent which may hereafter become due according to the terms of said lease shall be paid," and also, "and that all the covenants and stipulations in said lease will be observed and performed." Rent fell due March 1st, June 1st, September 1st, and December 1st, each year. March 1, 1912, the now bankrupt corporation became liable to pay rent for at least 18 days as the quarter's rent then fell due. The rent was \$52.50 for each three months, or \$17.50 per month. The receiver was in possession two months and paid \$35. The rent for the 18 days was not paid. However, I do not see why the bankrupt corporation was not liable for all the rent in arrears, as the only change was in the name of the corporation, and I do not see that the corporation by assuming the new name changed its contract obligations or liabilities or relieved itself therefrom. If not then, it was owing rent to the Merwin & Willoughby Company for about one year at the time of the bankruptcy. The facts set forth in the stipulation do not necessarily show that the Lamson Company took possession because of the bankruptcy, or that it asserted its right to take possession based alone on

the fact of such adjudication in bankruptcy. If such concession had been made, then within *Lamson, etc., v. Bowland*, supra, the claim must necessarily be disallowed. But, as stated, if under this contract the fact that the bankrupt corporation was in default in payment of rent when the bankruptcy occurred and the adjudication was made, made the rent for the entire term due and payable as a fixed liability and the Lamson Company had the right not only to take and hold the possession of the leased property, but prove its claim for rent for the entire 10 years, and receive its dividend, then this claim was properly allowed. This provision for the acceleration of time of payment growing out of failure to pay installments of rents as they fell due is a provision in the nature of a penalty, but not necessarily void.

It seems unconscionable to enforce such a provision in case of the bankruptcy of the lessee. There is no proof in this case or stipulation that this rented property had become of less value while installed or suffered any injury, or that it was not of equal value to the lessor in some other place. The record is silent on this subject. There is no proof or stipulation as to its value. We may presume its rental value elsewhere, if rented at all, is the same. By taking possession of the property and removing it the trustee in bankruptcy was deprived of it and of any opportunity to sell or re-lease. The consideration for the agreement to pay rent failed, but not through any fault of the lessor who, we must assume, was willing to leave it on receiving his rent. It was the property of the lessor subject to the rights of the lessee under the lease. Having exercised its right to repossess itself of the rented property prior to the expiration of the lease, can the lessor also recover rent for the full period? Can it have both remedies at the same time? It is not so provided in the lease by any language to that effect. One provision is:

"And it is also provided, that the lessor may at any time after such a breach of this lease occurs, enter the premises, take possession of said system and thereby terminate all rights and interest of the lessee in said system."

This is what the lessor has done. Can it now prove a claim for rent for the entire term and recover it? It is immaterial that the claimant will not obtain the full amount but only its dividend. It will get all the law gives in such cases.

When property is sold on condition that the thing sold shall remain the property of the vendor until paid for, purchase price to be paid in installments, and notes are given for such installments, and some are not paid and the vendor retakes the property, he cannot recover the purchase price or on the notes. *White v. Gray's Sons*, 96 App. Div. 154, 89 N. Y. Supp. 481; *Nelson v. Gibson*, 143 App. Div. 894, 898, 129 N. Y. Supp. 702; *Edmead v. Anderson et al.*, 118 App. Div. 16, 103 N. Y. Supp. 369; *Dougherty v. Neville*, 108 App. Div. 89, 93, 95 N. Y. Supp. 806; *Cooper v. Payne*, 111 App. Div. 785, 97 N. Y. Supp. 863; *Earle v. Robinson*, 91 Hun, 363, 36 N. Y. Supp. 178, affirmed 157 N. Y. 683, 51 N. E. 1090; *Hoffman v. White Sewing Machine Co.*, 123 App. Div. 166, 108 N. Y. Supp. 253. These cases go on the principle of a failure of the consideration; that vendor cannot

have the property, and recover the balance of the price agreed to be paid therefor. Suppose the contract of conditional sale should expressly provide that the vendor might have both in case of failure to pay the purchase price, would any court enforce the agreement? Would it not provide a penalty pure and simple? What real distinction can we draw between a contract of conditional sale, property delivered to vendee with title in vendor until paid for with right on non-payment of balance of purchase price to retake the property, and one leasing the same property for a fixed period, rent payable in installments and presumed to cover the value of such use for the period covered by the installment, with power to retake the property if the stipulated rent is not paid and also with a provision that, if there is a failure to pay any installment of rent, then the whole rent shall become at once payable? If the taking of the property by the vendor in the one case defeats the right to recover the balance of the purchase price due when the taking occurs, why does not the taking of the property by the lessor in the other case defeat the right to recover the rental accruing after such possession is taken even if due and payable before? I am unable to discover any difference in principle between the two cases. When the taking is unconditional (not a surrender and acceptance), this ought to be the rule in both cases, and, as it is not specifically so provided, I cannot give a construction to this lease in question here which will authorize the lessor to retake the leased property unconditionally, and at the same time prove and have allowed his claim for the rental for the full ten years. The trustee did not surrender the lease.

In *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. 576, it was held that the acceptance by the landlord of the surrender of demised premises will defeat the recovery of rent thereafter accruing. The court in its opinion, however, indicates that such surrender would not release the lessee from liability for the rent due, but not yet accrued. In *American Bonding Company v. Pueblo In. Co.* (C. C. A. 8th Circuit) 150 Fed. 17, 30, 80 C. C. A. 97, 110 (9 L. R. A. [N. S.] 557, 10 Ann. Cas. 357), it was held that:

"The termination of a lease during its term by surrender, by re-entry, or by eviction, without more, discharges the lessee from liability for rents that have not accrued, but leaves him liable for all the rents which have accrued and become due, and for the performance of all covenants whose fulfillment is due."

But in the case now being considered there was no surrender by the trustee, and the rent for some 9 years had not accrued, that is, had not been earned.

Agreements which fix the damages for the nonperformance of a contract at a sum certain are many times held to provide for a penalty. The sum fixed by agreement must be fair and reasonable, and it must appear that proof of the actual damage would be difficult to make, and the actual damages extremely difficult of ascertainment. In this present case the contract provides (1) for a ten years term; (2) an annual rental of \$210, payable quarterly; (3) that in case of bankruptcy or default the whole rent for the entire term of 10 years shall

become immediately due and payable without notice or demand, and also that the lessor may at once enter and take possession of the leased property. On the face of it the agreement is onerous, burdensome, and unfair. The lessee, or his estate, in case of insolvency or financial embarrassment, is penalized. Giving the construction contended for by the claimant and for a mere default in payment of a quarter's rent in advance, the whole \$2,080.75 would be at once due and payable, and the lessor not only could sue for and collect this amount, but immediately enter and take away the leased property. If susceptible of such construction, it provides for a penalty. If not a penalty then taking possession is the alternative of payment, and the lessor cannot both take possession and remove the property (there being no surrender), and prove his claim, and have it allowed for the rent for the entire term. If under such an agreement the lessor can do both then, if an estate in bankruptcy should pay 90 cents on the dollar, the lessor for one year's use of the property would get \$1,872 in cash, and have the use of the property for the balance of the term when the agreement shows on its face that the value of one year's use is only \$210. Such agreements are contrary or opposed to a sound public policy, and ought not to be enforced. The facts stipulated show no damages to the lessor except the measure fixed as the annual rent, \$210 per year, and to allow it to have a dividend in the full amount and also take and hold the leased property is to execute a contract evidently intended to penalize the lessee and its estate in case of bankruptcy and secure to the lessor a greater sum in proportion than other creditors of the same class receive. In *McCall Co. v. Deuchler* (C. C. A. 8th Circuit) 174 Fed. 133, 98 C. C. A. 169, the parties contracted for the purchase and sale of an article of merchandise to be delivered in stated quantities periodically during a term of over five years, and it was provided that in case of a breach by either party the other should be released, "and to recover and receive as liquidated damages, and not as a penalty, a sum equal to the agreed charge for fashion sheets during the entire term of this contract." On bankruptcy of the purchaser, the claimant sought to prove his claim for the amount provided, and the District Court and Circuit Court of Appeals rejected the claim on the ground the contract was for a penalty. The court said, after referring to the legal measure of damages in such cases:

"The provision in the contract ignores this measure" of damages "altogether, and fixes an arbitrary amount which is grossly in excess of all loss that could possibly have been sustained. This is manifest from the contract itself."

So in this case the parties measured the value of the use of this system at \$210 per year. The property leased, has not been damaged. By taking it the lessor admits it is of value to him elsewhere, and there is no proof it is not, and under this agreement to receive in case of bankruptcy a sum grossly in excess of the value of the use of the property while it was in the possession of the bankrupt the lessor seeks to recover, and receive not only the rent earned, but also the rent for 9 years use which the bankrupt did not have and cannot have by reason of the exercise by the lessor of the right to take possession.

In *United Shoe Machinery Co. v. Abbott*, 158 Fed. 762, 86 C. C. A. 118, it was held that "a contract by a vendor to pay an amount in excess of lawful interest in the event of his default in the payment when due of a simple contract debt" is a contract for a penalty, is against public policy, and unenforceable. It matters not under what guise the provision for a penalty appears, and so here the provision for the precipitation of payment of rent not earned or accrued in due course, and which cannot be earned and which cannot accrue in due course by reason of the act of the lessor in taking possession of the leased property, is evidently a cover for exacting a penalty in case of the financial embarrassment or bankruptcy of the lessee, or a sum in excess of the lawful dividend the lessor would otherwise be entitled to receive. It was evidently intended to subvert or evade the provisions of the bankruptcy law, and no court should lend its aid to the enforcement of such a provision.

The order of the referee allowing the claim at \$1,929.65 is reversed, vacated, and set aside, and he is directed to make an order allowing the claim at such sum and for such rent as was actually earned at the time the system passed to the hands of the receiver; that is, from the date of the lease down to the time the receiver took possession at the rate of \$210 per year. So ordered.

DOBSON v. FARBENFABRIKEN OF ELBERFELD CO. et al.

(District Court, E. D. Pennsylvania. June 25, 1913.)

No. 2,466, March Sess. 1913.

1. COURTS (§ 275*)—FEDERAL COURTS—FOREIGN CORPORATION.

In an action against a foreign corporation, it is essential to support the jurisdiction of the court that it shall appear somewhere in the record, either in the application for the writ or accompanying its service or in the pleadings or findings of the court, that the corporation is engaged in business in the district.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 275.*]

2. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—ACTIONS—SERVICE—STATE STATUTES.

Service of Process Act Pa. July 9, 1901 (P. L. 614) § 2, subd. E, provides that a corporation may be served by handing a true and attested copy of the writ at any of its offices, depots, or places of business to its agents or person for the time being in charge of such office, if on inquiry thereat the residence of one of its designated officers within the county is not ascertained, or if from any cause an attempt to serve at the residence given has failed. *Held* that, where suit was brought against a corporation organized under the Laws of Germany, a New York corporation alleged to have been organized by it to transact its business in the United States, and having a place of business in Philadelphia, plaintiff having alleged that the New York company was the German Company's agent, and was organized to do the very acts complained of by reason of which plaintiff sued to recover treble damages under the Anti-Trust Act of July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), service of process on officers of the New York Company at its

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to-date, & Rep'r Indexes

office in Philadelphia conferred jurisdiction, not only of the New York Company, but of the German Company as well.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2627; Dec. Dig. § 668.*]

3. CORPORATIONS (§ 668*)—SERVICE—CORPORATIONS—AGENTS.

Service of Process Act Pa. July 9, 1901 (P. L. 614) § 2, subd. E, provides that a corporation may be served by handing a copy of the process at any of its offices, depots, or places of business to its agents or person for the time being in charge thereof, if on inquiry thereat the residence of one of such officers previously specified within the county is not ascertained, etc. *Held*, that such section did not necessarily contemplate service on an individual representing the corporation as an agent, but authorized service on a foreign corporation by service on another corporation representing the foreign company as its agent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2627; Dec. Dig. § 668.*]

In Equity. Suit by James Dobson against the Farbenfabriken of Elberfeld Company and another. On motion to set aside service of writ of summons and return. Denied.

George Demming, Charles H. Burr, and Thomas Earle White, all of Philadelphia, Pa., for plaintiff.

Francis B. Bracken, of Philadelphia, Pa., for defendants.

THOMPSON, District Judge. This suit is brought under the seventh section of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202) against Farbenfabriken of Elberfeld Company, a corporation organized and existing under the laws of the state of New York, hereinafter referred to as the New York Company, and Farbenfabriken Vormals Friederich Bayer & Company, of Elberfeld, an alien corporation organized and existing under the laws of the empire of Germany, hereinafter referred to as the German Company.

The act provides that suit may be brought in any District Court of the United States "in which the defendant resides or is found." The present motion is as to the service upon the German Company. The marshal's return, after reciting service upon the New York Company, sets out service upon the German Company as follows:

"Also on the same date on the Farbenfabriken Vorm. Fr. Bayer & Company, Elberfeld, an alien corporation incorporated under the laws of the empire of Germany, by handing an attested copy thereof at No. 9 North Water street, Philadelphia, Pennsylvania, the place of business of the agents of the said defendant, to wit, the Farbenfabriken of Elberfeld Company, to Alfred J. Keppelman, the manager of said company and in charge of the affairs thereof, having duly inquired at said place of business the residence of any of the officers of said defendant within the district, and having failed to ascertain the same."

The specific reasons set up by the defendants for setting aside the service and the return are as follows:

"(1) That the return does not show or allege that the said corporation was transacting business, or that it had an office or place of business, in the state of Pennsylvania.

"(2) That the said return does not state that the said writ was served upon any officer or agent of the said corporation, competent to accept service of said writ on behalf of the defendant."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The defendants contend that the return is defective under the Service of Process Act of Pennsylvania of July 9, 1901 (P. L. 614), and is further defective in its failure to show that the German Company has any existence in this jurisdiction acquired through the exercise of corporate functions or the transaction of business here.

[1] It is essential, in order to support the jurisdiction of the court, that it shall appear somewhere on the record either in the application for the writ or accompanying its service or in the pleadings or the findings of the court that the corporation is engaged in business in the district. *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222.

"In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process." *St. Louis Southwestern Ry. Co. of Texas v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. —, and cases there cited.

[2] The Service of Process Act Pa. July 9, 1901 (P. L. 614), § 2, subd. E, provides that a corporation may be served—

"by handing a true and attested copy thereof, at any of its offices, depots or places of business, to its agents or person for the time being in charge thereof, if upon inquiry thereat the residence of one of said officers within the county is not ascertained, or if from any cause an attempt to serve at the residence given has failed."

In order to sustain the service, therefore, sufficient facts must appear from the record to establish (1) the presence of the corporation through its agents in the district in the exercise of its corporate functions; (2) that the New York Company is its agent in the district; and (3) that No. 9 North Water street, Philadelphia, where the writ was served, the place of business of the alleged agent, is the office or place of business of the German Company.

The plaintiff's statement of claim contains the averment that the German Company "is found in the Eastern District of said state," which, while a conclusion of law, is supported by the following averments bearing upon the questions involved in the present motion:

"The defendants are engaged in the business of manufacturing, producing, and selling dyestuffs and dyeing materials of various kinds. The defendant Farbenfabriken of Elberfeld Company is the agent of the Farbenfabriken Vormals Friederich Bayer & Company, of Elberfeld, the defendant German corporation. This defendant alien corporation, the Farbenfabriken Vormals Friederich Bayer & Company, is engaged in the manufacture of dyestuffs at Elberfeld, Germany. Through agents it sells its products throughout the world, including the various states of the United States of America, and maintains an office in the city of Philadelphia, state of Pennsylvania.

"The said defendant alien corporation procured the incorporation of the New York corporation defendant Farbenfabriken of Elberfeld Company to act as its agent and to sell dyestuffs throughout the United States of America, including the state of Pennsylvania. That the said New York corporation defendant is the corporate creature of the said German alien corporation, and is an attempt by such device and means to evade the provisions of the aforesaid act of July 2, 1890, and to accomplish within the United States of America and the state of Pennsylvania the illegal purposes in restraint of trade embodied in the aforesaid 'cartel' or agreement, and the illegal combination thereby effected. That all the actions, sales, and methods of doing

business and corporate existence of the defendant herein, the New York corporation, defendant, and the alien defendant corporation, are done in furtherance of the aforesaid 'cartel' or agreement in restraint of trade and illegal combination, and were and are intended to effectuate the purposes of said 'cartel' or agreement, and illegal combination throughout the various states comprising the United States of America, including the state of Pennsylvania."

The averments standing uncontradicted are sufficient in my opinion to establish that the German Company is carrying on through the New York Company as its agent the very business which is charged in the statement of claim to have been conducted in violation of the act of Congress. It is averred that all the actions and sales of the New York Company are done in furtherance of the alleged agreement in restraint of trade and illegal combination and intended to effectuate the purposes of that agreement; that the German Company procured the incorporation of the New York Company to act as its agent and to sell dyestuffs in the state of Pennsylvania. Taken altogether, the averments in the statement of claim indicate that the sole business of the New York Company is to act as agent for the German Company in the sale of its dyestuffs under the alleged unlawful agreement; that it was incorporated for that very purpose. While the averment that the German Company "maintains an office in the city of Philadelphia" does not expressly identify such office with the place of business of the New York Company, yet the statements as to the business and the purpose of organization of the New York Company are sufficient to sustain the conclusion that the office alleged to be maintained by the German Company through its agent in Philadelphia is the office and place of business of its agent, the New York Company, as set out in the return.

[3] It follows that the service at that office was a service at the place of business of the German Company within the district. It is urged on behalf of the defendant, the German Company, that the Pennsylvania Act of 1901 permitting service upon a corporation at its place of business by service upon its agents or person for the time being in charge thereof was intended to apply to an individual representing it as agent and not to a corporation so representing it. No authorities have been cited to sustain that contention. It appears that the German Company has constituted the New York Company its agent and transacts its business in this district through that company. The service upon the New York Company is without doubt sufficient to bring it into court; and, inasmuch as the writ was served upon it as agent in the same manner in which it was served upon it as principal, my opinion is that service in that manner is sufficient to bring its principal, the German Company, into court.

In the absence of registration by a foreign corporation under the laws of Pennsylvania under which service may be made upon the duly registered attorney or agent or the person in charge at the registered place of business, a foreign corporation would be enabled to carry on business within the district through a corporate agent and be immune from service of process if it could not be served through its corporate agent in the manner in which service was made in this case.

The motion is overruled.

In re SHULMAN et al.

(District Court, E. D. Pennsylvania. June 26, 1913.)

No. 4,129.

1. SALES (§ 220*)—ASSIGNMENT OF CONTRACT—EFFECT.

A bankrupt, having sold goods and delivered them to a carrier for transportation to the buyer, went to a bank to procure a loan on the account and executed instruments describing the account, and providing that for value received the bankrupt had sold, assigned, and transferred to the bank the claims or accounts set forth in the attached schedule, "and the goods covered by or described therein," and all moneys due or to grow due on the same or sales set forth, etc., with the sole right to collect the same as collateral security for advances. *Held*, that since at the time the assignment was executed the bankrupt had parted with title to the goods, and for that reason could not pledge them, the contract evidenced only a pledge of the accounts or claims against the buyer for the price, so that on his refusal to accept the goods the quoted clause did not vest title thereto in the bank.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 606; Dec. Dig. § 220.*]

2. BANKRUPTCY (§ 140*)—PROPERTY—OWNERSHIP.

A bankrupt, having sold goods and delivered them to a carrier for transportation to the buyer, assigned the account therefor to a bank as security for advances, the instrument providing that, on the buyer's rejection and return of the goods or any part thereof, the bankrupt would receive the same in trust for the bank and surrender them or the proceeds thereof if sold on demand, etc. The goods, having been returned, were redelivered to the bankrupt, and before the bank obtained possession by replevin bankruptcy proceedings intervened, and the goods were delivered to the bankrupt's trustee. *Held*, that such provision of the contract did not effect a valid pledge of the goods for want of delivery to the bank.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

In Bankruptcy. Proceedings against Louis Shulman and others, trading as Louis Shulman & Bro. On certificate to review a referee's order denying the application of the Bank of Commerce for the proceeds of the sale of certain raincoats alleged to have been pledged to the bank by the bankrupts as security for a loan. Affirmed.

B. Franklin Pepper and George Wharton Pepper, both of Philadelphia, Pa., for claimant.

Wessel & Aarons, of Philadelphia, Pa., for trustee.

J. B. McPHERSON, Circuit Judge. This certificate brings up for review the refusal of the referee (D. W. Amram, Esq.) to support the claim of the Bank of Commerce to be the assignee of certain raincoats—either the vendee or the pledgee. The coats were the product of the bankrupts' factory; and, as they were in the firm's possession when

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 206 F.—9

the involuntary petition was filed, the referee was right unless the bank's title was better than the prima facie title of the trustee. The facts now important are as follows:

As part of its business in the city of Philadelphia the bank lends money upon the security of commercial accounts, taking assignments thereof as pledgee. On or about June 28, 1911, a member of the firm applied for a loan upon security of this kind; one or two similar transactions having taken place between the parties. The bank's president asked about the firm's financial condition, and received a written statement showing that six months before, on December 31, 1910, their assets were more than \$135,000 greater than their liabilities. Influenced by this statement, the bank agreed to make certain advances, and the firm executed a regular printed form of assignment, which will be quoted in a moment. The schedule that practically accompanied this form (although it was not actually delivered until the next day) embraced 13 accounts, 5 of them aggregating \$14,524 for coats sold by the firm to Charles Josephson of New York, and upon these 5 the bank lent \$10,892. The firm also delivered to the bank the usual invoices describing the goods in detail, and a bill of lading or freight receipt showing shipment by rail to Josephson on June 28. Both the bank and the firm gave Josephson prompt notice of the assignment. At this time the bank had no knowledge, and no reasonable cause to believe, that the firm was insolvent. Josephson refused the goods, and they came back to the firm toward the end of July. They were then unpacked, and placed with the rest of the stock. The accounts would not have fallen due until October, and Josephson did not inform the bank that he had rejected the goods. Neither did the firm advise the bank of that fact until the last day of July. Thereupon the bank demanded immediate repayment of the loan, and when the firm could not repay, but offered the goods instead, the bank declined the offer, and continued during several days to demand either repayment, or some other satisfaction than delivery of the coats. But on August 7 the landlord distrained for rent upon these among other articles, and as the situation had evidently become critical the bank on August 8 for the first time demanded possession, claiming to be the assignee (either as vendee or pledgee) under the paper executed on June 28. On August 9 an involuntary petition in bankruptcy was filed, and on August 11 the bank replevied the coats, but, of course, could not interfere with the district court's possession, and was compelled to give them up. They were afterwards sold by a receiver, and this contest is over the proceeds of sale.

[1] Let us now examine the contract of June 28. Except one paragraph, which I omit for the present, the agreement is as follows:

"Know all men by these presents, that Louis Shulman & Bro. for value received have bargained, sold, assigned, transferred and set over, and by these presents do bargain, sell, assign, transfer and set over unto the Bank of Commerce, its successors and assigns, the claims or accounts set forth in the schedule hereto annexed, marked 'Schedule A' for identification, and made a part hereof, and the goods covered by or described therein, and all moneys due or to grow due upon the same, or sales therein set forth, and the sole

right to collect the same, as collateral security for the payment of the advances hereunder made to the undersigned by the Bank of Commerce and as collateral security for the payment of any past or any future obligations of or advances made to the undersigned, and all securities, property, accounts and claims together with any that may be pledged hereafter, shall stand as one general continuing collateral security for the whole of said obligations or advances, so that the deficiency on any one shall be made good from the collateral for the rest; and we hereby constitute and appoint said Bank of Commerce our true and lawful attorney, irrevocably for us and in our name and stead, but to its own use and benefit, to collect, receive, receipt for, sell, assign, transfer, set over, compromise or discharge the whole or any part of the aforesaid claims or accounts, and for that purpose to do all acts and things necessary or proper in the premises, and one or more persons to substitute with like power, hereby ratifying and confirming all that our said attorney or its substitute or substitutes shall lawfully do by virtue hereof.

"The undersigned hereby guarantees and certifies that the accounts so assigned are bona fide sales and correct accounts for goods actually sold and delivered and accepted, and that there is no set-off or counterclaim of any kind thereto; and agrees that any counterclaim or deductions allowed will be refunded by us by allowing the same to be deducted from future advances or by payment of the amount of such deductions in cash at the option of the Bank of Commerce, and that any invoices or bills rendered by us for these accounts shall have the statement upon their face, that they are payable only to the bank of deposit designated by the Bank of Commerce.

"The undersigned hereby guarantees payment in full at maturity of the accounts hereby assigned and of all other accounts which may be assigned in the future, and hereby authorizes the Bank of Commerce to charge to our account the amount of any accounts so assigned which may become overdue or in the opinion of the bank are undesirable. * * *

"The undersigned hereby covenants that all the said merchandise so sold, shipped and delivered was packed under our personal supervision and legibly marked with the address of the consignees and delivered to common carriers, against their receipts or bills of lading to be forwarded to their respective destinations.

"The amounts advanced by the Bank of Commerce shall bear interest at six per centum per annum, and the said bank shall be entitled to charge for its collection services $\frac{1}{2}$ per centum per month on the face value of all accounts assigned to it to the date of collection or payment.

"And we do hereby represent to the said Bank of Commerce that the said respective amounts in 'Schedule A' are owing to us and are outstanding to our credit and our name to the amount set forth in the said annexed schedule and that they have not been transferred or assigned, or given in any way as collateral security or otherwise, to any other person, and that these representations and covenants are made for the express purpose of inducing the said Bank of Commerce to part with its money and make this loan.

"In case the undersigned shall hereafter assign to the Bank of Commerce accounts additional to those included in 'Schedule A' said additional accounts shall upon acceptance by the bank become subject to all the provisions of this agreement as if originally entered in the schedule.

"In witness whereof we have hereunto set our hand this June 28th day, 1911.

Louis Shulman & Bro.

"By Louis Shulman."

Attached to this paper is a form of Schedule A, which is intended to receive the names and other descriptive details of such accounts as may be assigned; but, although the schedule also was duly signed, it remained blank, and no entries were ever made therein. But on the next day, June 29, the firm presented to the bank the following paper:

"Louis Shulman & Bro.

"Date June 29, 1911.

No. 39013

"To the Bank of Commerce, Philadelphia, Pa.

"Referring to our contract with you, dated June 28, 1911, we hereby tender for your acceptance additional accounts as per schedule enclosed. Upon your acceptance these accounts will become subject to all the provisions of said contract as if originally scheduled therein.

Due Date	Name	Address (City and State)	Gross Amt. of Invoice	Advance
Oct. 24	Chas. Josephson	New York	\$1327.50	996.
Nov. 9	do do	do	6359.50	4770.
" 9	" "	"	1713.00	1283.
Dec. 9	" "	"	3200.00	2400.
" 9	" "	"	1924.00	1443.
	&c. &c. &c.			

"Dated June 28, 1911.

"We do hereby certify and declare that the above is a true and correct inventory of the accounts assigned by us this day to the Bank of Commerce, for goods shipped to the above named firms.

"Louis Shulman & Bro.

"By Louis Shulman."

[1] These two papers constitute the contract, and I think it is clear that the transaction (up to this point, at least) is the ordinary pledge of book accounts as collateral security for a loan. If it were not for the clause italicized—"and the goods covered by and described therein"—there is not a word that even suggests a different agreement. And this clause is suggestion merely, for I think it is equally clear that the clause could have no immediate effect upon the goods themselves. No doubt it professes to pledge them, but at the time the firm had no such power. The coats had previously been the undisputed and unincumbered property of the firm; they had been sold to Josephson, had been consigned to him at New York, had been delivered to the carrier, and at the time the contract of June 28 was executed the firm had neither title nor possession, and could not pledge them to the bank. An agreement might be made to pledge them in the future if certain contingencies should arise—that matter will be considered hereafter—but they could not be pledged in fact because they had already been sold to another person, and had passed out of the firm's possession and control. Therefore the clause just referred to had no effect at that time upon the title to the goods; at the best, it amounted merely to a promise by the firm that, if necessary, they would pledge the goods to the bank at some indefinite time in the future, and under some undefined circumstances. Therefore, upon the foregoing portion of the agreement, no title to the coats was conveyed to the bank. Accounts were transferred, but not the tangible property.

[2] But the omitted paragraph must now be considered. It contemplates that the goods may not be accepted, in whole or in part, and undertakes to provide for such a contingency.

"And the undersigned hereby covenants to and with the Bank of Commerce that in the event of rejection and return of all or any part of the merchan-

dise so sold, shipped and delivered, that we will receive the same in trust for the said Bank of Commerce under advice to them and surrender it, or the proceeds thereof if sold, upon demand; and that if we should fail to pay the Bank of Commerce any sum or sums which may be due hereunder, or should we convert or appropriate any property, checks or payments belonging to the Bank of Commerce, that then and in such case any attorney of any court of record of this state or elsewhere may appear for us and on our behalf, and confess judgment in an amicable action of assumpsit or trespass against us for the amount so due and owing, or for the value of said property, checks or payments retained, converted or appropriated, with waiver of exemption, release of errors, attorneys' commission of ten per cent. and without stay of execution. If the undersigned shall be a corporation, its officers or agents signing for it shall be jointly liable hereunder, and be made parties defendant in such action."

Giving this paragraph its fullest effect, I cannot see that it helps the bank in the present dispute. We must remember that the coats had from the first been the firm's own property, and that the original title revested when the goods were returned. The firm had already promised to pledge the coats to the bank, and in the foregoing paragraph the promise is now repeated, "We will receive the same in trust for the said Bank of Commerce under advice to them and surrender it, or the proceeds thereof if sold, upon demand;" but this is not the equivalent of an actual sale, or an actual pledge, as against a trustee in bankruptcy or creditors having a lien. To make such a sale or pledge effective, delivery or its equivalent is essential, and there is no pretense that delivery was made or even attempted. The trust receipt cases—of which *Century Throwing Co. v. Muller*, 197 Fed. 252, 116 C. C. A. 614, in this circuit is a recent example—differ in this vital fact: In those cases the debtor had never acquired title to the property in question; the title had always been in some one else; and his creditors were not allowed to deal with the property of this other person as if it were the debtor's, although the property had come into the debtor's actual custody. But here the debtor had always been the owner, and was also in actual possession; and the question is, How and when did the claimant validly acquire the debtor's title—either by sale or by pledge? This is a widely different inquiry, and the answer in the particular case is this: The claimant never did acquire such a title, for although the debtor promised to transfer it, he never did, and meanwhile the bankruptcy act makes effective the superior rights of the trustee. *Guarantee Title Co. v. Bank* (C. C. A. 3d Cir.) 185 Fed. 373, 107 C. C. A. 429; *Bank v. Penn Motor Co.*, 235 Pa. 194, 83 Atl. 622.

The referee's order is affirmed.

UNITED STATES v. ALBERTINI.

(District Court, D. Montana. May 28, 1913.)

1. ALIENS (§ 71½, New, vol. 7 Key-No. Series)—NATURALIZATION—CANCELLATION OF CERTIFICATE—"ILLEGALLY PROCURED."
In Naturalization Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1911, p. 537), authorizing the cancellation of a certificate of citizenship on the ground of fraud, or that it was illegally procured,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the term "illegally procured" imports a certificate issued by a court without jurisdiction or in violation of the law's procedure.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 146.]

2. ALIENS (§ 71½, New, vol. 7 Key-No. Series)—NATURALIZATION—CANCELLATION OF CERTIFICATE—PROCUREMENT BY FRAUD.

From the nature of proceedings for naturalization, in that they are in fact and practice essentially *ex parte*, it is obligatory upon the applicant to answer all prescribed questions fully and truthfully; and a certificate issued to an alien on his verified petition in which he stated that he was unmarried, when in fact he had a wife and children, whom he deserted and left in his native country, is subject to cancellation on the ground of fraud.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 146.]

Petition by the United States against Celeste Albertini for cancellation of naturalization certificate. Decree of cancellation.

J. W. Freeman, U. S. Atty., and S. C. Ford, Asst. U. S. Atty., both of Helena, Mont.

Kremer, Sanders & Kremer, of Butte, Mont., for respondent.

BOURQUIN, District Judge. Proceeding to cancel a certificate of citizenship issued to defendant by a state court in 1910. The complaint herein alleges that said certificate was illegally procured in that defendant in his petition therefor stated he was not a married man and was not a believer in anarchy, whereas in truth defendant then had a wife and children living in Austria, and then was and now is an anarchist and of immoral character, in that he had frequently expressed anarchistic views; declarations in evidence thereof being pleaded. The answer denies all said allegations in reference to anarchism, but admits the same in reference to defendant's wife and children, pleading in avoidance that "many years ago, by mutual consent" of himself and his wife, "they declared their marriage contract to be of no further obligation" and "agreed to consider their marital relations at an end," thereupon ending the same; that his statements in his said petition in reference thereto were without fraudulent design or intent, and in the belief that they were in relation to his status in the United States. The reply denied all new matter.

From the evidence it appears the United States was represented at the hearing upon defendant's petition for citizenship, but by whom and the extent of its participation therein is not stated. There is evidence tending to prove the allegations in reference to defendant's anarchism, but under the circumstances it is not the clear, strong, and convincing proof necessary to the cancellation of a public grant, to which naturalization is analogous. The evidence in the matter of defendant's family is his own, in substance that in 1894 he and his wife married in Austria. In 1903 two female children had been born to them. He believed her at fault and separated from her, telling her she would not see him again. He came hither, another child was born, he occasionally sent her money for the support of the children, and at no time intended to bring her hither. When his petition for citizenship was prepared, he told the clerk he was not married, and no further

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

questions were asked him in reference to his family. He "considered" himself the "same as single," had no fraudulent intent, and "didn't think it would make any difference."

[1] Neither the complaint nor the proof makes out a case of a certificate "illegally procured," in that the term as used in Act June 29, 1906, c. 3592, § 15, 34 Stat. 599 (U. S. Comp. St. Supp. 1911, p. 537), imports a certificate issued by a court without jurisdiction or in violation of the law's procedure—without a petition or witnesses, or notice, or hearing, for example.

[2] The complaint tends to charge the certificate was procured by fraud, and though in the matter of the false statements in reference to defendant's family it may not have withstood demurrer, it will be deemed amended, in that evidence admitted without objection establishes the charge. The act aforesaid provides the public and the United States are to be notified of naturalization proceedings; that the latter may appear at the hearings, cross-examine petitioners and witnesses, call witnesses, produce evidence, and be heard in opposition. However, the great number of such proceedings throughout the country by aliens from the four quarters of the globe makes participation by the United States little more than formal. Aliens present themselves as friends, soliciting the boon of citizenship from the United States. It is their duty to make true and full disclosure of their qualifications, and honest answer to all questions prescribed. Some thereof relate to mental views and trend of thought, and that may be known to no one but the alien. Some relate to the alien's past, perhaps in an obscure quarter abroad. Some are incapable of reasonable investigation and disproof, if falsely answered or concealed, and are perforce taken largely on trust. The situation renders it easy for the dishonest alien to violate his obligation to deal fairly, enables him to successfully practice deception and concealment, and to abuse the trust of the government.

The government is friendly, and not adversary. There is no opposition, no contest, in the true sense of the word. In theory and form the proceedings may be in their nature adversary; but in practice and substance there is no adversary, and from that standpoint they are still *ex parte*. They are still analogous to proceedings in the land office to procure patents to public lands, wherein there is like notice of patent proceedings, right to appear, cross-examine, call, produce, oppose. The alien in the former as the entryman in the latter, in much yet has it virtually his own way. And even as the proceedings and patents in the latter are not res judicata against the government, so the judgment and certificate in the former are not conclusive upon it. It would not seem that the act aforesaid contemplates otherwise. Section 15 provides for cancellation of certificates on the ground of fraud or that they were illegally procured. It is not perceived wherein the said act either detracts from or adds to the rights and remedies of the government as they were prior to its enactment. The only change effected is notice posted by the clerk and copies of petitions by him transmitted to the Bureau of Immigration and Naturalization.

The design is to enable the government to exercise some supervision over the proceedings, some watchfulness, and in its discretion to op-

pose, contest, and convert the proceedings into those actually adversary. It may be that, if this discretion be so exercised, the judgment and certificate would be *res judicata* in the matter of fraud intrinsic the record. But that does not appear to be this case. Even as before the act aforesaid the government could maintain a bill to cancel certificates for fraud intrinsic the record, so can it since in a case like unto this at bar. The fraud, however, in pleading and proof, must rise to the bad eminence of that in any case—false representations or concealments of material facts, and without which the judgment would not have been rendered and the certificate of citizenship would not have been issued. See *Johannessen v. U. S.*, 225 U. S. 241, 32 Sup. Ct. 613, 56 L. Ed. 1066.

Defendant admits to abandonment, in legal contemplation, of his family in Austria for seven years prior to his admission to citizenship. If justified in separating from his wife, the burden *was on him* to demonstrate it and he has not. His evidence under the circumstances is not satisfactory. Married, he denied it; the United States, deceived, could make no investigation, and accepted his untrue statements as true. His abandonment existed during all the five years immediately preceding issuance of the certificate involved. It was not consistent with good morals, and hence during said period he had not behaved, as the law requires, as a man of good moral character. Had the truth been disclosed at the hearing upon his petition, as it is disclosed here, the result would not have been what it was. Without the misrepresentations and concealments by him at said hearing, the judgment therein would not have been rendered—the certificate would not have been issued.

It follows that the defendant's certificate of citizenship involved was procured by fraud and should be set aside and canceled.

Decree accordingly.

BUZBY v. KEYSTONE OIL & MFG. CO.

(District Court, N. D. Illinois, E. D. July 14, 1913.)

No. 30,823.

TRADE-MARKS AND TRADE-NAMES (§ 59*)—INFRINGEMENT—INJUNCTION.

Complainant engaged in manufacturing lubricating grease, adopting the trade-name "Keystone Lubricating Company," and as a trade-mark the symbol of the keystone of an arch, to be used in marking its packages, the word "Keystone" being used in connection, and its grease became known as "Keystone grease." *Held* that, confusion resulting, and the public being misled to buy defendant's lubricating grease, from its using the word "Keystone" in its corporate name, "Keystone Oil & Manufacturing Company," and to indicate its product, it should be enjoined from using that word in that part of its business.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 68-72; Dec. Dig. § 59.*]

In Equity. Suit by Augustus C. Buzby, doing business as the Keystone Lubricating Company, against the Keystone Oil & Manufacturing Company. Decree for complainant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Culver, Andrews & King, of Chicago, Ill., for complainant.
Parker & Carter, of Chicago, Ill., for defendant.

SANBORN, District Judge. This is a bill for infringement of a trade-mark, and for unfair competition. It appears that complainant began doing business in 1885 or 1886, manufacturing lubricating greases; that he adopted the trade-name "Keystone Lubricating Company" at that time; and that he registered a trade-mark, being the symbol of the keystone of an arch, its essential feature being the representation of a keystone, to be used for attaching to the cans or packages of grease which he manufactured and sold, the word "Keystone" being used in every connection. It further appears that the business grew from year to year, and that through extensive advertising by means of circulars and catalogues, and through steady and long-continued advertising in trade journals, and particularly through advertising by means of sending free a sample of the grease, with an engineer's cap and a grease cup for the purpose of introducing it, the grease became widely known, and the name "Keystone grease" became in time to be known as the grease which was manufactured by the Keystone Lubricating Company.

From about 1890 until 1901 the complainant worked the Chicago territory by sending traveling men here to stay for a few days up to two weeks at a time, calling upon the local trade; and during those years it appears that he had worked up and had established a substantial trade in the Chicago territory. The Keystone Lubricating Company had advertised Keystone grease in the National Engineer, a Chicago publication, as far back as 1894, and about the year 1901 the business had apparently grown sufficiently in this locality to justify the establishment of an office in Chicago. A permanent office was accordingly established and maintained in Chicago from 1901 or 1902 on, down to this date.

It further appears that the grease manufactured by the complainant, and known as "Keystone grease," is the highest priced grease on the market, and that it is sold and used in every state in the Union, and in practically every country in the world, and that the extensive and steady advertising which has been done by the complainant, and the quality of the grease itself, has resulted in a steady increase of his gross sales from year to year.

Defendant was incorporated in the year 1900, but did no business whatever in lubricating greases until the year 1903. From that time on until 1911 its activities in lubricating oils and greases were very limited, its business being confined almost entirely to the sale of gasoline and light oils.

The only infringement of the complainant's trade-mark, if any, consists in the use of the word "Keystone" in the defendant's corporate name, and in the fact that it is claimed that the public has been deceived by such similarity, in that the defendant's lubricating grease has been purchased on several occasions by persons believing they were buying the complainant's brand. The cans in which the complainant and defendant sold their goods are radically different. The color, lettering, and descriptive matter are wholly distinct, as well as the odor

of the grease itself. The defendant denies any intention to deceive in the use of the word "Keystone" in its corporate name, and claims that the fraud alleged in the bill in that respect has not been proved.

It appears from the evidence that after the bill was filed the John Lauson Manufacturing Company, of New Holstein, Wis., which had been a customer of complainant for a considerable time, ordered from defendant four 25-pound pails of No. 3 Keystone grease. The order was filled in cans marked with the defendant's name, describing the contents of each can as "Banana grease." The purchasing agent and engineer of the Lauson Company had used the complainant's Keystone grease, and it appears it was the intention of the purchaser to buy such grease, and not that of defendant. Another instance of confusion appears in the testimony. The witness Kliver, who keeps a garage in Chicago, bought defendant's grease, believing it to be complainant's brand, and subsequently one of complainant's salesmen solicited his order for lubricating grease, and shortly thereafter was informed by Kliver that he had bought some grease from complainant, when as a matter of fact he was referring to that which he had purchased from defendant. It is clear that Kliver supposed he was buying complainant's brand. Another instance of confusion is that of the Hibbard, Spencer & Bartlett order. The government advertised for bids upon lubricating Keystone genuine grease. The Hibbard firm, who are jobbers, telephoned to the defendant, supposing they were the manufacturers of the genuine Keystone grease, referred to in the bids. The purchasing agent asked defendant's agent over the telephone if they handled the genuine Keystone grease, and he was assured that they did. The Hibbard firm thereupon put in a bid and got the order, but the grease was rejected, as not being genuine Keystone grease. These are the only instances shown in the testimony that any one was deceived into buying defendant's product supposing it to be that of complainant.

The questions presented are whether the complainant's trade-mark is a valid one, whether the word "Keystone" has obtained a secondary meaning, so that the words "Keystone grease" have come to be known to mean the article made by complainant, and whether fraud has been sufficiently established. No direct proof of any fraudulent intent has been adduced, but it is insisted by complainant that the similarity of name tends to deceive the public, and that the instances above referred to show that fraud is actually being perpetrated upon the public.

The same complainant prosecuted an infringement suit in the Eighth circuit, the case being reported under the name of *Buzby v. Davis*, 150 Fed. 275, 80 C. C. A. 163, 10 Ann. Cas. 68. It was there held that the complainant's trade-mark is valid as such. The court say:

"The arbitrary symbol of the keystone of an arch is not a geographical term. It is the proper subject of exclusive appropriation as a trade-mark, and it was so under the common law before the state of Pennsylvania came into existence."

Of course, the general rule is fairly established that words which do not themselves indicate the origin, manufacture, or ownership of the goods, but are merely descriptive of the place where the article

is made or produced, cannot be monopolized as a trade-mark. *Elgin National Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365. It is thought that the *Davis Case* states the proper rule of law applicable to this case.

The complainant having a valid trade-mark, the defendant had no right to use the word "Keystone" in its corporate name, so far as the sale of lubricating grease by it is concerned, if the public is thereby misled. The instances cited show that the similarity of name causes confusion and mistake, and are thought to be sufficient to justify the claim of fraud made by the bill. Defendant does not infringe the trade-mark by marking his goods, but by using the same name to indicate its product. Confusion and mistake result, and this is sufficient to entitle the complainant to the relief prayed.

Defendant should incorporate its lubricating grease business under some other name, or adopt some other plan to avoid infringement.

In re HENDERSON.

(District Court, N. D. Georgia. May 15, 1913.)

No. 3,339.

BANKRUPTCY (§ 260*)—JURISDICTION OF COURT—DETERMINING VALIDITY OF LIEN.

In a proceeding by a trustee for an order authorizing the sale of real estate in his possession, the bankruptcy court is without jurisdiction to cite into court a mortgagee of such real estate and adjudicate upon the validity of his mortgage, without his consent and over his objection.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 360; Dec. Dig. § 260.*]

In the matter of C. E. Henderson, bankrupt. On petition by H. A. Ferris, trustee, for an order to sell real estate and for the determination of the validity of a lien thereon. Petition denied.

Moore & Pomeroy, of Atlanta, Ga., for trustee.

D. W. Blair, of Marietta, Ga., for Marietta Trust Co.

NEWMAN, District Judge. The question before the court now is on a petition of H. A. Ferris, trustee for C. E. Henderson, bankrupt, which shows that certain real estate, which is described in the petition, was scheduled by the bankrupt as a part of his estate. The petition further shows that the property had been appraised by appraisers appointed by the court, and is now rented by the trustee and the rentals collected by him. The trustee states that it is for the best interests of the estate that this property be sold, and requests that he be authorized to sell the same.

He then states that there is of record upon the books of the clerk of the superior court of Cobb county, Ga., an instrument purporting to be a deed to secure a loan, executed by C. E. Henderson to Marietta Trust & Banking Company, of date January 11, 1910, given to secure the principal sum alleged to be due such bank of \$10,625, and that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said instrument was filed for record in the office of the clerk of the superior court on October 8, 1912, at 9 o'clock a. m.

The trustee then charges that the deed is void, and of no force and effect, first, because the lien of the trustee is superior to that of the Marietta Trust & Banking Company, because said instrument was filed for record on the 8th day of October, 1912, the day subsequent to the adjudication of said C. E. Henderson as a bankrupt herein, said adjudication being on the 7th day of October, 1912; second, that the property is not described with sufficient definiteness and certainty to constitute a legal conveyance of the same; third, because the instrument was withheld from record for the purpose of, and had the effect of, bolstering up the credit of said C. E. Henderson, and thereby defrauding the other creditors of said C. E. Henderson; fourth, because the debt described in the instrument has been fully paid and satisfied, and none of said amount as specified therein is now due and payable.

The trustee shows that said alleged security deed is a cloud upon the title of the trustee, and will prevent said property from bringing its full and fair market value, unless the same is ordered sold free from said alleged lien, and unless said alleged lien is ordered canceled and the same declared to be inferior to the rights and lien of said trustee.

Wherefore, considering the above and foregoing, the trustee prays that the Marietta Trust & Banking Company be made a party respondent herein, that it be ordered and directed to show cause why its alleged claim of lien should not be held to be void and inferior to the rights of the trustee, and that he be authorized to advertise and sell said property at such time and place as the court may decree, free from the liens and claims of said Marietta Trust & Banking Company, and free from the claims and liens of all persons whomsoever.

The Marietta Trust & Banking Company appeared, and in the pleadings filed by it denies the jurisdiction of the court to determine the validity of the defendant's deed to the property referred to in this petition, and declines to consent for the court so to do. It then, without waiving its denial of jurisdiction, sets up that the several claims of the trustee as to the invalidity of this mortgage are not good and sufficient.

This petition of the trustee, while apparently asking mainly for authority to sell, also brings into question the validity of this deed to the Marietta Trust & Banking Company to secure the amount of money named above.

The petition of the trustee appears to have been presented to the referee on the 15th of November, 1912, who made an order making the Marietta Trust & Banking Company a party respondent to this petition, and the further order that all parties at interest show cause before him on the 30th of November, 1912, why the prayer of the trustee should not be granted, and the property therein described be sold free from the liens and claims of all persons whomsoever. The trustee was deputized to make service of the petition by serving a copy upon the cashier or other officer of the Marietta Trust & Banking Company. This service was acknowledged by counsel for the Marietta Trust & Banking Company.

I do not believe that the validity of this deed to secure the Marietta Trust & Banking Company can be passed upon and determined in this proceeding. It seems to me that a plenary proceeding of some sort will be necessary. As will be seen, there is no subpoena—simply an order by the referee to show cause. If the Marietta Trust & Banking Company had been present by its counsel in the proceedings which have taken place for the taking of testimony, etc., without objecting, it might be, in view of the fact that the evidence seems to have been pretty thoroughly taken, that the case should now be decided on what is before the court; but the Marietta Trust & Banking Company has been objecting all along, by demurrer and otherwise, to the jurisdiction of the court, and claiming that a plenary suit should be instituted against it before the validity of the security deed should be considered or determined.

I have, until recently, thought that this case could be determined on the present record, and for that reason have called upon counsel for briefs on certain questions affecting the merits of the matter; but, having looked into it more carefully, I am satisfied now that this cannot be done, and that the trustee must proceed by a plenary proceeding to remove this incumbrance from the property in question, if he can do so.

The result of this is that I must deny the present petition, although it seems to me it would be wise for counsel to agree, if they can do so, to sell the property and litigate over the proceeds. I have not been informed of the extent to which income is being derived from the property, which is a matter to be considered in connection with the question of speeding the sale.

All that is said here, and any order that may be taken, is, of course, without prejudice to the trustee in taking such action as he may hereafter be advised.

UNITED STATES v. MIDWEST OIL CO. et al.

(District Court, D. Wyoming. June 14, 1913.)

No. 733.

PUBLIC LANDS (§ 29*)—WITHDRAWAL FROM ENTRY—POWER OF SECRETARY OF THE INTERIOR.

Prior to Act June 25, 1910, c. 421, § 1, 36 Stat. 847 (U. S. Comp. St. Supp. 1911, p. 593), authorizing such action, neither the President nor the Secretary of the Interior had power to make an order withdrawing public lands from settlement, location, sale, or entry under the public land or mining laws.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 41-47; Dec. Dig. § 29.*]

In Equity. Suit by the United States against the Midwest Oil Company and others. On motion by defendant to dismiss. Motion sustained.

Ernest Knaebel, Asst. U. S. Atty. Gen., of Denver, Colo., H. S. Ridgely, U. S. Dist. Atty., and Wm. E. Mullen, Asst. U. S. Dist. Atty., both of Cheyenne, Wyo.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Vaile, McAllister & Vaile and Schuyler & Schuyler, all of Denver, Colo., and Lee Champion, of Casper, Wyo., for defendants.

RINER, District Judge. The bill of complaint in this case seeks to have declared void the claim of title asserted by the defendants to certain oil lands located in Natrona county, Wyo., and described in the bill as the N. E. $\frac{1}{4}$ of section 11, township 9 N., of range 70 W. The defendants have filed a motion to dismiss. The facts as disclosed by the bill may be briefly stated as follows:

On the 27th of September, 1909, the Secretary of the Interior issued what is designated in the record as temporary petroleum withdrawal No. 5, which is in the following words:

"In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public land laws. All locations or claims existing and valid at this date may proceed to entry in the usual manner after field investigation and examination."

Then follows a description of the lands in the states of California and Wyoming, which includes the 160 acres involved in this suit. It is further stated in the bill that subsequent to the issuance of this withdrawal order, and on the 27th of March, 1910, the grantors of the defendants entered upon the land in controversy and sunk a well to a great depth, and had therein encountered, and thereby rendered subject to ready extraction, large deposits of petroleum of great commercial value within the above-described parcel of land. The bill shows that no work had been done by the grantors of the defendants, the original claimants, prior to the 27th of March, 1910, nor was there any discovery until after the latter date. The bill then states that on May 4, 1910, the original claimants caused to be filed for record and to be recorded in the records of Natrona county a location certificate bearing date March 10, 1910, evidencing a claim or location by them of the lands described in the bill as a petroleum placer mining claim, under and in pursuance of the mining laws of the United States. It then sets forth that the property was transferred to the defendants, and that the rights of the defendants are based solely upon a transfer and assignment of the rights in said lands acquired by the previous location and by the drilling of said well; that the location was violative of the order of withdrawal and of the act of Congress approved June 25, 1910. The bill then states that the defendants had extracted more than 50,000 barrels of oil of the value of \$1 per barrel; that a demand was made upon the defendants on December 19, 1911, to vacate the lands and surrender possession, which they refused to do; that the present value of the lands exceeds \$250,000. The bill closes with a prayer that the defendants be decreed to have no estate, right, title, or interest in or to the land, or to the minerals therein, and that the lands and minerals be adjudged to be the property of the plaintiff. It also prays for an injunction and accounting.

The sole question presented by the motion to dismiss is whether the Secretary of the Interior, even by the direction of the President, had

the power, implied or otherwise, to withdraw these lands from entry in the absence of congressional legislation authorizing him to do so. Prior to the 25th of June, 1910, there was no statute expressly authorizing the Secretary of the Interior or the President to make withdrawals of public land of the class herein described and for the purpose named in the order of withdrawal from settlement, location, sale, or entry under the public land or mining laws of the United States. This being true, the question is narrowed to this: Did the Secretary of the Interior or the President, under the expressed or implied powers conferred upon them to administer the land laws and to make all needed rules and regulations with reference thereto, have the power to make the withdrawal order of September 27, 1909?

While the question resolves itself into a narrow one, it opened a broad field for discussion and was ably argued by counsel on both sides. It would be interesting indeed to notice at some length the propositions discussed by counsel in support of and against the existence of the power to promulgate this order, and to review the authorities to which the court's attention was directed; but as the case will doubtless go to an appellate court (and the court indulges the hope that it will) that seems unnecessary. It is quite sufficient for the court here to say that it has devoted itself to a careful and painstaking examination of every authority called to its attention by counsel, both at the oral argument and in the briefs, and that such examination and consideration has led to the conclusion that the power did not exist, in the absence of congressional legislation authorizing it.

A decree will be entered sustaining the motion and dismissing the bill, with an exception allowed to the plaintiff.

In re CHALMERS.

(District Court, D. Montana. May 29, 1913.)

No. 714.

BANKRUPTCY (§ 140*)—BAILMENT—RECLAMATION OF PROPERTY BY BAILOR.

A shipment of flour to a bankrupt, on an oral agreement that he would store it, sell as he could, and thereupon account and pay for the quantity sold at invoice price was not a conditional sale, but merely a bailment until and to the extent that sales were made, and on the bankruptcy the shipper was entitled to reclaim from the trustee the flour remaining unsold.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

In the matter of C. D. Chalmers, bankrupt. On review of referee's order denying petition of the Madison State Bank for reclamation of property. Reversed.

M. M. Duncan, of Virginia City, Mont., for trustee.

E. B. Howell, of Butte, Mont., for claimant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BOURQUIN, District Judge. Review of a referee's order, denying a claimant's petition for delivery to it of certain property in the possession of the trustee as assets of the bankrupt's estate.

It appears the claimant owned certain flour, which it shipped to the bankrupt in July, 1911, upon an oral agreement that the bankrupt would store it, sell when he could and thereupon pay to the claimant the invoice price. The flour was a local brand, without established market, and the bankrupt would not buy it. The claimant says that so far as it was concerned the bankrupt could do what he pleased with the flour, so long as he paid the invoice price; but the agreement was as aforesaid. The bankrupt sold some of it, and accounted to the claimant on demand in November, 1911. Thereafter he sold more, but did not account or pay for it. During this time the claimant also sold some of the flour, and the bankrupt delivered it; but the bankrupt received no compensation of any kind, and claims none. The bankrupt was so adjudicated in November, 1912. He scheduled the balance of the flour as assets, and the value as a debt due claimant. The trustee took possession.

If the arrangement was a conditional sale, it is void under local law. The agreement is brief; but, taken in connection with what the law implies and the conduct of the parties, it would seem their intention was not a conditional sale, but in the nature of a consignment to sell, and in legal effect a bailment, with an option in the bankrupt to purchase, and to be exercised, if at all, simultaneously with and to the extent of any sale of the flour by the bankrupt. It resembled, but was not, a *del credere* agency. Upon any sale made, the bankrupt alone became debtor to the claimant for the invoice price, and he could sell at any time, to any one, at any price, and on any terms. He sold as principal; the legal effect being that, when he sold, he also bought from the claimant, and title was transferred out of the claimant, via the bankrupt, to the purchaser. The bankrupt did not agree to buy when possession was given him, nor did the claimant agree to sell to him. The relation of debtor and creditor did not exist between them then, nor until sale made by the bankrupt, and then only to the extent of the sale. The bankrupt did not agree to pay, nor did he become liable to pay, for unsold flour at any time. Before sale, the flour could not have been levied on for the bankrupt's debts, but could have been for the claimant's debts. Before sale, the claimant could sell the flour or demand possession at any time. Before sale, the flour destroyed, the loss would be wholly claimant's; and, before sale, title was wholly in claimant. All this distinguishes bailment from sale. See *Nutter v. Wheeler*, Fed. Cas. No. 10,384; *In re Linforth*, Fed. Cas. No. 8,369; *Tiedeman, Sales*, §§ 5, 8.

The order of the referee is reversed, with directions to restore the flour to claimant.

UNITED STATES v. KNIGHT et al.

(Circuit Court of Appeals, Eighth Circuit. July 28, 1913.)

No. 3,921.

INDIANS (§ 15*)—INDIAN LANDS—ALLOTMENT—CONVEYANCE BY HEIRS—APPROVAL—AUTHORITY—WHAT LAW GOVERNS.

Act Cong. April 26, 1906, c. 1876, § 22, 34 Stat. 145, provided that the adult heir of any deceased Indian of either of the Five Civilized Tribes, whose selection of public land had been made, or to whom a deed or patent had been issued for his share of the land of the tribe, might sell and convey the land so inherited, except that all such conveyances were subject to the approval of the Secretary of the Interior. Act May 27, 1908, c. 199, § 9, 35 Stat. 315, provided that the death of any allottee of the Five Civilized Tribes should remove all restrictions on the alienation of the allottee's land, except that no conveyance of any interest of any full-blood Indian heir in such land should be valid, unless approved by the court having jurisdiction of the settlement of the allottee's estate. *Held*, that the validity of deeds of Indian heirs depends on the law in force at the date of the deed, and hence, where a conveyance by a sole Indian heir of her inherited allotment was made October 12, 1908, and was approved by the county court having jurisdiction of the settlement of the ancestor's estate, it was valid, without the approval of the Secretary of the Interior, though the ancestor died prior to the adoption of the act of 1908.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.*]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Action by the United States of America against Morris F. Knight and another. Judgment for defendants, and the United States appeals. Affirmed.

William J. Gregg, U. S. Atty., of Tulsa, Okl. (John B. Meserve, of Muskogee, Okl., on the brief), for the United States.

John B. Campbell and Joseph C. Stone, both of Muskogee, Okl. (Wm. O. Beall and Thos. H. Owen, both of Muskogee, Okl., and Harry H. Rogers, of Holdenville, Okl., on the brief), for appellees.

George S. Ramsey and C. L. Thomas, both of Muskogee, Okl., amici curiæ.

Before SANBORN and CARLAND, Circuit Judges, and WILLARD, District Judge.

CARLAND, Circuit Judge. This is an appeal from a judgment dismissing a bill filed by the United States upon a demurrer thereto by appellees. The bill alleged that on September 24, 1904, one Darkey Stop, a duly enrolled member and citizen of the Cherokee Tribe of Indians, selected as her allotment and distributive share of the public lands of said tribe the following parcel: The south half of the southeast quarter, section 10, township 20, range 13. Said land was duly allotted to said Indian, and thereafter a patent for the same was duly executed by W. C. Rogers, principal chief of the Cherokee Tribe, which patent was approved by the Secretary of the Interior. Darkey

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
206 F.—10

Stop died November 17, 1906, leaving surviving her as sole heir at law a daughter, Caniyah Stop, who is a duly enrolled member and citizen of the Cherokee Tribe of Indians of the full blood. Upon the death of Darkey Stop the above-described land descended in fee to said Caniyah Stop. On October 12, 1908, Caniyah Stop executed and delivered to Morris F. Knight and Cyrus S. Avery a deed with covenants of warranty for the land in question, which deed was approved by order of the county court of Adair county, Okl., the court having jurisdiction over the settlement of the estate of Darkey Stop, deceased, but was not approved by the Secretary of the Interior. The bill prayed that the deed from Caniyah Stop to Knight and Avery be adjudged void.

The appellant claims that the deed was void for the reason that it was not approved by the Secretary of the Interior. The validity of the claim of appellant must be determined by the construction of section 22 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, and section 9 of the Act of May 27, 1908, c. 199, 35 Stat. 312. These sections read as follows:

Section 22:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

Section 9:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyances of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: Provided further, that if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the state of Oklahoma, free from all restrictions: Provided, further, that the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section."

Darkey Stop having died before May 27, 1908, it is claimed that the deed of Caniyah Stop was invalid because not approved by the

Secretary of the Interior as provided in section 22 above quoted, although it was executed October 12, 1908, and therefore after section 9, above quoted, was enacted. In other words, it is claimed that as to all full-blood Indian heirs whose ancestors died before May 27, 1908, the approval of their deeds must still be by the Secretary of the Interior.

The question therefore to be decided is this: By what authority should the deed from Caniyah Stop to Knight and Avery have been approved, the Secretary of the Interior or the county court of Adair county? The only circumstance that is urged as a reason why section 9 does not control is the fact that Darkey Stop died before it became a law. Very exhaustive arguments have been presented on both sides and much has been said concerning the following words found in section 9:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land."

It is urged by counsel for appellant that this clause refers to the death of an allottee who shall die after the passage of the law, and that to hold that it referred to the death of an allottee before the law became effective would be to give it retrospective force. We fail to see how appellant's case is in any wise strengthened if we admit all that counsel claim for the clause above quoted. The only complaint made of the deed made by Caniyah Stop is that it was not properly approved, but the death of Darkey Stop in no wise affects the question of approval because it is nowhere provided that death shall remove that requirement. Why, then, should we trouble ourselves about the death of the allottee or when it occurred? Both by the law of April 26, 1906 (34 Stat. 137), and the law of May 27, 1908 (35 Stat. 312), the deed of a full-blood Indian heir was valid if approved, but not until approved, as provided in those acts. And as it cannot be claimed or pretended that the death of the allottee in any wise affected the requirement of approval, either by the Secretary of the Interior or by the county court in Oklahoma having jurisdiction over the settlement of the estate of the deceased allottee, it is clear that the decision of the question involved in this case simply requires us to determine as to what law, in regard to the approval of the deed of the Indian heir, was in force at the time Caniyah Stop executed and delivered the deed in question to Knight and Avery. There ought not to be, and we do not believe there is, any doubt about this. Prior to the passage of the law of April 26, 1906 (section 22), full-blood Indian heirs, being members of any of the Five Civilized Tribes in Oklahoma, could not convey their allotted lands unless there had been actual removal of restrictions by the Secretary of the Interior prior to the conveyance. On and after the above last-mentioned date down to the passage of the law of May 27, 1908 (section 9), conveyances by full-blood Indian heirs were valid if subsequently approved by the Secretary of the Interior. After the passage of the law of May 27, 1908, the last expression of the will of Congress as to how such deeds should be approved is found in section 9 hereinbefore quoted, and that law was complied with in regard to the deed of Caniyah Stop.

In *Tiger v. Western Investment Company*, 221 U. S. 286, 31 Sup.

Ct. 578, 55 L. Ed. 738, it became the duty of the Supreme Court to construe section 22 mentioned herein for the purpose of determining whether the provision in this section requiring the approval of deeds of Indian heirs by the Secretary of the Interior was effective after the expiration of the five-year period named in section 16 of the Act of June 30, 1902, c. 1323, 32 Stat. 503. For the purpose of construing said section the Supreme Court was of the opinion that it could refer to subsequent legislation, and did refer to and quote section 9 mentioned herein, and in regard thereto used the following language:

"The obvious purpose of these provisions is to continue supervision over the right of full-blood Indians to dispose of lands by will, and to require conveyances of interests of full-blood Indians in inherited lands to be approved by a competent court."

While the Supreme Court was not construing section 9, it was before the court, and we are informed as to what the court thought was its obvious purpose. We therefore conclude that, as the death of the allottee in no wise affects the requirement as to approval, the deeds of Indian heirs must be approved in accordance with the law in force at the date of the deed.

The Supreme Court of Oklahoma in *MaHarry v. Eatman*, 29 Okl. 46, 116 Pac. 935, and the United States Court for the Eastern District of Oklahoma in *Harris v. Gale* (C. C.) 188 Fed. 712, reached the same result as herein indicated, but for somewhat different reasons.

We are urged to give force and effect to what is claimed to be the construction placed upon section 9 by the department charged with the execution of the statute, namely, the Department of the Interior. In the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect.

We are justified, however, in saying that immediately after the passage of the law of May 27, 1908, and down to August 17, 1909, the Department of the Interior placed a construction upon section 9 herein mentioned in accordance with the views herein expressed.

We are therefore of the opinion that the decree below should be affirmed.

And it is so ordered.

THE QUEEN.

THE UMATILLA.

(Circuit Court of Appeals, Ninth Circuit. June 12, 1913.)

Nos. 1,850, 1,851.

1. PILOTS (§ 10*)—TENDER OF SERVICES—CONSTRUCTION OF STATE STATUTE.

In Pol. Code Cal. § 2466, requiring every vessel spoken inward or outward bound to or from the port of San Francisco, with certain exceptions, to pay pilotage fees, the provision that "a vessel is spoken by day by a pilot boat displaying a union jack or by night displaying a torch or flare-up within a distance of 3 miles of the vessel," does not exclude other methods of tendering the services of a pilot nor require the tender

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to be made to an outgoing vessel after she is under way, and an oral offer of service made on board a vessel while moored to a wharf and within an hour of her sailing time is a valid tender under the statute.

[Ed. Note.—For other cases, see Pilots, Cent. Dig. §§ 11-13; Dec. Dig. § 10.*]

2. PILOTS (§ 13*)—COMPENSATION—LIEN.

Pol. Code Cal. § 2432, which provides that "all vessels * * * and the master and owners thereof are jointly and severally liable for pilotage fees, to be recovered in any court of competent jurisdiction," and section 2466, which makes every vessel of certain classes which is spoken when bound into or out of the harbor of San Francisco liable for pilotage fees, create a valid maritime lien for such fees, whether the services are accepted or not, which is enforceable by suit in rem in a court of admiralty.

[Ed. Note.—For other cases, see Pilots, Cent. Dig. § 16; Dec. Dig. § 13.*]

3. COMMERCE (§ 78*)—COMPENSATION OF PILOT—STATUTES—CONSTITUTIONALITY—TONNAGE.

The fact that by the pilotage laws of a state the pilotage fees fixed are based in part on the tonnage of the vessel, and that a percentage of such fees is required to be paid to the state pilot commissioners, does not render the statute unconstitutional as imposing a tonnage duty.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 54-60; Dec. Dig. § 78.*]

Appeal from the District Court of the United States for the Northern District of California; John J. De Haven, Judge.

Suits in admiralty by M. Anderson against the steamship *Queen*, and by N. Jordan against the steamship *Umatilla*; Pacific Coast Steamship Company, claimant. Decrees for claimant, and libelants appeal. Reversed.

For opinion below, see 184 Fed. 537.

William Denman and Denman & Arnold, all of San Francisco, Cal., for appellants.

George W. Towle, of San Francisco, Cal., for appellees.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. These cases were argued and submitted together. They are libels against the respective ships mentioned for alleged pilotage services. Both cases are alike, except that in that against the ship *Umatilla* a question is raised as to the sufficiency of the tender of the services sued for.

The cases were submitted upon an agreed statement of facts, from which it appears that the libellant in each case was at all the times mentioned in the libel a duly licensed pilot of the port of San Francisco, holding a license from the United States local inspectors of steamships, and also one from the California state board of pilot commissioners, of the port of San Francisco; that the libellant in the case of the *Queen* tendered to the master of that steamship, as she was entering the port of San Francisco on the 14th day of August, 1905, his services as a pilot, which services were refused; that the steamer *Queen* was at the time a duly registered American vessel, and was then com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pleting a voyage from an American port on Puget Sound to the port of San Francisco, via Victoria, British Columbia, and for some time prior thereto had been engaged in making voyages between the port of San Francisco and American ports on Puget Sound, and that on each and every of such voyages the port of Victoria, British Columbia, was a regular port of call, being the first port of call on each voyage outward from San Francisco, and the last port of call on each voyage toward San Francisco from the American ports on Puget Sound; that the steamship Umatilla was at all of the times mentioned in the libel against that ship a duly registered American vessel, engaged in making similar voyages, and, being about to sail on her regular voyage from San Francisco to the port of Puget Sound, the libellant in that case tendered to the master of the ship "his, said Jordan's, services as a pilot so licensed, to pilot said Umatilla on her then voyage out of said port of San Francisco, by going on board said vessel alongside the wharf to which said steamship was then made fast, and not more than one hour before she was to and did sail on her voyage therefrom, and then and there orally stating to said master that he, said Jordan, was then and there ready and able and willing to so pilot said vessel, and that he, said Jordan, then desired that he be so employed."

The agreed statement shows these further facts:

"(4) That each of said vessels in said several libels mentioned was at all of the times in said libels and schedules referred to or mentioned a duly registered American steam vessel, and was at all said times sailing under 'register,' and each of said vessels at each of the several times in said several libels and schedules referred to was either on a voyage from the port of San Francisco in the state of California to a United States port on Puget Sound, or from a United States port on Puget Sound to said port of San Francisco, but in either such case said vessel did while en route between said ports in the United States stop at the port of Victoria, B. C., to and from which said port of Victoria she did then carry, and did then and there deliver and receive both passengers, mail, and freight; and on each and every such voyage the port of Victoria, B. C., was a regular port of call, being the first port of call or stop on each voyage outward from San Francisco, Cal., and the last port of call or stop on each voyage toward San Francisco, Cal. Each and every one of the ships in this agreement mentioned on sailing outward bound from the port of San Francisco on her said voyage above described displayed at her foremast head the English flag, which indicated, according to the usage and custom of vessels and their navigators, that she was destined to a port under the dominion of Great Britain, whose merchant flag was so as aforesaid displayed at her foremast head, and similarly on each and every said inward voyage above described each and every one of the vessels in this agreement mentioned displayed the English flag on her foremast head, to indicate that she had come direct from a port under the dominion of that country.

"(5) That each of the masters and first officers of each of said vessels at all of the times in said several libels and schedules referred to was duly licensed under the laws of the United States of America to act as and serve as master and as pilot of any American steam vessel in entering and in departing from the said port of San Francisco, and all of the engineers and other officers of each of said vessels who under the laws of the United States needed then to be licensed were then duly licensed officers thereof; and each of said masters, during the two years next prior to any of the times in said libels referred to, had many times safely, and without the assistance of any pilot licensed under authority of the state of California, navigated and piloted vessels under his command then sailing under 'register,' and of the

class of those in said libels and said schedules referred to, out of and into said port of San Francisco.

"(6) That no master of any vessel owned or employed by either of said claimants, and sailing under 'register,' had ever, during the 20 and more years next prior to any of the times in said libels referred to, accepted the services of any of said libelants, nor of any state licensed pilot, to pilot any such vessel out of or into said port of San Francisco; and during all of the times herein last referred to each of said libelants and all state licensed pilots well knew that their services as pilots licensed by the state of California to so pilot any such vessel would not, if tendered, be availed of or accepted by either or any of the masters of such vessel, or by either or by any of said claimants.

"(7) That each and every and all of the said vessels in said several libels or in any schedule hereto attached referred to was long prior to any of the times in said several libels or schedules referred to well known to each and every and all of said libelants, and to all state licensed pilots of the said port of San Francisco. That said several vessels sailed from and arrived at San Francisco on a regular schedule, and could be and were by each and all of said libelants, and all state licensed pilots, identified and known in approaching the port of San Francisco long before he or any pilot needed or in the ordinary course of his business, would make any effort to 'speak' the same, if such vessel were by him thought to be in need of a pilot.

"(8) That, when the present state pilotage regulations of the port of San Francisco were under consideration by the Legislature of the state of California, the state licensed pilots of said port appeared before each of the committees of said Legislature having such matters in charge, and then by themselves and by their representatives were heard in connection with such regulations, and were likewise so heard by the Governor of said state before the act of the Legislature fixing such regulations, as now embodied in certain sections of the Political Code, was approved by him; and the fact long before then had been, and then was, and since then has been, and still is, that the only steam vessels that had been or were engaged in the coasting trade, touching en route at a foreign port, and sailing under 'register' out of or into the said port of San Francisco, were such of the vessels of said claimants, to wit, Pacific Coast Steamship Company, or the Pacific Company, as had been and were so employed."

The answer in each case set up that the steamship referred to in it during all the times mentioned was a duly registered steam vessel of the United States, and then was and during many months prior thereto had been continuously employed in the carriage of persons and property between the port of San Francisco, Cal., and the ports of Port Townsend, Seattle, Tacoma, Everett, Anacortes, South Bellingham, and Bellingham, all in the state of Washington, and in like business when returning to San Francisco; that during all of said times the said ship was a coastwise steam vessel of the United States then engaged in interstate coastwise commerce and transportation, and during all of said times was under the command of a master who then held a pilot's license or certificate that had been theretofore duly and regularly issued to him by the proper and competent authorities of the United States, and which said pilot's license authorized the said master under the pilot laws of the United States to pilot any and all enrolled or registered steam vessels of the United States, including the steamship in question, into and out of the port of San Francisco, and that the chief officer of the said steamship also held during all of the said times a similar pilot's license, which said licenses were then in full force, and that all the engineers of the said steamship were duly and regularly licensed by the proper United States authorities as re-

quired by the United States statutes, which licenses were in full force, and that each of the several officers of said ship had taken the oath of office prescribed by statute; that the said ship on its regular voyages between the port of San Francisco and the Puget Sound ports of the United States touched en route at the port of British Columbia, and there received on board passengers and freight for carriage thereon, the stop and stay of the ship at Victoria for such purpose being about one hour only, which stop the ship was authorized to make by the clearances granted at the United States custom house; that the number of passengers and the amount of freight taken on board at Victoria were insignificant as compared with the number of passengers and amount of freight taken on board at the American ports mentioned and transported by the steamship to and from the said American ports.

The record in each case shows that the services sued for were never in fact rendered, and that the acceptance of the proffered services was expressly refused by the respective steamships. The cases were certified by this court to the Supreme Court, where it was distinctly adjudged (225 U. S. 187, 32 Sup. Ct. 626, 56 L. Ed. 1047) that registered coastwise seagoing steam vessels are not required by any federal law to have a United States pilot in entering or leaving any state port, and that, even if any such vessel should have on board a pilot holding a federal license when entering or leaving such port, the regulation of such port pilotage is still subject to the laws of the state. The state laws, so far as applicable to the present controversy, are found in sections 2429, 2457, 2431, 2458, 2437, 2432, 2466, and 2468 of the Political Code of California, which, so far as necessary to be stated, are as follows:

"Sec. 2429. Qualifications of Pilots.—No person must be appointed a pilot unless he is an American citizen, over the age of twenty-one years, with a practical knowledge of the management of sailing vessels and steamboats, and of the tides, soundings, bearings, and distances of the several shoals, bars, rocks, points of land, lighthouses, and fog signals of the ports and harbors for which he is appointed, of a good moral character, and temperate, with the skill and ability necessary to discharge the duties of pilot."

"Sec. 2457. Commissioners to Examine and License Pilots.—The board of commissioners must examine and license, in the manner prescribed, not less than fifteen nor more than twenty pilots for the port of San Francisco, and not more than two pilots for the ports of Mare Island, Vallejo and Benicia."

"Sec. 2431. Pilots to Take Official Oath and Give Bond.—Every pilot must execute an official bond in the sum of five thousand dollars, to be approved by the officer or board appointing him. The bonds of pilots appointed by commissioners must be filed with such commissioners."

"Sec. 2458. Pilots to Keep Boats.—Pilots must at all times keep, for their exclusive use, boats of such description and good condition as directed by the board."

"Sec. 2437. Further Duties of Pilots.—When cruising off or standing out to sea, pilots must go to a vessel nearest to shore, or in the most distress, under a penalty of one hundred dollars; for refusing to go on board a vessel when required, a like penalty of one hundred dollars may be imposed; in either case, upon conviction, the pilot may be suspended or expelled, at the discretion of the commissioners."

"Sec. 2432. Vessel, Owner, etc., Liable for Pilotage.—All vessels, their tackle, apparel, and furniture, and the master and owners thereof, are jointly

and severally liable for pilotage fees, to be recovered in any court of competent jurisdiction."

"Sec. 2466. Rates of Pilotage at San Francisco.—The following shall be the rates of pilotage into and out of the harbor of San Francisco: All vessels under five hundred (500) tons three (\$3.00) dollars per foot draught; all vessels over five hundred (500) tons three (\$3.00) dollars per foot draught and three (3c) cents per ton for each and every ton registered measurement; and every vessel spoken inward or outward bound except as hereinafter provided shall pay the said rates. A vessel is spoken by day by a pilot boat displaying a union jack or by night displaying a torch or flare-up within a distance of three (3) miles of the vessel. * * *

"Sec. 2468. Exemption and Reduction of Pilotage.—All vessels sailing under an enrollment, and licensed and engaged in the coasting trade between the port of San Francisco and any other port of the United States shall be exempt from all pilotage unless a pilot be actually employed. All foreign vessels and all vessels from a foreign port or bound thereto, and all vessels sailing under a register between the port of San Francisco and any other port of the United States shall be liable for pilotage as provided in section twenty-four hundred and sixty-six of this Code."

[1] As has been stated, the only distinction between the two cases is that while the Umatilla was moored to the wharf, about to sail on her voyage out of the port of San Francisco, and within an hour of her sailing time, the libellant went on board and orally stated to her master that he was then and there ready, and able, and willing to pilot the vessel out of the harbor, and desired to be employed to do so, which services the master declined, concerning which the point is made that the tender of such service was without validity by reason of the provisions of section 2466 of the Political Code of California above quoted, and, further, that the vessel must be under way before a tender can be made. We see no merit in the point. In respect to the latter suggestion, in harbors where the tides are swift and the currents uncertain, it may well be that the greatest need of a pilot is when the vessel begins to move. The statute says that "every vessel spoken inward or outward bound," except as thereafter specified, shall pay the prescribed rates, and adds that:

"A vessel is spoken by day by a pilot boat by displaying a union jack, or by night displaying a torch or flare-up within a distance of three miles of the vessel."

It would, we think, be absurd to hold that the pilot must take his boat out three miles from where the vessel to be piloted is moored and "speak" by displaying a union jack if in the day, or a torch or flare-up if at night. Equally untenable, we think, is the contention that an oral tender by the pilot to the master is insufficient. It is more certain, distinct, and reliable than the provisions of the statute as to how a vessel shall be spoken by a pilot boat, which may be and generally is some distance from the vessel to be piloted. There is therefore no substantial distinction between the two cases under consideration, in respect to both of which counsel for the appellee further contends that the decrees appealed from may yet be affirmed on two grounds: First, for the reason, as is claimed, that the California statute does not create a maritime lien upon the vessel to which the services are tendered; and, secondly, that the pilotage statute of the state imposes a duty or tax on tonnage for its own use, and is therefore invalid.

[2] In respect to the first of these contentions, the California statute prescribes, as has been seen, that:

"All vessels, their tackle, apparel, and furniture, and the master and owners thereof, are jointly and severally liable for pilotage fees, to be recovered in any court of competent jurisdiction." Section 2432, *supra*.

Not only are the master and owner thereby expressly made liable for such fees, but also the vessels themselves, their tackle, apparel, and furniture, jointly and severally. Section 2466 of the same Code prescribes the rates of pilotage into and out of the harbor of San Francisco, and expressly declares that "every vessel spoken inward or outward bound," with certain specific exceptions within which the present cases do not come, shall pay such rates; and by section 2468 of the same Code it is, among other things, expressly provided that:

"All vessels sailing under a register between the port of San Francisco and any other port of the United States shall be liable for pilotage as provided in section twenty-four hundred and sixty-six of this Code."

In the face of such explicit declarations of the statute, making such vessels as are here in question, their tackle, apparel, and furniture, liable for the prescribed charges and enforceable in a court of competent jurisdiction, we have no hesitation in holding that such charges are a lien upon such vessels, the appropriate court for the enforcement of which is a court of admiralty.

In the case of *Steamship Company v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805, the Supreme Court had under consideration a statute of California passed May 20, 1861 (St. 1861, p. 594), entitled "An act to establish pilots and pilot regulations for the port of San Francisco," which statute was practically the same (so far as the question here involved is concerned) as the statute upon which the present cases are based, except that by that statute the charge for pilotage where the tendered service was not accepted was fixed at one-half, whereas, under the present statute, the charge is the same whether or not the tender is accepted. In the course of its opinion the court said:

"The claim to half-pilotage fees, it is true, was given by the statute, but only in consideration of services tendered. The object of the regulations established by the statute was to create a body of hardy and skillful seamen, thoroughly acquainted with the harbor, to pilot vessels seeking to enter or depart from the port, and thus give security to life and property exposed to the dangers of a difficult navigation. This object would be in a great degree defeated if the selection of a pilot were left to the option of the master of the vessel, or the exertions of a pilot to reach the vessel in order to tender his services were without any remuneration. The experience of all commercial states has shown the necessity, in order to create and maintain an efficient class of pilots, of providing compensation, not only when the services tendered are accepted by the master of the vessel, but also when they are declined. If the services are accepted, a contract is created between the master or owner of the vessel and the pilot, the terms of which, it is true, are fixed by the statute; but the transaction is not less a contract on that account. If the services tendered are declined, the half fees allowed are by way of compensation for the exertions and labor made by the pilot, and the expenses and risks incurred by him in placing himself in a position to render the services, which, in the majority of cases, would be required. The transaction in this latter case between the pilot and the master or owners cannot be strictly termed a contract, but it is a transaction to which the law

attaches similar consequences; it is a quasi contract. The absence of assent on the part of the master or owner of the vessel does not change the case. In that large class of transactions designated in the law as implied contracts, the assent or convention which is an essential ingredient of an actual contract is often wanting. Thus, if a party obtain the money of another by mistake, it is his duty to refund it, not from any agreement on his part, but from the general obligation to do justice which rests upon all persons. In such case the party makes no promise on the subject; but the law, 'consulting the interests of morality,' implies one; and the liability thus arising is said to be a liability upon an implied contract. The claim for half-pilotage fees stands upon substantially similar grounds."

That was a suit at common law, but the subsequent case of *Ex parte McNiel*, 13 Wall. 236, 20 L. Ed. 624, was an application for a writ of prohibition to the District Court to prevent the enforcement of a judgment in favor of the libellant for half-pilotage under a New York statute, where his services were tendered and refused, on the ground that the District Court had no jurisdiction of the cause of action stated in the libel, and that no lien existed on the vessel enforceable in a court of admiralty. Among other things, the Supreme Court said:

"It must be admitted that pilot regulations are regulations of commerce. A pilot is as much a part of the commercial marine as the hull of the ship and the helm by which it is guided; and half-pilotage, as it is called, is a necessary and usual part of every system of such provisions. Pilots are a meritorious class, and the service in which they are engaged is one of great importance to the public. It is frequently full of hardship, and sometimes of peril; night and day, in winter and summer, in tempest and calm, they must be present at their proper places, and ready to perform the duties of their vocation. They are thus shut out for the time being from more lucrative pursuits and confined to a single field of employment. * * * The precise question we are considering came before this court in *Cooley v. Board of Wardens of the City of Philadelphia* [12 How. 299, 13 L. Ed. 996]. The suit was for half-pilotage under a statute of Pennsylvania, substantially the same, in this particular, with the statute of New York. The plaintiff recovered in the lower court, and the Supreme Court of the state affirmed the judgment. The case was brought here for review by a writ of error under the 25th section of the Judiciary Act [Act Sept. 24, 1879, c. 20, 1 Stat. 85], and was argued with exhaustive learning and ability. This court, after the fullest consideration of the subject, also affirmed the judgment. We are entirely satisfied with that adjudication, and reaffirm the doctrines which it lays down. It is conclusive upon this branch of the case before us. The other objections taken to the judgment relate to the jurisdiction of the court. It is said there is no jurisdiction in admiralty to maintain a libel for a penalty. It was not a penalty that was recovered. There was a tender of services upon which the law raised an implied promise to pay the amount specified in the statute. Courts of admiralty have undoubted jurisdiction of all marine contracts and torts."

In the case of *Ex parte Hagar*, 104 U. S. 520, 26 L. Ed. 816, the same court denied an application for a writ of prohibition to restrain the District Court for the District of Delaware, sitting in admiralty, from proceeding further in a suit pending in that court against a vessel to recover the half-pilotage which was claimed to be due under the statutory provisions of Delaware (which were quite similar to those of California) for refusing to accept the services of a pilot when tendered, saying:

"It has long been well settled that claims for pilotage fees are within the jurisdiction of the admiralty."

See, also, *Ex parte Pennsylvania*, 109 U. S. 174, 3 Sup. Ct. 84, 27 L. Ed. 894.

Moreover, the Supreme Court by its rule 14 (29 Sup. Ct. xl) has provided that all suits for pilotage, without limitation as to the character of the service, may be brought in rem against the ship. It reads:

"In all suits for pilotage the libellant may proceed against the ship and master, or against the ship, or against the owner alone, or the master alone, in personam."

This rule allowing a suit in rem for pilotage is substantially like rule 19 (29 Sup. Ct. xli), allowing suits in rem for salvage, and as said by counsel for appellants, the readiness and tender of the pilot is not unlike that of the "standing by" of the salvor which entitles the salvor to an action in rem against the vessel. *The Flottbec*, 118 Fed. 954, 55 C. C. A. 448, and cases there cited.

In *The Edith Godden* (D. C.) 25 Fed. 511, Judge Brown, in considering the statute of New Jersey, said:

"Upon the merits * * * I think the pilot has sufficiently made out his claim in accordance with the statutes of New Jersey to be paid for his services, which were offered and rejected. The right to enforce such claims by libel in rem has been repeatedly sustained, even where the state statute did not in express terms make the vessel liable. *The Glenearne* [D. C.] 7 Fed. 604; *The Lord Clive* [D. C.] 10 Fed. 135. The Supreme Court in the cases of *Steamship Co. v. Joliffe*, 2 Wall. 450, 457 [17 L. Ed. 805], and of *Ex parte McNiel*, 13 Wall. 236, 242 [20 L. Ed. 624], has expressly declared that the obligation to pay these pilotage fees under state statutes, where the pilot's services are tendered and refused, is a liability upon a contract implied by the statute. Lowell, J., in the case of *The America*, 1 Low. 176 [Fed. Cas. No. 289], says: 'The suit is for an offer which the law makes equivalent to actual service.' Contract obligations in the navigation of the ship are enforceable in rem as well as in personam. These adjudications as to the nature of the obligation, made since the decision of Judge Betts and Judge Sprague in the cases of *The George Law*, 6 Amer. Law Reg. 368 [Fed. Cas. No. 8,223], and of *The Robert J. Mercer*, 1 Spr. 284 [Fed. Cas. No. 11,892], in effect overrule the decisions in the cases last named.

"In various other cases since, where writs of prohibition were refused by the Supreme Court, the proceedings were in rem. *Ex parte Hagar*, 104 U. S. 520 [26 L. Ed. 816]; *Ex parte Pennsylvania*, 109 U. S. 174, 3 Sup. Ct. 84 [27 L. Ed. 894]. In view of the nature of the obligation as adjudged by the Supreme Court, namely, an implied contract made in the course of the navigation of the ship, it is immaterial whether the state statute in terms gives a lien on the ship or not. From the fact that the obligation is one of contract, the admiralty has jurisdiction to enforce the obligation by any appropriate form whether in rem or in personam. *Ex parte McNiel*, 13 Wall. 243 [20 L. Ed. 624]; *The George S. Wright*, Deady, 591 [Fed. Cas. No. 5,340]; *The California*, 1 Sawy. 463, 467 [Fed. Cas. No. 2,312]; *The William Law* [D. C.] 14 Fed. 792. Rule 14 of the Supreme Court in admiralty expressly authorizes a proceeding in rem for pilotage; and if, as Judge Lowell says, the offer of pilotage is by statute made equivalent to actual service, then this rule would seem to be an express authority for a suit in rem."

Many other cases in which suits in rem against the vessel have been maintained for pilotage, where the tender of service has been refused might be cited, among them *The Glenearne* (D. C.) 7 Fed. 604; *The George S. Wright*, Fed. Cas. No. 5,340; *The America*, Fed. Cas. No. 289; *The Alameda* (C. C.) 32 Fed. 331; *The Australia* (D. C.) 36 Fed. 332; *Welldt v. Howden* (D. C.) 39 Fed. 877; *Freeman v. The*

Undaunted (C. C.) 37 Fed. 662; The Earnwell, 70 Fed. 331, 17 C. C. A. 136; The Carrie L. Tyler, 106 Fed. 422, 45 C. C. A. 374, 54 L. R. A. 236.

[3] The objection of counsel to the validity of the pilotage statute in question proceeds upon the theory that the 5 per cent. of the pilotage charge required by the statute to be paid by the pilots to the pilot commissioners is a duty or tax on tonnage with which to pay the state's indebtedness. We do not so understand it. The present state statute created, as did the act of May 20, 1861, under consideration in *Steamship Company v. Joliffe*, supra, a board of pilot commissioners authorized to license pilots and to prescribe their qualifications, duties, and compensation. The commission is, and then was, an essential part of the pilotage establishment expressly recognized by Congress in section 4235 of the Revised Statutes (U. S. Comp. St. 1901, p. 2903), which reads:

"Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be, or with such laws as the states may respectively enact for the purpose."

Under the California act of 1861, the commissioners were allowed 10 per cent. of the fees collected by the pilots (Stats. 1861, p. 594); under the present act they are allowed 5 per cent. of such fees. The act of 1861 was adjudged valid by the Supreme Court in the *Joliffe* Case, notwithstanding its constitutionality was questioned, although apparently not on this precise ground. But in *Huse v. Glover*, 119 U. S. 543, 549, 7 Sup. Ct. 313, 316 (30 L. Ed. 487), the Supreme Court distinctly held that:

"A duty on tonnage within the meaning of the Constitution is a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country; and the prohibition was designed to prevent the states from imposing hindrances of this kind to commerce carried on by vessels."

It results from what has been said that in each case the judgment of the court below must be and hereby is reversed, and the cause remanded, with directions to enter judgment for the libellant with costs.

PACIFIC TELEPHONE & TELEGRAPH CO. v. STARR.

(Circuit Court of Appeals, Ninth Circuit. July 7, 1913.)

No. 2,242.

1. MASTER AND SERVANT (§ 106*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—UNSAFE APPLIANCES.

Plaintiff, who with other employes of defendant telephone company was engaged in putting up wires on a building, fell and was injured by reason of the breaking of the round of a ladder on which he was standing, which was made of a piece of board sawed across the grain. Ladders for the use of the employes were supplied by defendant, but sometimes when those were insufficient the foreman directed the men to borrow

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

such as could be obtained nearby, and the one used by plaintiff had been so borrowed by another workman. *Held*, that in legal effect such ladder was furnished by defendant, which was responsible for its condition to the same extent as though it had been furnished from its own supply.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 193-198; Dec. Dig. § 106.*]

2. MASTER AND SERVANT (§ 208*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—DEFECTIVE APPLIANCES—ASSUMPTION OF RISK.

Ladders of unusual length, which employes of a telephone company are required to use in putting up wires on buildings, are not simple appliances, like mechanics' tools, for defects in which the employer cannot be held responsible, and the risk from which an employé assumes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 551; Dec. Dig. § 208.*]

3. MASTER AND SERVANT (§ 288*)—ACTION FOR INJURY TO SERVANT—ASSUMPTION OF RISK—WHEN QUESTION FOR JURY.

Plaintiff, who was an employé of defendant telephone company, while standing on a long ladder furnished by defendant, engaged in putting up wires, fell and was injured by reason of a defect in the ladder. There was evidence tending to show that the defect was not obvious to a casual observer, but was discoverable by a careful inspection, which was not made. *Held*, that the question of plaintiff's assumption of the risk was one for the jury, and not for the court.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Clinton W. Howard, Judge.

Action at law by Frank Starr against the Pacific Telephone & Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Pillsbury, Madison & Sutro, of San Francisco, Cal., and Hughes, McMicken, Dovell & Ramsey, of Seattle, Wash., for plaintiff in error.

C. A. Reynolds, Harry Ballinger, and Charles T. Hutson, all of Seattle, Wash., for defendant in error.

Before GILBERT, Circuit Judge, and WOLVERTON and DIETRICH, District Judges.

WOLVERTON, District Judge. The defendant in error, who was plaintiff below, while engaged in cleating a cable through which were carried telephone wires to the side wall of a building in Seattle, Wash., fell from near the top of a ladder to the pavement below, a distance of from 20 to 25 feet, and was severely injured. Starr was in the employ of the Pacific Telephone & Telegraph Company at the time, to perform the service in which he was then engaged. The immediate cause of the accident was a defective round in the ladder, being the second from the top, which gave way. The round consisted of a board from 2½ to 3 inches in width by about three-quarters of an inch in thickness, which was sawed across the grain. With the weight of Starr upon it, it split out with the grain diagonally across the piece.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

For the injury thus sustained Starr sues to recover damages. The action is based upon the negligence of the company in furnishing the plaintiff with a defective and unsafe ladder upon which to perform his work, and in failing to properly inspect such ladder, or to exercise reasonable care and precaution in the selection of the same for plaintiff's use. For the particular work in hand a long extension ladder had been brought from the company's supply, and, finding that other ladders were needed, at the direction of George E. Smith, the foreman, two short ladders were picked up in the vicinity, one by Filer and another by McCartney, two men also working with plaintiff, there being six men working at the time. It being made known to Smith that another long ladder was needed, he directed the men to splice the two short ladders picked up by Filer and McCartney. This was done by Starr, the plaintiff, and McCartney, and no defect developed in the splicing. The ladders were spliced the day before the accident occurred.

The following is in effect a brief résumé of the testimony so far as deemed pertinent for application of the proper legal principles which control the case:

George E. Smith, who was foreman of the gang that was at work at the time for the defendant company, testified that a majority of the ladders was supplied by the telephone company; that as a general thing he got the ladders, that is, when they were telephone ladders; that it was not always possible to get a sufficient number of ladders from the telephone company, and in that emergency if he (Smith) was around he always told the men to borrow them—to get them. As respects the ladder in controversy, he further says that it consisted of two pieces; that he knew where the top piece came from—it was borrowed by Filer a couple of days before the accident; that Filer used the top piece for a while in putting up terminal boxes for connecting wires with the cable, these boxes being from 7 to 8 feet from the ground, and the ladder about 6 feet long; that the ladder was weather-beaten, the sides being dressed and the boards or cross-pieces rough, and the whole ladder was of fir. He further testified that cross-grained sticks are not usually used for rounds of ladders; that he was at the place of the accident substantially every day, and saw the ladders in use during the time before the accident; that he had a conversation with the men in the presence of Starr concerning the ladders; that they wanted a longer ladder to get up on the building with, and he told them to splice the two short ladders together and use them; that he did not observe any cross-grained round in the shorter ladder of the two, such condition not being apparent, and he did not think it would be apparent without a special inspection of the round; that he made no inspection of either of the ladders. On cross-examination he further testified that whenever the men were stringing a cable he was always right there.

Thomas McCartney testified that he was working with Starr at the time; that the extension ladder was furnished by the company; that it was the understanding that the company should furnish the ladder; that it did not always provide a sufficient number of ladders for the use

of the men, and when the company failed in that respect the men "used to have to rustle around the alleys and get them"; that this was done by the order of the foreman; that he thought Filer borrowed the short ladder, that being the topmost piece of the spliced ladder, and he (the witness) borrowed the longer piece; that the rounds were nailed to the side pieces of the ladder, not notched in; that he did not observe any cross-grained rounds in the ladder—they were not apparent to a person with ordinary use of the ladder—and that the use of a cross-grained piece would not be safe; that the men asked the foreman for some ladders to do the work; that the foreman replied that the men would have to rustle for them, and then, after the ladders were procured, he directed them to be spliced.

R. D. McMellon testified that George Smith was the foreman in charge at the time; that the company was supposed to furnish ladders, though it did not always furnish them; that when the job required a large number of ladders the foreman directed the men to borrow them, and this they did; he heard Smith tell two of the boys to splice the two ladders together; that the ladder in question was unpainted and roughly finished; that he examined the rung of the ladder at the time, and it was broken—that is, split "kind of crossways," and the larger piece was hanging down—that was after the accident; that the condition of the board before the accident would have been observable if one had made a close inspection of it. On cross-examination he testified:

"Q. Now, how close an inspection would it have required to see that this rung which broke was cross-grained? A. Well, I imagine it would have taken a careful examination of it before the accident. Q. How do you mean; how careful? A. Well, if a man got right down and probably examined the wood real carefully and close he could have noticed it. Q. Suppose Smith had examined it to determine whether it was cross-grained or not, what would he have had to have done; would he have had to scrape the timber? A. I think not. Q. He wouldn't had to have done that? A. No. Q. Would he have had to use a magnifying glass? A. I wouldn't judge he would have. Q. You mean to say Smith could have seen it with his naked eye, if he had just taken the ladder in his hand and looked at it? A. I think he could, yes; if he had looked at it closely. Q. How long would it have taken him to do that? A. I shouldn't judge it would have taken very long. Q. Could he have done it in an instant? A. No; I think not. Q. He wouldn't have had to cut into the grain, or anything of that kind? A. It wouldn't have taken him very long to examine the one rung. Q. He wouldn't have had to scrape the timber, or cut into it at all? A. I think not. I don't know. He might have."

Other witnesses—Werner and Dalton—testified along the same line.

The plaintiff testified that he noticed Filer working on the ladder, and that he didn't examine it in particular. He was asked:

"Did such observation as you gave to the ladders, or either of them, disclose any danger about them? A. No, sir; I thought they was perfectly safe."

And in other respects he testified in like manner as the foregoing witnesses. He also said that Smith, the foreman, could not have told the rung was cross-grained by just glancing at it:

"If he had got right down close, and been looking for a cross-grain, he would have found it."

He was asked:

"Now, explain that; you think he could have told—you think Smith could have told—so as to have kept you off the ladder, if he had gotten down close to it, and looked at it closer? A. He could; yes. The same as one of those others were cross-grained, and he didn't know it."

The only witness called by the defendant was Filer, who testified in effect that he borrowed the short ladder, and that he considered it rather frail.

At the close of the testimony the defendant moved the court to direct a verdict in its favor, which was denied. Judgment was for plaintiff, and the telephone company prosecutes a writ of error.

[1] It is first contended by counsel for the company that the rule which imposes liability upon an employer who furnishes unsafe appliances has no application here, because the company did not furnish the appliance, but the same was selected by the plaintiff and his fellow servants.

We cannot agree with counsel in this statement as to who furnished the ladders. The strong tendency if not the great weight of the testimony is to the effect that the company was to furnish the ladders with which the men were to do their work in adjusting the cable. It was only when the company failed to furnish the requisite number of ladders from its supply that the men were required to get them elsewhere in the vicinity for their use; and this they did generally at the direction of the foreman. The very ladders which were conjoined were procured from the neighborhood by the direction of the foreman, and the splicing was done also at his direction; he designating what ladders should be joined. True, the company did not furnish these specific ladders out of its stock; but it did direct, through its foreman, how they should be procured, and, when procured, it directed their use and the specific manner in which they should be used. In such a case it is far from accurate to say that the company did not furnish the ladders. In legal effect just the contrary is true, for it did furnish them through the direction of the foreman how to obtain them. The situation is no different than if the foreman himself had gone out and got the ladders and turned them over to the men and directed them to use them. The act was the act of the company, for the men's employment and their engagement in the work contemplated that the company should furnish the ladders. The men did not engage to furnish any such tools, instrumentalities, or conveniences. This is a sufficient answer to the contention, without the citation of authorities; it being mainly one of fact. To say the least, the evidence was more than ample to carry the case to the jury upon the hypothesis that the company, and not the men, was to furnish the ladders, and upon the further proposition that the company did in fact furnish the ladders in use by the men, and upon which Starr was working at the time of his fall.

[2] Counsel next insist that a ladder is a simple appliance—that is, of a class with the ordinary carpenter's or mechanic's tools—and that accidents occasioned by the use of such simple appliances are not actionable. Many authorities are cited in support of this proposition,

but their application is not apparent, when the nature of the work in which these men were engaged and the kind of ladders required for their service are taken into account. The company was engaged in constructing a telephone system, or a part of it, throughout the city of Seattle, which required the stretching of wires, and cables carrying wires, by adjusting them upon poles and buildings where convenient at a considerable height from the ground. This required the use of ladders not of the ordinary kind, such as stepladders and short contrivances used about the house or by mechanics about their general work, but ladders of more than the ordinary length, and extension ladders calculated to reach high positions, which could be used with safety by men doing that character of work. These are the kind of appliances, and not the simple or ordinary kind, that the company was supposed to furnish for the use of the men engaged in the particular work in hand. And it was the attempt to supply a long ladder, one of unusual length, that led to the accident complained of. So it is not apparent that the doctrine sought to be invoked has application here.

[3] But let us consider the subject from another direction. The master is charged with the duty of observing reasonable care and precaution in furnishing to his employés reasonably safe tools and implements with which to do their work. The duty is not absolute to provide reasonably safe tools and implements, for he is not an insurer on that score, but to exercise reasonable care and forethought in providing such tools and implements as are reasonably suitable and safe for the work. When he has done this, he has discharged his bounden duty to his servants and employés. This duty imposes upon the master the responsibility of inspecting these instrumentalities to determine their safety, and here again he may be excused for a failure to discover defects, if he has been reasonably careful and diligent in making the inspection; but he is not to be excused in failure to make any inspection at all. If a tool or appliance is defective, and the defect is discoverable upon a careful scrutiny and examination, such as a reasonably prudent and careful man would make under like circumstances, the master would be at fault in furnishing such a tool or appliance to his workmen, and his failure to inspect could not help him. It would injure him, rather, as he would be guilty of a neglect of duty. If, however, the defect was latent in character, and not ordinarily discoverable by reasonable inspection, then he could not be held accountable. The duty to make the inspection, however, would remain, though, if the defect was of that character that a reasonable inspection would not disclose it, there could, of course, be no liability for failing to inspect.

The workman assumes those risks of danger which are ordinarily incident to the work in which he is engaged, and those which are open and obvious to the senses, and which are known to him, if he continues in the occupation. He assumes none that may arise from latent defects in appliances not apparent from casual observation, which appliances it is the duty of the master to furnish, and to exercise reasonable care with reference to their selection.

The common tools doctrine is but an adjunct of the doctrine of the

assumption of risk. If the tools are so simple that their mechanism, structure, and defects, if they have any, are as obvious to the workman as to the master, then and upon this account he assumes the risks attending the use of them. As is said in *Vanderpool v. Partridge*, 79 Neb. 165, 112 N. W. 318, 13 L. R. A. (N. S.) 668:

"The reason for the rule [the common tools rule] is that any defect in such simple tools or appliances would be as obvious to the servant as to the master."

But the rule can have no application where the appliance is of such character as that it cannot be classified as a simple tool or implement in mechanical use. In such a case the ordinary rule applies that the workman assumes such risks only as are open and obvious while pursuing his work, and he assumes no risks that are not apparent to the senses in that way. It is not incumbent upon him to make an inspection to determine the safety of implements and appliances furnished him in the course of his employment by the master. That is the duty of the master, not of the workman.

These principles are discussed and applied in the following cases of more or less analogy to the present: *Ohio & Pittsburgh Milk Co. v. Fehl*, 187 Fed. 792, 109 C. C. A. 640; *Williams v. Garbutt Lumber Co.*, 132 Ga. 221, 64 S. E. 65; *Jones v. Pacific Mills*, 176 Mass. 354, 57 N. E. 663; *Flood v. Western Union Tel. Co.*, 61 Hun, 619, 15 N. Y. Supp. 400; *Twombly v. Consolidated Electric Light Co.*, 98 Me. 353, 57 Atl. 85, 64 L. R. A. 551.

The conclusion of the court in the latter case is peculiarly applicable here. It is as follows:

"And we think it was fairly open to the jury to find that the defective condition of the round might have been discovered had it been suitably inspected; not, perhaps, by such an inspection as would naturally be given to it by the workman upon it, whose duty it was to work, not to inspect, and who might lawfully rely upon the presumption that the master had performed its duty, but by such an inspection on the part of the master as reasonably would be necessary to make sure that an appliance upon which the servant was to risk his life or limb every time he used it was reasonably safe."

These considerations lead to the conclusion that the real question was one of assumption of risk on the part of Starr in the use of this ladder, and that the evidence adduced developed a cause proper to be submitted to the jury, and not one for the court to determine as matter of law.

Likewise the question whether the plaintiff was guilty of contributory negligence under the evidence was one for the jury, and not for the court.

Lastly, it is insisted that plaintiff failed to prove his cause of action. What has been said already is sufficient to indicate that the proofs offered were quite sufficient upon which to submit the cause to the jury.

Affirmed.

CROWE v. OSCAR BARNETT FOUNDRY CO.

(District Court, D. New Jersey. May 23, 1913.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—GRATE-BAR.

The Crowe patent, No. 668,495, claims 1 and 2, for a grate-bar for use in furnaces, must be narrowly construed in view of the prior art and the proceedings in the Patent Office and limited to the specific form of hooks shown and described for attaching the chain of a traveling grate. As so construed, *held* not infringed by the grate-bar of the Clark patent, No. 972,751.

2. PATENTS (§ 112*)—INFRINGEMENT—EVIDENCE.

The granting of a patent for a device similar to one covered by a prior patent is *prima facie* evidence that there is a difference between the two.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 162-165; Dec. Dig. § 112.*]

In Equity. Suit by Paul L. Crowe against the Oscar Barnett Foundry Company. On final hearing. Decree for defendant.

W. P. Preble, of New York City, for complainant.

Russell M. Everett, of Newark, N. J., for defendant.

CROSS, District Judge. [1] On February 19, 1901, Paul L. Crowe, the complainant, obtained letters patent No. 668,495 for a grate and bar therefor. The patent has six claims, the first two of which, by his bill of complaint herein, he alleges are valid and have been infringed by the defendant, and he prays for the relief usually granted in equity in such cases. The claims in suit are as follows:

"1. A grate-bar comprising a body portion having a strengthening web beneath it, a fire bearing surface comprising a series of teeth formed by vertical corrugations upon the opposite sides of the bars, and depending single hooks near both ends of the grate-bar, said hooks having chain engaging portions extending longitudinally of the bar, and adapted to engage the links of ordinary chains for forming a traveling grate.

"2. A grate-bar for traveling grates comprising a body portion, laterally extending fingers forming a fire bearing surface, a depending projection near each end of the bar upon the under side thereof terminating respectively in a laterally projecting finger forming chain engaging hooks, the hooks at both ends extending in one direction, substantially as described."

The inventor, speaking of his invention, says that it relates to improvements in furnace grate-bars, but more especially to those which are adapted for use in traveling grates; that it is simple and inexpensive in construction and well "suited for use in connection with a chain or cable of substantially the design of a common anchor or logging chain." Complainant's counsel, by his statements with reference to the scope of complainant's patent, at the hearing and argument, seemed to regard the claims in suit as combination claims for a grate-bar and a cable or logging chain, component parts of a traveling grate, but this view is manifestly erroneous; the claims are not combination claims and do not directly relate to a logging or a cable chain. They have merely to do with a grate-bar, which, however, it is incidentally al-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Fed'r Indexes.

leged, has peculiar facilities by means of certain hooks, for attachment to a logging or cable chain.

An examination of the file wrapper and contents which are in evidence, in connection with the prior art, shows that the claims in controversy depend for their validity for the most part upon the form and location of the hooks or means of attachment of the grate-bars to the chain, and that the patentee by the limitations imposed upon and accepted by him, in his endeavor to secure his patent, has estopped himself from asking other than a narrow construction of them; consequently, he is not entitled to any considerable range of equivalents.

Claims 1 and 2 as originally introduced read as follows:

"1. A grate-bar comprising a body portion having a strengthening web beneath it, a fire bearing surface comprising a series of teeth formed by vertical corrugations upon the opposite sides of the bars, and a depending single hook near each end of the grate-bar for engaging the chains of the traveling grate, substantially as described.

"2. A grate-bar for traveling grates comprising a body portion, laterally extending fingers forming a fire bearing surface, a depending projection near each end of the bar upon the under side thereof terminating respectively in a laterally projecting finger, forming chain engaging hooks, substantially as described."

The examiner rejected both of them in view of the following references: Tibbitts, No. 561,627 (1896); Playford, No. 570,268 (1896); and Milburn (British), No. 8,111 (1884)—all for chain grates. The patentee's solicitors sought to retain claim 1 by argument of the following character: After calling attention to the fact that the claim called for "a depending single hook near *each end* of the grate-bar," they claimed that Tibbitts and the British patent of Milburn showed hooks at *one end* only of the grate-bar, and that Playford showed no hook at all. The examiner's objection to claim 2 was acquiesced in by the applicant's solicitors, and they accordingly amended it by adding the following words in the connection in which they appear in claim 2 in suit, "the hooks at both ends extending in one direction," and as thus amended that claim was allowed. The argument of complainant's solicitors, however, as to claim 1, did not meet and answer the objections previously urged against its allowance by the examiner; hence it was again rejected. The patentee again yielded, canceled the claim, and inserted in lieu thereof the following:

"1. A grate-bar comprising a body portion having a strengthening web beneath it, a fire bearing surface comprising a series of teeth formed by vertical corrugations upon the opposite sides of the bars, and depending single hooks near both ends of the grate-bar, adapted to engage and connect the bar with the chains of a traveling grate."

His solicitors thereupon sought to obtain the allowance of the claim thus amended, and to distinguish it from the examiner's references by renewing their argument to the effect that Tibbitts only showed a hook at one end of his grate-bar, while applicant's claim called for two, one at each end; that Playford used no hook; and that Milburn's British patent employed hooks at one end of the grate-bar only, which, moreover, were not used for connecting the bars with chains. The examiner, however, finally rejected the claim, holding that it merely

duplicated the fastening hook of Tibbitts, which duplication did not involve invention. The applicant then appealed to the Examiners in Chief, who, while the appeal was pending before them, permitted the applicant to substitute claim 1 as it now appears, in lieu of the claim appealed from. They, however, practically upheld the examiner, since they did not allow the claim appealed from and allowed the substituted claim only for the reason, as urged by the appellant:

"That owing to the form of hook which he used and their location near the end of the grate, his grate-bar is more easily removed and replaced than either of the grate-bars of the references."

And the claim as allowed, it should be noted, required the hooks to extend "longitudinally of the bar."

From the foregoing history of the patent, it is apparent, as already stated, that both of the claims in issue, so far from being broad claims, are claims of narrow scope which must be strictly construed, to be upheld. Claim 2 must have hooks "at both ends of the grate-bar, extending in one direction"; and it might as well be said here, as later, that the defendant's construction does not infringe this, the vital feature of the claim, because it does not have hooks at both ends, but rather a hook at one end and a bolt at the other. While the language of claim 1 as allowed is perhaps somewhat broader on its face than that of claim 2, it must nevertheless, in view of its history, be restricted to the specific form of hooks shown and described in the specification and drawings of the patent, for the reason that it was because of their form and position, as appears by the foregoing quotation from the findings of the Examiners in Chief on appeal, that the claim was finally, but with considerable hesitancy, allowed.

The file wrapper and contents demonstrate that it was not intended by claims 1 and 2 to give Crowe, the patentee, anything more than a right to use hooks of the form which he had shown and described; that is to say, hooks with arms extending longitudinally of the grate-bar, as called for by claim 1, or hooks at both ends extending in one direction, as called for by claim 2. Unquestionably their facility of adjustment to the chain procured the allowance of claim 1 by the Examiners in Chief. Tibbitts had already used a hook at one end of the grate-bar which performed the same function at one end that Crowe's did, and the examiner was clearly right in saying, in substance, that the placing of a hook at both ends of the grate-bar was merely a duplication and did not show novelty or invention. Furthermore, an examination of the record will show that there was no novelty in the use of anchor or cable or logging chains upon which to attach and advance the grate-bar. In 1887, a British patent No. 867 was issued to one Wrigley, figures 3 and 5 of which show, as plainly as drawings can, grate-bars attached to an anchor or logging chain, forming a traveling grate. He manifestly had in mind grate-bars and chains and traveling grates, of the same general character as those referred to in the patent in suit. In his provisional specification, Wrigley says:

"Figures 3, 4, 5, and 6 are diagrams showing how the bars may be connected with *ordinary chains* so as to be moved in the upper and lower grooves by passing the chain over *pulleys* at each end of the furnace, and which may be applied as a modification of the propelling apparatus shown in figure 1."

And at the close of his specification, he adds:

"Having now described the nature of the said invention, together with the method of carrying the same into practical effect, I wish it to be distinctly understood that I claim the employment and use of transverse fire-bars connected together as an endless chain in furnaces or in combination with the apparatus for effecting their progression as hereinabove described, set forth, and fully illustrated in the drawings of the patent."

With this disclosure made nearly a generation before Crowe's invention of the patent in suit, it is difficult to find novelty or invention in the claims in suit, unless it be found in the specific form of hook attachment already alluded to. Certainly there was no novelty in making a chain grate of transverse fire-bars connected at their opposite ends to cable, anchor, or logging chains; and, as counsel for the defendant pertinently remarks, it is a remarkable coincidence that claim 2 of the patent in suit uses the term "ordinary chains" in the same sense and connection that Wrigley used it in his patent 30 years before. It seems unnecessary to prolong this discussion, although British patent No. 2,798 to Welch (1877), and United States patent No. 531,964 to Perkins, might profitably be considered in connection with those already mentioned.

Defendant is not using, as has already been intimated, the hooks of claims 1 and 2 in suit, but is closely following the attachment and device set forth and described in a patent issued to one Clark, No. 972,-751 (1910). This patent was obtained without reference to the patent in suit, and is really little more than a modification of Tibbitts. Tibbitts' bar is fastened to the chain at one end by a hook; the bar is then drawn over and bolted to the chain at its other end. Defendant's device is operated quite similarly; its bar is hooked at one end in a vertical link in the chain, while the opposite end is dropped onto the other chain and fastened thereto by passing upward through a horizontal link, a T-headed bolt into a socket in the bar, after which a cotter pin is passed through said socket and the end of the bolt therein. It manifestly is not fastened to the bar by hooks such as are called for by the claims of the patent in suit. Furthermore, it is a serious question whether complainant's own device, as manufactured and sold by it, comes within claims 1 and 2 of his patent. Certainly, the complainant seems to have departed widely from its teachings, and it is possible that in this departure the reason may be found why the complainant has concluded that the defendant is infringing his patent. However that may be, I am satisfied that the defendant does not infringe it. There is no testimony to show that it does, while there is abundant testimony to show that it does not.

[2] Moreover, this conclusion is supported by the fact that the defendant is using a patented device which is *prima facie* evidence that it differs from that of the patent in suit. *Gillette v. Durham Duplex Razor Co.* (D. C.) 197 Fed. 574.

The bill of complaint will be dismissed, with costs, on the ground of noninfringement of claims 1 and 2 in suit.

C. A. DUNHAM CO. v. WARREN WEBSTER & CO.

(District Court, D. New Jersey. June 9, 1913.)

PATENTS (§ 328*)—INFRINGEMENT—THERMOSTATIC CONTROLLER.

The Dunham patent, No. 865,171, for a thermostatic controller, construed in the light of the prior art and of the specification, which states that it is for an improvement on the devices of prior patents to the patentee, must be limited to the specific construction shown and described. Claim 3, as so limited, contains nothing disclosing invention aside from a plate in the expansion disk to act as a brace and prevent the collapse of the walls of the disk. As so construed, the claim *held* not infringed.

In Equity. Suit by the C. A. Dunham Company against Warren Webster & Co. On final hearing. Decree for defendant.

Robert W. Hardie, of New York City, for complainant.

Francis C. Lowthrop, of Trenton, N. J. (Francis T. Chambers and John E. Hubbell, both of Philadelphia, Pa., of counsel), for defendant.

CROSS, District Judge. The defendant, Warren Webster & Co., is charged by the complainant in this suit with having infringed patent No. 865,171, now owned by it, but which was issued February 3, 1907, to one C. A. Dunham, for a thermostatic controller. The principal defenses set up are want of novelty and invention in the subject-matter of the patent, and noninfringement. In the view taken of the case, it will be necessary to consider only the question of infringement.

In the patent in suit, Dunham, the patentee, states that he had previously taken out two patents relating to the same general subject-matter. Thus he says:

"My present invention relates to an improvement in thermostatically operated controlling devices of the same general design as those disclosed in my prior patents, Nos. 735,733, August 11, 1903, and 753,557, March 1, 1904. The invention is useful primarily as a steam trap, but it is also useful with controlling valves and other devices in various connections where it is desired to operate the valve or other device according to temperature changes. The object of my present invention is principally to improve the construction and assemblage of the chambered expansion disk which is employed to actuate the valve or other member, rendering the expansion disk more sensitive and at the same time more durable and easier of operation than such disks previously constructed."

From this extract it undeniably appears that the invention of the patent in suit was, at the most, but an improvement upon what was embraced in, and protected by, other patents previously obtained by the patentee. The patent itself, therefore, goes far, as indeed it well might, towards answering the present contention of the complainant that it covers an invention of a broad and basic character.

Turning for a moment to Dunham's three patents, and considering them in the order of their issue, it will be noticed that the first relates, as the patentee says, to improvements in drain valves or traps of that class, which are equipped with thermostatic devices that automatically open and close the movable valve member by a change in the temperature of the fluid admitted to the valve chamber, such a con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

struction of valve being especially adapted, according to the specification, for use in connection with steam engine separators, heating systems, radiators, steam cookers, and other places where a regular trap is not available, after which follows the patentee's statement of the object of his invention. His patent of 1904 is for a "steam trap," of which he says:

"The present invention relates to improvements in drain valves and steam traps of the general class disclosed by my prior application for letters patent filed July 5, 1902, serial number 114,485"—

while the patent in suit, as has already been shown, does not purport to embrace anything more than an improvement upon the devices of his earlier patents. It thus appears that, although Dunham selected a different name for the devices of his several patents, they nevertheless admittedly embraced nothing more than improvements to the thermostatic controller of the prior art. The one described in the Dunham patents comprises a disk called a "chambered expansion disk," formed of two thin sheet metal plates, each of them stamped into a cupped form with corrugations and having their peripheral edges closely and securely joined together by a lapped and soldered joint. The chamber of the expansion disk thus formed by the union of such metal sheets is charged, as in the prior art, with a volatile and preferably a liquid substance, such as ammonia. The fluid placed in the chamber, must be one readily vaporizable, so that when and as it becomes warmed it will be wholly or partially vaporized, thereby pressing apart the thin corrugated plates which form the chamber, which plates will moreover, through the spring of the metal, upon the condensation of the vapor, contract and resume their normal position. The corrugated metal forming this chamber must obviously be thin, so as to be readily capable of expansion.

At this point it may be well to quote claim 3 of the patent in suit, which is the only one in issue.

"(3) In a thermostatic controller, a chambered expansion disk and a plate in the disk set edgewise against its walls and forming a brace to resist the collapse of the disk."

The 1903 patent of Dunham had no brace on the inside of the chambered expansion disk, or indeed any stop of any kind to check the collapse of the disk, which consequently was free to collapse to any extent demanded by an excess of pressure on the outside of the chamber over that on the inside. The second or 1904 patent, however, had a tubular stop centrally located, whereby the contraction of the disk at its center as the result of outside pressure was controlled and limited; while in the patent in suit, instead of the tubular stop of the patent last referred to, we find that each of the corrugated plates which form the expansion disk, has affixed on its inner side, at its center, what is styled a "plug." These plugs are opposite to each other, so that, when the expansion disk has collapsed to a sufficient extent, their inner ends meet and prevent its further collapse.

Complainant's counsel strongly contends that claim 3 is a broad one. A cursory examination of it, however, in connection with Dunham's previous patents, not to mention others in the prior art, will show

that the only possible advance thereby suggested is "a plate in the disk *set edgewise against its walls* and forming a brace to resist the collapse of the disk." Both of his earlier patents were for a thermostatic controller in which there was a "chambered expansion disk," essentially like that of the patent in suit, while the patent of 1904, and several others in the prior art, showed a stop designed among other things, to prevent the collapse of such a disk. But, aside from the prior art, it cannot be that any remarkable inventive advance was shown by merely so adjusting a brace as to prevent the collapse of the walls of the expansion chamber, if and when they should be exposed to undue pressure from without.

If the roof of a shed were in danger of collapse, either from an excessive weight of snow resting thereon, or from any other cause, the person who should suggest putting one or more props or braces, no matter what their form, under the roof to prevent or limit such collapse, would be in little danger of being called a genius, and yet such a suggestion would be about as inventive, and in view of the prior art possibly more, than that of the claim in suit. Hence, because of the number and variety of supports and stops previously shown in the very art now being considered, it is clear that the complainant, if claim 3 is to be upheld, must be satisfied with substantially that particular form of brace or stop claimed, described, and shown in the specification and drawings of its patent. This is not to say that other features covered by other claims of the patent in suit may not render its controller valuable. It is sufficient at this time to declare that no such feature or element has been discovered in claim 3, the comparatively narrow scope of which has already been referred to, and is in fact demonstrated, in part at least, by the following language taken from the specification:

"In order to assist the juxtaposed plugs 25 and 28 in the function of preventing the collapse of the expansion disk, particularly at the outer portions of the disks where the plugs are not effective, I provide spreader plates 38. These plates, as shown in Fig. 3, have a marginal form corresponding to the corrugations in the plates 21 and 22, and are fitted snugly within the expansion disk, so that, upon any undue movement of the plates toward each other, said plates will engage the spreaders or braces and their further movement will be arrested. The plates are disposed radially, as shown in Fig. 4."

The plate or support of claim 3, it will thus be noticed, is *set edgewise against its walls* (those of the disk) and in the specification is called a "spreader plate"; its declared function being merely "to assist the juxtaposed plugs 25 and 28 in the function of preventing the collapse of the expansion disk, particularly at the outer portion of the disk where the plugs are not effective." These spreader plates are therefore manifestly distinct entities, separate and apart from the plugs whose function it is their province to aid. That such is their function, and their only function, is not only outlined in the specification, but specifically declared by the claim itself.

The matter in issue in this suit being admittedly confined to claim 3, it is impossible to understand why a very considerable portion of complainant's record in this case was ever made. Divers heating systems have been learnedly and interestingly discussed by witnesses

and counsel; but what these several systems, or the more or less intricate apparatus necessary to their operation and maintenance have to do with the plate or prop of claim 3 has not been made manifest. Nor is the controversy over one or other of the various kinds of thermostatic controller, or over the complainant's type of expansion disk, since the same kind of disk appeared not only in Dunham's previous patents, but in other patents still earlier; nor, again, are we at all concerned with the scope or validity of any of the 11 claims of the patent, other than of claim 3. In short the matter in issue, as has just been said, is so well defined by the terms of that claim, construed as they must be in the light of the prior art, that we repeat it is extremely difficult to understand why so much ado has been made over what seem to be absolutely irrelevant and immaterial matters.

Since the exact form of brace called for by claim 3 and shown and described in the specification and drawings does not appear in the prior art, it will be assumed, for the purpose of this suit, notwithstanding, what has been said, that that claim discloses novelty and invention. But with this much assumed, the question still remains has the defendant infringed it? The defendant's construction, unlike the complainant's, is not of the diaphragm kind; that is, it is not made of corrugated plates united at their edges to form a chambered expansion disk, but is of a type well recognized in the prior art and known as the "bellows type," consisting of a metallic bellows, cylindrical in form, the ends of which are secured to top and bottom plates of unyielding metal; the bellows being adapted to be filled with a vaporizable fluid and operated as a thermostatic controller. There are many patents in the prior art covering the flexible diaphragm type of controller, such as the one in suit, and there are also many others of the bellows type. It is, however, unnecessary to discuss them in detail. An ordinary observer after a casual inspection, would readily distinguish and correctly classify them. Undoubtedly the defendant had a perfect right to adopt and use, as it did, the bellows type without at all trenching upon the complainant's rights. It merely followed Dunham's prior patents and other patents still earlier, so that the only questions for consideration are, whether the defendant has adopted and used the "plate" or stop of the third claim, and, if it has, did it set it edgewise against the walls of the chambered disk.

As a matter of fact, the only stop it uses is a tubular stop centrally located and attached to one of the solid end plates, but so attached that it in no wise touches, much less rests against or supports, the side, or collapsible part, of the bellows, which is the only part of defendant's expansion disk that can seriously be claimed to represent the chambered expansion disk of complainant's patent. The defendant's stop may repeatedly be found in the prior art, sometimes in the form of a solid block, sometimes in the form of a spring and sometimes in a tubular form, and located not only at the center but at points between the center and periphery of the expansion chamber. For instance, in patent No. 141,063, to Maxim and Hawes for a steam trap issued in 1873, considerably over 30 years prior to the patent in suit, there was shown what was called an "expansion vessel," containing alcohol or

other easily evaporating fluid designed to operate a valve, for the purpose and in the manner of the patent in suit; within which expansion vessel there was, moreover, located a cylindrical block of wood of a "length sufficient to prevent the sides of the vessel being injured by collapsing by the external pressure." It is, moreover, perfectly manifest, as has been shown, that claim 3, interpreted in the light of the specification, recognizes not only a stop consisting of the plugs centrally located which are not unlike the defendant's in principle, but also an additional stop or brace set edgewise against the walls of the expansion disk to assist the centrally located plugs in preventing its collapse. Since then the defendant uses but one type of stop, and that an old one in form and function, and since its stop is not set edgewise against the walls of the expansion disk as called for by claim 3, it cannot be, and is not, included within its terms.

It seems unnecessary to consider the prior art in detail. A casual inspection of it will show that the claim in suit can only be upheld by giving it a narrow construction. To hold that the defendant's construction infringes it would require it to be so broadly construed that it would run counter to the prior art, to its own destruction. Defendant's expert has also shown that the tubular support of the defendant's device has the additional function of controlling and centering the valve upon the valve seat. No such function exists or can be claimed for the device of claim 3; hence, in form, location, and function the defendant's stop or brace is totally unlike the one therein referred to. Furthermore, and finally, the complainant shows two kinds of braces, stops, or supports, the defendant but one.

The bill will be dismissed, with costs, upon the ground of noninfringement.

T. B. WOOD'S SONS CO. v. VALLEY IRON WORKS.

(District Court, M. D. Pennsylvania. July 24, 1913.)

No. 120.

PATENTS (§ 328*)—INFRINGEMENT—SHAFT HANGER.

The Wood patent, No. 790,609, for a shaft hanger, *held* not infringed by a hanger which lacks the cylindrical surfaces on the upper and lower sides of the bearing box, which is the principal element distinguishing the patented device from the prior art.

In Equity. Suit by the T. B. Wood's Sons Company against the Valley Iron Works for infringement of letters patent No. 790,609, for a shaft hanger, granted to Charles O. Wood May 23, 1905. On final hearing. Decree for defendant.

See, also, 198 Fed. 869.

Edwin J. Prindle, of New York City, for complainant.

F. B. Brock, of New York City, for defendant.

WITMER, District Judge. The validity of the Woods patent was settled in a former suit between the parties hereto, reported in 191

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Fed. 196 and 196 Fed. 780, 116 C. C. A. 46, and, as well, the issue of infringement of a shaft hanger then made and sold by the defendant. Whether a certain other devised hanger, since made and sold by the defendant, constitutes infringement of such patent, is now for determination.

Complainant's and defendant's hangers are alike in certain respects. In appearance they are very similar; but complainant's is not a design patent, and the matter of unfair competition was settled in a former suit.

The hangers differ radically in one essential functional feature. Complainant's hanger has cylindrical bearing surfaces upon the upper and lower sides of the box, while defendant's hanger has perfectly flat bearing surfaces at these same points. These cylindrical surfaces will allow the bearing box, when the flat screws are applied, to adapt itself perfectly to the shaft. It was principally upon this novel and important feature of complainant's hanger, as distinguished from the former art represented in defendant's hanger, that complainant secured his patent and favorable decision of this court. I distinctly recall the emphasis placed by counsel for complainant on this novel and important feature of his patent in an effort to sustain it, and the same was recognized by the court on appeal in these words:

"The patent accomplishes this by means of horizontal screws on the sides and large screws on the top and bottom; these last screws having plane surfaces, but bearing upon a countersunk cylindrical surface or a flanged cylindrical surface. This surface upon which the flat screw bears allows a variation in position of the box, but when once adjusted the flat surface of the screw has sufficient bearing to prevent further movement when the large screw or flange is fastened with a set screw. * * * We are particularly impressed by this on an examination of the patent in suit in comparison with the others, and also by the fact that, after a natural adjustment by the moving of the shaft (the hanger-box adapting itself to any position of the shaft), the box can be firmly screwed in the desired position by means of horizontal screws at the sides of the box and by the large flat vertical screw bearing upon the cylindrical surfaces of the upper and lower sides of the box, and then fixed by a set screw in the large flat screw, the flat screw being prevented by the countersink of flange from escaping from the top or bottom of the box. 196 Fed. 780 [116 C. C. A. 46]."

The language of the defendant's expert witness, Dempster M. Smith, without quoting at length, expresses my views of the matter in these words:

"My deduction from Mr. Freeman's [complainant's witness] primary conclusion, with which I agree, is that the combination and functions of the Wood structure are so very like the prior art that the only novel feature existing in the patent is the transverse cylindrical seat surrounded by a flange, and that, since defendant's structure does not have this seat, it is outside the patent claims. My further conclusion is that defendant's structure in several respects functionates in a slightly different manner from the patent structure, as explained by Mr. Freeman, and that so far as these functions approach the functions of complainant's patent they are common both to that patent and to the prior art, are taught by the prior art, and do not in any way negative the structural distinction between defendant's structure and the claims."

The opinion expressed, I believe, is furthermore borne out by the file wrappers of the Wood patent as embodying the views of the exam-

iner and counsel for the applicant. While it is true that the language of the grant is controlling, and proceedings in the Patent Office are generally not of much importance in the interpretation to be placed upon the claims and specifications of a patent, the opinion and arguments of parties are nevertheless more or less persuasive, as in this case they truly exhibit the impression of the examiner and the limitation conceded by counsel for the applicant.

The claims submitted by Wood's attorney with his original specifications were very broad, and most of them would clearly cover defendant's structure, as well as his own. The examiner rejected all of these claims upon patents to Jacquin, Dierker, Everline, 539,045, and Crowell. These claims were stricken out, and a single one inserted, which describes the box surfaces as—

"cylindrical surfaces, each of which surfaces is cylindrical to an axis passing substantially through the center of the bearing blocks and through the plane of said frame."

This claim was rejected; the examiner saying:

"The patents to Jacquin and to Dierker, jointly considered, clearly anticipate every essential feature of applicant's claim. Jacquin's shows the lateral and vertical adjusting devices in a combination substantially the same as applicant's, and Dierker shows the cylindrical surfaces, with the 'metal about said surfaces being raised to form retaining flanges to insure engages of said screws.'"

Applicant then struck out this claim and inserted two others. Each of these claims describe:

"Surfaces that are curved only in directions parallel with the shaft axis,
* * * forming bearings upon which the bearing box may rock vertically."

In argument the applicant's counsel said:

"The Dierker patent is the only one needing consideration, in view of the limitations of the above claims to the curved surfaces on the bearing box."

These claims were in turn rejected, and the patented claims were then inserted, each containing, as fully pointed out above, the specific "cylindrical surfaces whose axes are transverse to the axis of the bearing." In argument in support of these claims counsel for applicant said:

"The cylindrical surfaces *o o'* on the bearing box permit the box to rock vertically. * * * Because of the fact that the axes of the cylindrical surfaces are transverse to the shaft, * * * the box can be adjusted vertically without disturbing the vertical screws. * * * The patent to Jacquin does not anticipate, because there are no cylindrical surfaces on the bearing blocks which are engaged by the vertical screws. * * * None of the references shows a bearing box having cylindrical surfaces upon the bearing box which are surrounded by flanges."

The patentee himself thus insisted upon the importance of these cylindrical surfaces, and depended upon them to distinguish his claims patentably from the prior art. Evidently without the inclusions of this specific element the claims would not have been allowed. Defendant's structure omits this essential cylindrical seat. In doing so the

structure becomes identical with the prior art so far as the Wood patent is concerned.

The prayer of the bill is denied, and the bill dismissed, at the cost of the complainant.

LUTEN v. MacAFEE et al.

(District Court, M. D. Pennsylvania. June 8, 1913.)

No. 85.

PATENTS (§ 261*)—INFRINGEMENT—LICENSE.

A defendant cannot be charged with infringement of a patent, when the patented article was sold him by the patentee with license to use the same even though the consideration agreed upon has not been paid.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 364; Dec. Dig. § 261.*]

In Equity. Suit by Daniel B. Luten against D. J. MacAfee and S. B. MacAfee. Decree for defendants.

Jones, Addington, Ames & Seibold, of Chicago, Ill., for complainant.

Mills & Schrier, of Athens, Pa., and Lilley & Wilson, of Towanda, Pa., for defendants.

WITMER, District Judge. This is a suit brought by Daniel B. Luten against D. J. MacAfee and S. B. MacAfee, doing business under the name and style of the MacAfee Concrete Company, under letters patent Nos. 818,386, 853,202, and 853,203, taken out and owned by Daniel B. Luten, the complainant, upon his invention for reinforcing, by iron and steel rods, concrete arch bridge structures.

The inventions embodied in these patents and covered by the claims thereof were used by the defendants in the construction of a concrete bridge, erected by the defendants for the county commissioners in the fall of 1908 on the depot road over Middle creek, Wyalusing township, Bradford county, Pa. The bridge was constructed under a contract with the commissioners and under specifications and plans providing as follows:

"The type of bridge construction contemplated by these plans and specifications is covered by letters patent and applications for letters patent, owned by the National Bridge Company, of Indianapolis, Ind. Said company will contract with any contractor to furnish the steel specified, with shop work complete, f. o. b. Wyalusing, Pa., together with the necessary working drawings, and the license to erect the bridges specified, for the following amount, to wit: \$218."

The National Bridge Company, of which the complainant, D. B. Luten, is president, did furnish the defendants the patented reinforcing steel working drawings and license to erect a bridge; the defendants agreeing to pay the sum of \$218, as specified. There can be no question about the agreement between the Bridge Company, acting

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by and through its president, and the defendants as appears from the correspondence in evidence.

The complainant contends, however, though the defendants were supplied with the structural steel, and license to use the same, they have neglected and refused to pay for it. The defendants, on the other hand, contend that they did make settlement for the amount involved with the agents of the National Bridge Company, Messrs. E. R. Booth and W. N. Conger, of Owego, N. Y., claiming to be members of the Owego Bridge Company and Owego Concrete Company. Whether or not this settlement was made, as contended by the defendants, or whether sufficient consideration passed between the parties, by way of settlement, is a matter that may be settled hereafter in a manner affording the defendants the opportunity of trial by jury.

It clearly appears that there has been no wrongful invasion or infraction of the plaintiff's rights under his letters patent. It cannot be said that there was infringement by the defendants in making use of the patented article sold them by the patentee, with a license to use the same in manner contemplated, for a consideration specified; the elements of infringement, the invasion or infraction of plaintiff's rights to the monopoly, being wanting. The infringement of a patent is the unauthorized making, using, or selling of the invention during the life of the patent. There is no infringement where its use is authorized by the owner. *Holmes v. Kirkpatrick*, 133 Fed. 232, 66 C. C. A. 286; *Hanifen v. Lupton*, 101 Fed. 462, 41 C. C. A. 462; *American Graphophone Co. v. Talking Mach. Co.*, 98 Fed. 729, 39 C. C. A. 245; *Pelzer v. Binghamton*, 95 Fed. 823, 37 C. C. A. 288; *Sprague Electric R., etc., Co. v. Nassau Electric Co.*, 95 Fed. 821, 37 C. C. A. 286; *Blakey v. National Mfg. Co.*, 95 Fed. 136, 37 C. C. A. 27; *Dibble v. Augur*, Fed. Cas. No. 3,879, 7 Blatch. 86; *Jordon v. Dobson*, Fed. Cas. No. 7,519, 2 Abb. U. S. 398, 4 Fish. Pat. Cas. 232, 7 Phila. 533.

Furthermore, it is not proven or charged in the bill that there is such threatened infringement as entitles the complainant to relief in this court.

The bill is dismissed, at the cost of the complainant.

In re ROBINSON.

(District Court, D. Idaho, N. D. June 19, 1913.)

1. BANKRUPTCY (§ 396*)—EXEMPTIONS—TOOLS AND APPLIANCES—ELECTRIC MOTOR—LATHE—"IMPLEMENTS."

Where a bankrupt was a polyartist and used an electric motor and a lathe in his business, they were properly regarded as "implements" within Idaho Rev. Codes, § 4480, exempting the tools or implements of a mechanic or artisan necessary to carry on his trade not exceeding \$500 in value.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668; Dec. Dig. § 396.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3424-3426.

*For other cases see same topic & § NUMBER in Dec. & A.M. Digs. 1907 to date, & Rep'r Indexes

2. BANKRUPTCY (§ 396*)—EXEMPTIONS—STATUTES—CONSTRUCTION—TOOLS OR IMPLEMENTS.

Idaho Rev. Codes, § 4480, provides that the tools or implements of a mechanic or artisan necessary to carry on his trade not exceeding \$500 in value are exempt from execution. *Held*, that where a bankrupt was a polyartist, and had tools appropriate to blacksmithing, carpentering, and electrical work, all of which he used in his business, he was not limited to the selection as exempt of tools and appliances applicable to a single trade, but was entitled to select as exempt tools and appliances without reference to the trade to which they were applicable, so long as their value in gross did not exceed the statutory limit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668; Dec. Dig. § 396.*]

In Bankruptcy. In the matter of bankruptcy proceedings of J. L. Robinson. The referee set aside certain personal property of the bankrupt as exempt under the state law, and the trustee files a petition to review. Affirmed.

Whitla & Nelson, of Cœur D'Alene, Idaho, for trustee.

McFarland & McFarland, of Cœur D'Alene, Idaho, for bankrupt.

DIETRICH, District Judge. By this proceeding the trustee in bankruptcy seeks the review of an order made by the referee on the 24th day of April, 1913, setting aside certain personal property of the bankrupt as exempt under and by virtue of section 4480 of the Idaho Revised Codes. By this provision of the statute "tools or implements of a mechanic or artisan necessary to carry on his trade, not exceeding in value the sum of five hundred dollars" are exempt from execution. The property described in and set aside by the order consists of a large number of different articles of personal property, some of them being tools or appliances generally used by blacksmiths, and some of them being more particularly required by electricians, and others being more commonly used by carpenters, and still others relating to various trades, and some being in common use in several callings.

[1] Among the articles are an electric motor, and a lathe, which, because of their size and character, it is contended by counsel for the trustee should not be classed as "tools" or "implements"; but while it is impossible to lay down any general rule on the subject, and it is sometimes difficult to distinguish between a tool or implement upon the one hand and a machine upon the other, I am inclined to think that under the circumstances, and considering the purpose for which they are used by the bankrupt, together with their size and character, they may properly be classed as "implements" under the statute. In re Robb, 99 Cal. 202, 33 Pac. 890, 33 Am. St. Rep. 48.

[2] But the point most earnestly urged is that, under the statute, a debtor must confine his claim of exemption to tools or implements designed for and used only in one distinct, specialized trade or calling, and that, therefore, the bankrupt here cannot claim as exempt blacksmith tools, and carpenter tools, and electrical tools, but he must elect between the several trades, and confine his claim to those used in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 206 F.—12

one so chosen. It is not pretended that the Supreme Court of the state has ever construed the statute in this respect, and, moreover, there are apparently very few, if any, reported decisions from other states involving the precise point. There are cases which hold, and properly, I think, that where, by the exemption statute, the tools or implements pertaining to any given trade are specifically named and expressly exempted, or where tools or implements in any specified trade, of a prescribed maximum value, are exempted, the debtor must confine his claim to the one trade; or, in other words, to one class of exemptions. He cannot claim exemptions to the full value allowed by the statute in more than one class. But such cases are to be distinguished from that presently under consideration. The statute does not prescribe that certain specified tools of a blacksmith, or of a carpenter, or of an electrician, are exempt, or that a carpenter may claim exemptions to the amount of \$500, and a blacksmith may claim exemptions to a like amount. Nor is the bankrupt here insisting upon more than one exemption. He is not claiming \$500 worth of tools as a blacksmith, and another \$500 worth as a carpenter, and still another \$500 worth as an electrician. The aggregate value of all of the exemptions for which he asks does not exceed \$500; he is therefore claiming but a single exemption, in a single class, and undoubtedly his claim is within the spirit of the law. The statute under consideration provides certain exemptions for farmers, but these constitute an entirely distinct class. As another class it prescribes exemptions for miners, and as still another class certain specific exemptions are allowed to a drayman or truckman. Doubtless a debtor cannot claim exemptions in different classes, but the articles which were here allowed by the referee as exempt, while pertaining to different trades, all fall within one class: they are the tools or implements of a mechanic or artisan. That being the case, no cogent reason is apparent for compelling the debtor to make the election insisted upon by the trustee. So far as appears, the debtor was actually using all of the tools or implements as an artisan or mechanic in making his living. He was in the general repair business, a "jack of all trades," as he put it, and naturally required a great variety of tools; but such a trade or calling is quite as legitimate, and perhaps no less useful to society, and possibly quite as efficient as a means of earning a livelihood for the debtor and his family, as is a trade or calling more highly specialized. Suppose that in a small community, where there is not a sufficient amount of either carpenter's work or painting to engage all of the time of one man, a mechanic qualifies himself to render efficient service both as a carpenter and a painter, and purchases the necessary tools and appliances for carrying on both lines of work, and in fact follows both trades, and depends for his livelihood upon his earnings in both; is there any reason either in the spirit or in the letter of the statute, when fairly construed, why he should not be permitted to claim as exempt, up to the value of \$500, the tools of both callings? None is apparent; but that is substantially the case here.

It is accordingly thought that the referee's order was proper, and it will be affirmed.

THE SANTA CLARA.

(District Court, S. D. New York. June 27, 1913.)

No. 63.

1. SEAMEN (§ 29*)—ACTION FOR PERSONAL INJURIES—DEFENSES—PLEADING.

Where, in a suit in rem by a seaman to recover for personal injuries, the claimant intends to rely upon the fact that the ship belongs to a foreign country, under whose laws an action in rem for such injuries cannot be maintained, notice of such defense must be given in the pleadings.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.*]

2. SEAMEN (§ 29*)—INJURIES—LIABILITY OF VESSEL.

A seaman, injured in the service of the ship, is entitled to wages and maintenance and cost of cure, at least to the end of the voyage, without reference to the question of negligence, and to indemnity where his injuries result from unseaworthiness of the ship.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.*]

3. SEAMEN (§ 29*)—INJURIES—LIABILITY OF VESSEL.

Libelant, a seaman, was injured while descending in the dark from the bridge deck to the bunker, by losing his balance through a lurch of the ship and falling down a hatchway. He was familiar with the situation, and had used the same way for some months. The ship was of a usual construction, and there were no defects in equipment or appliances which caused the injury. *Held*, that the failure to provide lights or handrails or other protection around the hatch did not render her unseaworthy, and that libelant was not entitled to recover compensation for his injury.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.*]

In Admiralty. Suit by Juan Veiga against the steamship Santa Clara; Joseph H. Trachy, claimant. Decree for libelant.

Black, Varian, Bigelow & Somers, of New York City, for libelant.

Convers & Kirlin, of New York City (John M. Woolsey, of New York City, of counsel), for claimant.

WARD, Circuit Judge. [1] The libel is in rem for personal injuries to a fireman on the Santa Clara, and asks for full indemnity and such other and further relief as the libelant may be entitled to in the premises. This prayer, in analogy to the practice in equity, entitles the libelant to any relief appropriate to the case stated in the libel. If found not entitled to full indemnity, he will be allowed wages and expenses of maintenance and cure, at least to the end of the voyage.

The answer put in issue only the allegations of the libel, and set up an affirmative defense that the libelant's injuries were due to his own negligence or that of his fellow servants, and not to any fault or negligence of the steamer or her owners.

At the trial the claimant asked leave to amend the answer by alleging that the steamer was British, with a view of proving that under the British law the libelant was entitled to no lien, and therefore could not maintain this action. The *Lamington* (D. C.) 87 Fed. 752. Neither the claim, nor the stipulation, nor the answer gave any intimation

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the steamer was British, or that the British law would be relied on to defeat the libellant because of his method of procedure. Such pleading would deceive many, if not most, of the practitioners at this bar, and might leave an ignorant seaman with a good case without remedy after the steamer had left the jurisdiction. When a shipowner intends to rely upon such a defense, it is but fair to notify the opposite party of it in the pleading, and not to lead the unwary into a trap. Therefore I refused to allow any amendment, and will dispose of the case on the issues actually joined.

The libellant was hurt while on his way from the bridge deck through the fidley to the coal bunker at about 5:20 a. m. December 19, 1912. He had gone up to shift a ventilator, so as to give more air in the stoke hole, and was returning to his work in the port coal bunker. The morning was dark and stormy; the fidley very dark and without any artificial light whatever. The hatch through which he was to descend by the first ladder from the bridge deck to the 'tween decks was about 2 feet 6 inches long and 17 inches wide. The cover of it was kept permanently open by being fastened to the bulkhead. The floor of the fidley was of iron grating. In feeling his way with his foot, the libellant lost his balance through a lurch of the ship and fell, striking his right shoulder against the cover fastened against the bulkhead, and sustained painful injuries, from which he has not yet recovered, and which are likely to last for some time to come. There was no hand-rail or other protection around the hatch, nor any artificial light in the room.

[2] The relation of seamen to shipowners is peculiar. By the maritime law the seaman injured in the service of the ship is entitled to wages and maintenance and cost of cure, at least to the end of the voyage, without any reference whatever to the question of negligence, either upon his own part, or upon that of his fellow servants, or upon that of the owners. The single exception grafted out of humanity upon the law of the sea is to give the seaman indemnity from the vessel where his injuries result from unseaworthiness of the ship. *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760. This decision was lately considered by the Circuit Court of Appeals for this circuit in *The Steamship New York*, 204 Fed. 764.

[3] Therefore the sole question in the case is: Did the absence of the safeguards mentioned make the *Santa Clara* unseaworthy? No appurtenance upon which the seaman had a right to rely gave way through a defect, either original or supervening, as has been generally the case where indemnity has been allowed. The default was in the entire failure to furnish appurtenances which are now claimed to have been necessary to make the ship seaworthy. The libellant was perfectly familiar with the situation. He had used this particular method of going to and coming from the stoke hole for more than four months.

Uncovered holds and hatches are common in ships. The calling of seamen involves danger and requires care and skill. Owners are not obliged to furnish the best, safest, and most convenient structures. While they may be in this case chargeable with negligence, I do not think it is such negligence as amounts to making the vessel unsea-

worthy. The appurtenances not supplied, though appropriate and desirable, cannot, I think, be called necessary.

There will be an interlocutory decree in favor of the libelant for his wages and the cost of his maintenance and cure, if any, up to the end of the voyage, and, if not agreed upon, the usual order of reference.

SEABOARD AIR LINE RY. v. RAILROAD COMMISSION OF GEORGIA
et al.

(District Court, N. D. Georgia. May 15, 1913.)

RAILROADS (§ 9*)—POWERS OF STATE COMMISSION—REQUIRING PHYSICAL CONNECTION BETWEEN LINES—REVIEW OF ORDER.

A state railroad commission having the right to require a physical connection made between two railroad lines, if such an order is fair and reasonable, its enforcement cannot be enjoined by the courts; and the fact that it will cause some small loss to one of the roads at first is not sufficient to establish its unreasonableness.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. § 9.*]

In Equity. Suit by the Seaboard Air Line Railway against the Railroad Commission of Georgia and others. Decree for defendants.

W. G. Loving and Watkins & Latimer, all of Atlanta, Ga., for complainant.

Hines & Jordan, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. The Railroad Commission of Georgia, on the 12th day of July, 1912, passed an order requiring the Seaboard Air Line Railway and the Lawrenceville Branch Railroad, within four months, to make and maintain a physical connection at Lawrenceville, Ga. The Commission did not fix the specific place for the connection, nor did it prescribe who should pay therefor; but it expressed the opinion that the expenses of construction and maintenance should be borne equally by the two railroads.

This suit is brought to enjoin the enforcement of this order. It is conceded by counsel that this is not a case coming within section 266 of the new Judicial Code (Act March 3, 1911, c. 331, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]), amended by the act of March 12, 1913, requiring three judges, and no attack whatever is made upon the constitutionality of the act of the Legislature of Georgia authorizing the Railroad Commission of Georgia to require physical connections between railroads. Code Ga. 1910, § 2664. This Code section is taken from the act of August 22, 1907. Laws Ga. 1907, p. 76, § 7.

The right of state railroad commissions to require such physical connection has been fully sustained by the Supreme Court of the United States in Wisconsin, etc., R. Co. v. Jacobson, 179 U. S. 287, 301, 21 Sup. Ct. 115, 45 L. Ed. 194, and in State of Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. Ed. 863. In the latter case the right of the railroad to appeal to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

courts is also fully recognized and sustained; this right having been also recognized in the Jacobson Case.

Considerable evidence has been offered on the hearing here as to the necessity for this connection, particularly as to the necessity for it with reference to the transportation of freight, and more especially with reference to the transportation of freight in car load lots. This evidence does not show that the Seaboard Air Line Railway would be benefited by this connection; indeed, it may be admitted that it comes very near showing the contrary, as to immediate results, at least. The fact, however, that the Seaboard Air Line Railway would suffer some small loss by reason of this connection at first is no reason why the order is not valid. *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398.

Admitting that the Commission can make orders that are fair and reasonable in character, it should appear satisfactorily here, in this *de novo* investigation and application for an injunction, that the order of the Commission is not reasonable in character under all the circumstances shown in the matter. The Seaboard Air Line Railway contends here that to enforce the order of the Commission would require quite a large expenditure, something like \$10,000, while the Commission has put in evidence a plan by which it is claimed the connection can be made for something like \$1,800, under \$2,000 anyhow. I am satisfied from statements of counsel made in the case that the Commission is perfectly satisfied with this connection last named. Counsel for the Commission has stated in open court that the Commission would not ask this connection to be made if it required the expenditure of anywhere near \$10,000, but claims that the work can be done and the connection made for a much smaller amount. I have no doubt, from what appears here, that if the Seaboard Air Line Railway will appear before the Railroad Commission a proper arrangement will be made for making the connection at a very reasonable expense.

It is unnecessary to go extensively into the evidence adduced here. I do not think that the complainant has shown, even as to the matter of carriage of freight, that the order of the Commission is so unreasonable as to justify interference by this court. It seems that until recently the road from Lawrenceville, on the Seaboard Air Line Railway, to Sewanee, on the Southern Railway, was a narrow-gauge road, but that it has now been widened to the standard gauge of both the Southern and Seaboard main lines. This being true, it seems to me that, upon the face of the whole matter, there should be some physical connection between these two roads. The public interests may at any time be such as to require the taking of trains over this line, which necessity may arise from various causes which may well be anticipated.

Counsel for the railroad contend that this court would have no right to consider any other grounds for sustaining this order of the Commission than those upon which the Commission acted. Of course, it is a *de novo* investigation, and this matter appears upon the very face of the proceeding. This Lawrenceville Branch Railroad, from Sewanee, on the Southern, to Lawrenceville, on the Seaboard, being now

of standard gauge, enters the city of Lawrenceville, and, although the two roads enter the same town, there is now no physical connection whatever between them. As the connection can be made at comparatively little expense, it seems to me that the Railroad Commission was fully justified in making the order that it did. At all events it cannot be called an unreasonable order, under all the facts connected with the matter.

The application for an injunction is denied.

BOLTON STEAM SHIPPING CO. v. CROSSMAN et al.

(District Court, S. D. New York. July 1, 1913.)

No. 65.

1. SHIPPING (§ 116*)—LIABILITY OF VESSEL FOR SHORTAGE OF CARGO—EVIDENCE.

The receipt of a specified number of packages by the master makes a *prima facie* case against the ship, where a smaller number is delivered; but the ship will be discharged if he is able to show that he delivered all that he actually received.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 435; Dec. Dig. § 116.*]

2. SHIPPING (§ 116*)—SHORT DELIVERY OF CARGO—EVIDENCE CONSIDERED.

Evidence considered, and *held* not sufficient to exonerate a ship from liability for a short delivery of a cargo of coffee from Antwerp to New York, on the claim that she did not receive the number of bags called for by the bill of lading.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 435; Dec. Dig. § 116.*]

3. SHIPPING (§ 140*)—CONTRACT EXEMPTING CARRIER FROM LIABILITY FOR NEGLIGENCE—HARTER ACT—SPECIAL CARRIER.

The provisions of Harter Act Feb. 13, 1893, c. 105, § 1, 27 Stat. 445 (U. S. Comp. St. 1901, p. 2946), making invalid contracts relieving a carrier from liability for negligence, apply to a special as well as a common carrier.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 493-495; Dec. Dig. § 140.*]

In Admiralty. Suit by the Bolton Steam Shipping Company against George W. Crossman and Herman Sielcken. Decree for respondents.

Convers & Kirlin, of New York City (John M. Woolsey, of New York City, of counsel), for libellant.

Burlingham, Montgomery & Beecher, of New York City, for respondents.

WARD, Circuit Judge. The libel is filed by the owners of the steamer Ribera to recover from the holder of the bill of lading \$636.08, balance of freight due on cargo of coffee in bags, Antwerp to New York. Two bills of lading were signed by the master, which called in the aggregate for 56,864 bags, while the tally made by the ship's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

agents after the cargo had been discharged here and as it was removed from the wharf called for 56,834 bags.

Article 6 of the libel alleges that the whole cargo received at Antwerp has been delivered at New York, which is denied in the answer. Articles 7 and 8 of the libel allege that the parties, in lieu of weighing the cargo at New York, agreed that the weight was 7,418,792 pounds, and further allege that the freight earned at 12s. 6d. per 20 hundred-weight is \$10,080.78, of which only \$9,444.70 have been paid; the respondent refusing to pay the balance of \$636.08.

The answer admits the allegations of articles 7 and 8, but denies that any balance of freight is due, and sets up as a separate and independent defense the short delivery of 30 bags of coffee, of a value of \$636.08.

If the respondent's admission of the allegations of articles 7 and 8 of the libel are to be taken literally and separately, the libelant's case would be expressly admitted. Taken, however, with the denial of the allegation of article 6 that the whole cargo shipped had been delivered, and with the denial that any balance of freight is due, and with the defense of short delivery, the admission must be construed as meaning only that the freight claimed would be due and payable if the whole cargo shipped had been delivered. Indeed, this question of short delivery is the only issue involved.

[1] The parties would like a decision which will fix the rule in all cases of short delivery. This is as impossible as to lay down a rule which will fix negligence in all cases. Each depends upon its own circumstances. The receipt of a specified number of packages by the master creates a prima facie case against the ship; but the ship will be discharged if he is able to show that he delivered all that was actually received. He may show that the figures in the bill of lading were the result of errors in addition, or errors in tallying, or of confusion of similar cargo.

[2] Both parties appear to agree that the tally made in New York was correct; that is to say, that the actual number of bags received by the respondent was 30 short of the bill of lading number. If the ship's duty was discharged when it delivered the bags over the side, as the libelant contends, and she did deliver all there were on board, her owners should explain why the bills of lading call for 30 bags more than were delivered. The testimony satisfies me that a very careful tally was kept at Antwerp as the bags went into the sling. The ship was fully loaded before all on the last wagon could be taken aboard. The libelant argues that the bills of lading by error called for these, which were intended to be loaded, but which were not. Precisely the contrary seems to me to be the fact, because there was a deduction made from one of the bills of lading of 16 bags, which were evidently the bags intended to be shipped, and which were not shipped. This shows care, but in no way explains an overage of 30 bags. There is evidence that the customs officers at Antwerp also kept a tally. The libelant should have examined them, and also the shippers, to ascertain from their accounts what number of bags went on board. Commercial transactions are made in reliance upon ships' documents, and any doubt as to their correctness should be resolved against the ship.

[3] The libelant contends that, because it is a special and not a common cartier, it is excused for negligence under the provision of the charter party.

"All goods to be brought to and taken from alongside at merchant's risk and expense."

Assuming that this covenant is incorporated by reference in the bill of lading, and that it amounts to an exemption of the carrier for its own negligence, it is no defense. There is no evidence that 30 bags shipped were lost by the carrier's negligence. The libelant's contention is that it never received them. Moreover, under section 1 of the Harter Act, any clause in the bill of lading relieving the carrier, whether common or special, from liability for loss arising from negligence in proper custody, care, or delivery of merchandise committed to its charge, is void.

The libel is dismissed, with costs.

In re NATIONAL MARBLE & GRANITE CO.

(District Court, N. D. Georgia. April 29, 1913.)

No. 3,097.

BANKRUPTCY (§ 348*)—DEBTS ENTITLED TO PRIORITY—WAGES DUE "TRAVELING SALESMAN"—"WAGES."

Claimant, who was a traveling salesman for another concern, had an agreement with the bankrupt, which was a manufacturer of monuments, that he should receive 15 per cent. on the price of monuments sold by him as a commission, to be paid when the monument was set up and paid for. He contracted for the sale of a monument some 10 months before the bankruptcy, and it was set up and paid for about a month before. *Held*, that he was a "traveling salesman," and that his commission was "wages" earned within three months, entitled to priority under Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447) as amended by Act June 15, 1906, c. 3333, 34 Stat. 267 (U. S. Comp. St. Supp. 1911, p. 1507).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. § 348.*

For other definitions, see Words and Phrases, vol. 8, pp. 7082, 7083, 7369-7373, 7831.]

In the matter of the National Marble & Granite Company, bankrupt. On certificate of referee relating to claim of C. A. Brock. Allowed as preferred claim.

Batchelor & Higdon, of Atlanta, Ga., for petitioner.

Smith, Hammond & Smith, of Atlanta, Ga., and D. W. Blair, of Marietta, Ga., for trustee.

NEWMAN, District Judge. In this case C. A. Brock proved a claim for 15 per cent. commission on \$1,700, the price of a monument sold by him for the bankrupt company. Brock was a traveling man for another concern, but he had an agreement and understanding with the bankrupt company that he was to have 15 per cent. on monuments

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sold by him, as commission, to be paid him when the monument was set up and paid for. The monument was sold, or the agreement was made with Mr. and Mrs. J. M. Cartledge, the purchasers, in March, 1911. The monument was delivered, put up, and paid for some time in December, 1911, and the bankruptcy proceedings were instituted in January, 1912.

There is no question but that the monument was delivered and paid for within three months before the date of the commencement of the bankruptcy proceedings, and no question is made in this case, as I understand it, but that Brock comes within the statute and was a traveling salesman, and no question is made but that commissions due salesmen for sales made by them are "wages" within the meaning of section 64 of the Bankrupt Act with reference to those entitled to priority.

"The term 'wages' should be construed in a broad and general sense as meaning compensation for services rendered." Collier on Bankruptcy (9th Ed.) p. 902.

In the Case of the New England Thread Company, 158 Fed. 788, 89 C. C. A. 285, in a decision by the Circuit Court of Appeals for the First Circuit, the headnotes explain what was decided as follows:

"Claimant was employed by the bankrupt as a salesman under a contract which assigned him certain territory and cities throughout the country in which he obligated himself to take proper care of the trade. He was paid entirely by a commission on sales made, and established an office in Boston at his own expense. A circular was sent out by the bankrupt announcing his employment as its special representative in the United States, and directing that all orders be sent to his office. He exercised full discretion as to when and where he should travel and also received orders as his office. *Held*, that he was a traveling salesman within the meaning of Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), as amended Act June 15, 1906, c. 3333, 34 Stat. 267 (U. S. Comp. St. Supp. 1911, p. 1507), and entitled to priority thereunder for commissions earned within three months prior to the bankruptcy not exceeding \$300."

"Commissions paid to a traveling salesman for his services are 'wages,' within Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), as amended Act June 15, 1906, c. 3333, 34 Stat. 267 (U. S. Comp. St. Supp. 1911, p. 1507)."

The only point insisted upon here is that the \$255 was not "earned" within the three months before the date of the commencement of the proceedings in bankruptcy. He is entitled, under section 64b, to wages not exceeding \$300 if the same were "earned" within three months before the date of the bankruptcy proceeding.

It is perfectly clear that Brock was not entitled to his compensation until the monument was erected and paid for; all the testimony shows that, although he made the contract for the sale of the monument something like ten months before the bankruptcy proceeding, he was not to receive anything at all for his services in connection with the sale of the monument until the company received the money for it.

I cannot escape the conclusion that his commission was not "earned" until the monument was paid for. He was to receive the commission when the monument was paid for, and only when it was paid for. He could not have required or expected the company to pay him until the monument was paid for and the money for it received. A part of the

contract under which he was to be entitled to his commission, and as necessary to his earning the same as any other part, was that the parties purchasing the monument should accept and pay for it. Therefore I do not see how he could have earned it until it had been demonstrated that the people to whom he made the sale would go on and carry out their contract and pay his employer for the same.

In accordance with the above, the referee is directed to allow the claim of C. A. Brock as a preferred claim under section 64b of the Bankrupt Act.

In re YOUNG.

REYNOLDS v. DAVITTE.

(District Court, N. D. Georgia. April 11, 1913.)

No. 18, in Equity.

BANKRUPTCY (§ 302*)—ACTION BY TRUSTEE—RECOVERY OF PROPERTY SOLD.

Bankrupt, as a member of a partnership conducting a soda fountain business, joined in a sale of the stock and fixtures to the father-in-law of his partner, and retired from the business, which was continued by his former partner alone, but in the firm name. *Held*, that the fact that such partner thereafter contracted indebtedness on the strength of his possession of the property afforded no ground for attacking the validity of the sale by the bankrupt or his trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 456, 457; Dec. Dig. § 302.*]

In Equity. Suit by Hugh T. Reynolds, trustee in bankruptcy of D. H. Young, against J. S. Davitte. On demurrer to bill. Sustained.

Dean & Dean and J. M. Hunt, all of Rome, Ga., for trustee.
Maddox & Doyal, of Rome, Ga., for defendant.

NEWMAN, District Judge. This is a petition by Hugh T. Reynolds, trustee in bankruptcy of D. H. Young, seeking to set aside a sale of certain soda fountain apparatus and other property from Burnett & Young to J. S. Davitte (Burnett and Young each having signed the bill of sale to J. S. Davitte individually). It seems from the allegations of the petition and the conceded facts that on and before September 8, 1910, B. F. Burnett and D. H. Young were doing business as partners under the name of Burnett & Young, making and selling cold drinks and operating a general soda fountain business in the town of Rockmart, Ga. On said date, September 8, 1910, Burnett & Young sold out their entire stock, business, and fixtures to J. S. Davitte, of Rockmart, Ga., giving him a bill of sale signed in their individual names, as above stated. It further appears that on the date of this sale D. H. Young retired from the business, and the same was continued by Burnett under the firm name of Burnett & Young. Burnett is alleged to be the son-in-law of Davitte.

The ground now relied upon to set aside this sale seems, as I gather it, to be that Davitte left this property, the soda fountain, etc., in the possession of Burnett, and that Burnett created a large amount of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

debts, amounting in all to \$3,649.34, and as I further understand it credit was given for this amount on the strength of the possession by Burnett of this property. I do not see how the trustee in bankruptcy of Young can make this question in this way. Young concededly was not using the property after September 8, 1910, and the only way in which he could become liable at all for these debts would be upon the ground that he continued to allow Burnett to use his name. The possession of the property had nothing to do with that, and it seems to me to be a matter not at all germane to the Young bankruptcy proceeding. Young was not in possession of the property, and whoever was deceived was deceived by the conduct of Burnett and Davitte.

It would certainly be necessary for it to be determined that Young was liable for the debts made after he withdrew from the business. He cannot by putting them in his schedule of liabilities enable his trustee in this way to attack a situation that existed as between Burnett and Davitte. It is stated in the amended petition by Reynolds, trustee, filed November 21, 1912, that the debts created after September 8, 1910 (\$3,649.34), "was created by Burnett doing business in the firm name of Burnett & Young," and "at which time D. H. Young became physically retired, and as a matter of fact actually retired, from the business of Burnett & Young, and ceased all connection therewith; that is between himself and Burnett and Davitte, and he was no longer a member of the firm." The creditors whose debts were created prior to September 8, 1910, would depend, as to this property, on the bona fides of the sale from Burnett & Young to Davitte, whether it was for a present consideration and made in good faith. Any rights of the creditors whose debts were created after September 8, 1910, as to this soda fountain, etc., would only exist by reason of the fact that Davitte allowed it to remain in Burnett's possession, thereby causing persons giving credit to believe it still belonged to Burnett. According to the pleadings, it never was in Young's possession after the date named and after he retired from the business. Any rights against him, as I have already stated, would depend upon the use of his name, and not upon the retention of possession of the property.

Reynolds, standing in Young's shoes, would not have any rights at all, because Young clearly, on the pleadings here, would have no right to rescind or to recover the property in question. It is only as the representative of creditors that he would have any rights at all, and acting in that capacity I do not think he has any rights for the reasons stated.

The foregoing is without reference to the defense made that the bill of sale for personalty was not required to be recorded under the laws of Georgia, but that its record is simply permissible.

I do not think this petition can be maintained, and the demurrer to it is sustained.

BRITISH-AMERICAN TOBACCO CO., Limited, v. BRITISH-AMERICAN CIGAR STORES CO.

(District Court, S. D. New York. June 6, 1913.)

No. 59.

TRADE-MARKS AND TRADE-NAMES (§ 92*)—UNFAIR COMPETITION—RIGHT TO USE OF CORPORATE NAME.

A bill by the British-American Tobacco Company, Limited, a British corporation manufacturing tobacco products, which it sells to jobbers and retailers only, *held* not to state a cause of action for an injunction against the British-American Cigar Stores Company, an American corporation selling tobacco products at retail only, to restrain it from using the words "British-American" in its corporate title, where it was not alleged that the words had acquired a secondary signification in connection with complainant's products, and the bill showed that the parties were not in competition with each other.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 102, 103; Dec. Dig. § 92.*]

In Equity. Suit by the British-American Tobacco Company, Limited, against the British-American Cigar Stores Company. On motion to dismiss bill under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi). Motion granted.

Nicoll, Anable, Lindsay & Fuller, of New York City, for complainant.

Kearny & Dickinson, of New York City, for defendant.

WARD, Circuit Judge. The bill alleges that the complainant, the British-American Tobacco Company, Limited, a British corporation, is and for some years past has been widely known both in this country and abroad as a manufacturer of tobacco products; that, although its charter authorizes it to sell at retail, it does not do so, but for good reasons stated sells only to jobbers and retailers; that the defendant has very lately been incorporated under the laws of New Jersey, and admitted to do business in this state under the corporate title British-American Cigar Stores Company, and is engaged in the retail tobacco business, selling to consumers solely.

Although the names are not identical, and the complainant does only a wholesale and the defendant a retail business, it is difficult to resist the conviction that the defendant has used these words in its corporate title in order to profit in some way by the complainant's reputation, if not in the sale of its goods, then in the placing of its capital stock. If it had only wanted, as it alleges, a name descriptive of its intention to establish a chain of stores in Canada and the United States, other words, such as "Canadian-American Cigar Stores Company" would have served as well.

The bill challenges the right of the defendant to use the words "British-American" as a part of its corporate title, and prays that such use may be enjoined. The words, being geographical, cannot be appropriated as a trade-mark. If the bill had alleged that they had ac-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

quired a secondary signification in connection with the complainant's products, and that the defendant was by using them selling its goods as the complainant's and getting the benefit of the complainant's business, an injunction might issue. But, on the contrary, the bill shows that the parties are not in competition with each other, and expressly states as its grievance that jobbers and retailers buy as little as possible of a manufacturer who competes with them by retailing. It is for this reason that it does not retail and does not wish to be thought to do so. Though the similarity of names may in this way injure the complainant with jobbers and retailers, who are confused thereby and led to suppose that the complainant is doing a retail business, I do not think this fact gives it the exclusive right to the use of the words.

The motion to dismiss the bill is granted.

UNITED STATES v. ATLANTIC COAST LINE R. CO.

(District Court, E. D. North Carolina. July 9, 1913.)

No. 23.

1. POST OFFICE (§ 22*)—RAILROAD AS CARRIER OF MAILS—NATURE OF SERVICE.

A railroad company, carrying the mails under contract, is not in respect to such service a common carrier, but is a public agency of the United States, employed in performing a governmental function.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 40, 41; Dec. Dig. § 22.*]

2. POST OFFICE (§ 21*)—RAILROAD AS CARRIER OF MAILS—REMEDY FOR BREACH OF CONTRACT.

Rev. St. § 3962 (U. S. Comp. St. 1901, p. 2704), which authorizes the Postmaster General to make deductions from the pay of contractors for failure to perform service according to contract, and to impose fines upon them for other delinquencies, provides a summary remedy to the United States for breaches of such contracts, which is exclusive; and where such a deduction has been made from the pay of a railroad company under a contract for transporting over its road employes, equipment, and mails in postal cars, "because of the destruction of mail and equipment" in a wreck, the United States cannot also maintain an action in the courts for damages, neither the government nor the company being under any liability to the owners of mail destroyed or lost.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 27-39; Dec. Dig. § 21.*]

3. POST OFFICE (§ 21*)—RAILROAD AS CARRIER OF MAIL—LIABILITY FOR MAIL MATTER LOST—ACTION BY UNITED STATES AS BAILEE.

A contract by a railroad company with the Postmaster General to transport over its road cars containing mail matter in the custody of employes of the postal service contemplates only the carriage of matter lawfully mailable, and the company cannot be held liable in an action for breach of the contract, brought by the United States as bailee, for the value of a package lost containing valuable articles, which was mailed in a foreign country in violation of the convention between that country and the United States, and the contents of which package were not known to the government or the railroad company.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 27-39; Dec. Dig. § 21.*]

4. BAILMENT (§ 21*)—ACTION BY BAILEE AGAINST THIRD PERSONS—DEFENSES.

Where a bailee sues for the benefit of the bailor for the conversion or loss of the bailed property by another, his right of action and extent of recovery are measured by those of the party for whose benefit he sues, and the action is open to any defense which might be made against the bailor; and this is especially true where the statutes of the state require actions to be prosecuted by the real party in interest.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 91-102; Dec. Dig. § 21.*]

5. UNITED STATES (§ 129*)—ACTION FOR BENEFIT OF PRIVATE PERSONS—DEFENSES.

Such rule is equally applicable to actions by the United States as formal plaintiff, but for the benefit of private persons.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 117; Dec. Dig. § 129.*]

6. BAILMENT (§ 3*)—RESPONSIBILITY OF BAILEE—DECEPTION BY BAILOR.

One cannot be made bailee of an article as to the nature or value of which, by the conduct of the bailor, in violation of the terms of the contract, he was misled and deceived.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 18-20; Dec. Dig. § 3.*]

At Law. Action by the United States against the Atlantic Coast Line Railroad Company. Judgment for defendant.

See, also, 189 Fed. 779.

H. F. Seawell, Dist. Atty., of Carthage, N. C., and Chapman W. Maupin, Sp. Atty., of Washington, D. C., for the United States.

George B. Elliott, Chas. A. Townes, and Davis & Davis, all of Wilmington, N. C., for defendant.

CONNOR, District Judge. Action for damages for loss of mail equipment and registered mail matter, while in transit over defendant's line of railroad.

Plaintiff declared: (1) For destruction of mail pouches and other equipment, of the value of \$135.85, the property of plaintiff, alleged to have been placed in the possession of defendant pursuant to a contract of carriage and destroyed by the negligence of defendant's employés. (2) For destruction or loss of certain diamonds, of the value of \$6,208.27, and other registered mail matter, of the value of \$2.50, of which plaintiff was the bailee as registered mail matter, while in transit over defendant's road pursuant to a contract for carriage. (3) For that defendant negligently permitted its employés and others to convert to their own use certain diamonds, while in the possession of defendant under a contract for carriage.

Issues, arising upon the pleadings and set out in the record, were submitted to and answered by the jury, whereupon a stipulation was made between the parties that the judge upon the verdict, the facts found by the court from the depositions and exhibits, and the admissions in the pleadings, should render such judgment as, in his opinion, was in accordance with law; each party saving all exceptions set out in the record. The court finds the following facts:

Defendant operates a line of railroad connecting, at Weldon, N. C.,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with other lines of road, from the north, to the South Carolina state line, and connecting with other lines of road to the south. Pursuant to the provisions of acts of Congress, plaintiff, by its Postmaster General, on February 13, 1900, entered into a contract with defendant, which was in force and effect at all times thereafter to and including April 18, 1904, whereby defendant contracted to carry for plaintiff such foreign and domestic mail and mail equipment as was delivered to it in accordance with the acts of Congress and the regulations of the Post Office Department, over the line of said road from Weldon, N. C., to the South Carolina line, known and designated as "Mail Route No. 118.002," at a stipulated price per mile. On said 18th day of April, 1904, there existed an authorized United States mail service, known and designated as the "Washington and Charleston Railway Post Office," extending from Washington, D. C., to Charleston, S. C., and thence south, of which said line defendant's railroad formed a part.

On and prior to said date there was existing and in force a postal convention, entered into between the United States of America and the republic of France, whereby the former accepted and carried registered mail, and other mail matter, originating in the territory of the latter, and ending in or passing through the territory of the former. By the terms and provisions of said convention certain articles, including diamonds and other jewels, having a salable value, were prohibited from being placed in or sent through registered mail originating in France and coming to or passing through the United States. On or about the 8th day of April, 1904, the firm of Rousselon Frères & Co., residents of Paris, France, placed in a sealed package, addressed to García Corrugado y Sabrino, at Havana, Cuba, 32 cut diamonds, and placed the said sealed package and registered same in the post office at Paris, France, for transmission through the mail, via the United States of America, to the addressees at Havana. Said diamonds were sent to the addressees on consignment for sale for account of the owners. Said package, containing said diamonds, was so placed in the post office, and registered, in violation of the laws and postal regulations of the republic of France and of the terms and provisions of the postal convention concluded between the United States and the republic of France. Said package, in a pouch with other foreign mail, was brought from Paris to Havre by rail, and from Havre to New York in a steamship, as a part of the foreign mail, placed in the mail car, attached to the train of the Pennsylvania Railroad at Jersey City, and carried to Washington, D. C. It was there placed in the mail car attached to defendant's train No. 35, going south, April 18, 1904, over the route known as the "Washington and Charleston Railway Post Office." The mail pouch containing said registered package was placed in the mail car in charge of the railway postal clerks and other employés of plaintiff, to whom were assigned the usual powers and duties prescribed by law and the postal regulations for such clerks and employés.

On the night of April 18, 1904, defendant's train No. 35 collided with defendant's train No. 8, standing on defendant's track at Lu-

cama, a station on defendant's line of road in the state of North Carolina. The collision was caused by the negligence of defendant's employés in charge of train No. 8, and not by the negligence of the employés in charge of train No. 35. There was no evidence tending to show any defect in the construction or condition of defendant's track, engine, or equipment, headlight, brakes, or other ways and appliances; nor was there any evidence tending to show any negligence on the part of defendant in the selection of its employés in charge of either of its trains. The negligence of the employés in charge of train No. 8 consisted in a failure to obey the rules prescribed for the safety of trains approaching another train standing on the track. The mail car attached to train No. 35 was destroyed by fire, originating, by reason of said collision, in a freight car, being a part of train No. 8. The mail pouches and mail equipment in the car were destroyed. Neither the postal authorities nor employés in the post office at Paris, nor the postal authorities nor employés of the United States mail service, nor those of the defendant corporation, had any knowledge, notice, or information that the registered package mailed by Rousselon Frères & Co. in Paris contained diamonds, nor did they have any notice or knowledge of the character or value of the contents of said package, nor of the registered package mailed at Boston, Mass. The only marks or words on said packages when placed in the mail, were the names of the addressees and point of destination. The postal clerks, route agents, and other employés of the government, one of whom was injured in said collision, were carried by another of defendant's trains, immediately after the collision, to Fayetteville, N. C., a station over defendant's road, 70 miles distant from Lucama. None of them returned to Lucama.

On the day following the collision, while the servants of defendant were engaged in removing the débris and ashes from the track, a person not connected with nor in the employment of defendant picked up from the ashes near the track a diamond. He did not know what it was—kept it two or three weeks before learning its character or value. Another person, not in the employment of defendant, found in the ashes two diamonds, not knowing what they were or their value. During that week or ten days following several persons, raking among and sifting the ashes, found several diamonds at the place where the mail car was burned. They were carried to a jeweller, living in a town some six miles distant, who informed such persons of their character and value. The postal clerks and other employés of the government had no notice of the finding of the diamonds.

About 22 diamonds were found and sold by persons searching for them in the ashes. The safe transmission of the diamonds was insured by a French insurance company, which paid to the owners their full value. There was, in addition to the package containing the diamonds, a package in the registered mail, containing a medallion of the value of \$2.50, mailed at Boston, Mass., addressed to Mrs. Garriss, Smoke, S. C., which was destroyed by fire. The plaintiff paid to the addressee the value of the medallion. There is no evidence that plain-

tiff has paid Rousselon Frères & Co. or any one else the value of the diamonds, or that any claim has been made therefor.

Pursuant to the provisions of section 3962 of the Revised Statutes (U. S. Comp. St. 1901, p. 2704, 5 Fed. Stat. Anno. 893) the Postmaster General on October 2, 1906, deducted from the amount due defendant for mail service under its contract, "because of the destruction of mail and equipment in the wreck of train 35, near Lucama, April 18, 1904, \$500." It does not appear whether on October 2, 1906, plaintiff had notice that the diamonds were in the mail car. This action was instituted on the 9th day of September, 1907.

[1] Defendant resists a recovery upon several grounds, all of which are urged in the oral argument and are set forth in the brief of counsel. It is insisted that no action will lie against defendant for the loss of the diamonds and other mail matter, or the pouches, by reason of the negligence of its employés, for that the defendant was neither a common carrier, nor a carrier for hire, but an instrumentality employed by the government in the performance of a governmental duty. In *Atchison, T. & S. F. Ry. Co. v. U. S.*, 225 U. S. 640, 649, 32 Sup. Ct. 702, 703 (56 L. Ed. 1236), it is said:

"The Company, in carrying the mails, was not hauling freight, nor was it acting as a common carrier, with corresponding rights and liabilities; but in this respect it was serving as an agency of government, and as much subject to the laws and regulations as every other branch of the post office."

The law has been uniformly so held by the state and federal courts. In *Boston Insurance Co. v. Chicago, R. I. & P. Ry. Co.*, 118 Iowa, 423, 92 N. W. 88, 59 L. R. A. 796, registered mail matter was destroyed by fire caused by the negligence of the employés of the company in control of the train to which the mail car was attached, and other employés operating a switch. The plaintiff insurance company, having paid the owners the value of the registered mail matter, sued the railroad company. The court, in a well-considered opinion, held that:

"A railroad company, carrying mail under contract with the United States government, owes no duty to the sender of a particular registered package of mail, which will give him a right of action in case the package is destroyed through the negligence of the company's servants."

The question was discussed in *Bankers' Mutual Casualty Co. v. Minn., St. Paul, etc., Ry. Co.*, 117 Fed. 434, 54 C. C. A. 608, 65 L. R. A. 397 (C. C. A. Eighth Circuit), and in *Central Railroad v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334. It may be treated as settled that the defendant was not, by virtue of its contract with the Postmaster General a common carrier. It is said:

"It neither receives nor undertakes to deliver any of the letters or packages carried over its line. They are received by the government or its agents, which undertakes to deliver them at their destination. The railway company is not, as we understand it, a bailee of the matter carried by it; that is, a bailee in the ordinary sense. Neither the sender of the letter nor the government delivers mail to the railway company. It is at all times in charge of the officers and agents of the government. The railway company simply has charge of the car in which the mails are carried, and its responsibility in respect thereto is to the general government." *Boston Ins. Co. v. Chicago, etc. Ry. Co.*, *supra*.

In the opinion, from which quotation has been made, it is said:

"Letters and packages are inclosed in government mail bags, secured by locks provided by the government, taken in charge by agents of the government * * * in cars of such character as the general government requires, handled by government agents in these cars, and by them delivered to other agents of the government for transmission or delivery to the addressees. Mailable matter is at all times in charge of government appointees or contractors. Railroads, as carriers of the mail, have no knowledge of the contents of the mail sacks, * * * except to obey the instructions of the Post Office Department. In so far as they handle the mail, they are simply instrumentalities of the government for the performance of a public function, and are neither common nor private carriers for the government or the individual."

This language accurately describes the conditions disclosed by the evidence in this record. The Postmaster General, pursuant to authority vested in him by Congress, made the contract with defendant to carry the mail between the points named in the complaint for the price set out. Every statute, and all regulations of the Post Office Department, having a legal relation to the subject-matter of the contract, are to be read into the contract for the purpose of interpreting it, ascertaining the intention of the parties, and fixing their relative duties, rights and liabilities.

[2] It is well to note, in this connection, that by section 3962, R. S. (5 Fed. Stat. Anno. 893), it is provided that:

"The Postmaster General may make deductions from the pay of contractors, for failure to perform service according to contract, and impose fines upon them for other delinquencies."

This statute is not now referred to for the purpose of discussing the defense of accord and satisfaction, relied upon by defendant, but as throwing light upon the interpretation of the contract, and ascertaining the intention of the parties in respect to liability of defendant, and the remedy for breach of its obligation. It has been held by the Court of Claims in *Otis v. United States*, 24 Ct. Cl. 72, that:

"The service to be performed [in the carriage of the mails] is of such a character that a provision [such as that made by this section] is essential to the successful performance of the most important function incident to the executive branch of the Government. If the Post Office Department were subjected to the ordinary remedy for a violated contract, the measure of protection would be incommensurate to the wrong inflicted, and the mail service might thereby be impaired in that efficiency required by public policy."

It is further said:

"If this court were to so construe the law that these defendants could only recover for a violation of contracts according to the usual mode of assessing damages, the postal service might be stripped of that efficiency required by public necessity." *Supra*.

In *Parker v. U. S.*, 26 Ct. Cl. 357, Nott, J., discussing the provisions of section 3962 (U. S. Comp. St. 1901, p. 2704) says:

"No man is obliged to be a mail contractor against his will; and the statute is operative against no man until by voluntarily entering into a contract for performing a mail transportation service he expressly or impliedly agrees to submit the differences which may arise to the arbitrament of the Postmaster General. The only effect of the statute is that it requires the Post Office Department to exact this agreement from all mail carriers, and that

it takes such contracts to this extent out of the ordinary rules of law which regulate penalties and liquidated damages. * * * The vast area of the Post Office system, its complexity of routes, the remoteness and distance of its operations from the seat of the government, require that a summary method of dealing with its innumerable contractors and subcontractors shall exist, though its administration may often involve instances of individual injustice."

It is insisted on the part of defendant that, in construing the contract made by it with the Postmaster General for carrying the mail, the fact must be kept in view that it was well known to both parties that the government was not liable for the loss of the mail to the owner, nor was the defendant liable to such owner; that in performing the service the government was discharging a public governmental function, imposed by the federal Constitution and acts of Congress, and that defendant was an agency employed to aid the government in the performance of such duty; that it should be assumed that the rate of compensation for such service was fixed by the parties, in view of the law relieving both from such liability; that the power conferred by the statute upon the Postmaster General to impose fines for failure to carry the mail and other delinquency on the part of defendant was intended to be the sole and exclusive remedy reserved by the government for such default or delinquency in carrying the mail; that, in fixing the amount of the fine, it was the duty of the Postmaster General to take into consideration the extent of the loss sustained by the government and the degree of blame attaching to the contractor. It is insisted that this view is sustained by the action of the Postmaster General in the instant case—the fine is imposed "because of the destruction of mail and equipment in the wreck of train 35, near Lucama, April 18, 1904." The amount imposed is \$500, whereas the value of the equipment, being the only property in the car owned by the government, is but \$135.

A careful examination of section 3962, in the light of the construction put upon it by the Court of Claims, will aid us in ascertaining the intention of the parties respecting the extent of the liability of the defendant for defaults or "failure to perform the service according to contract," and the method of its enforcement. It will be observed that the power to fix and make deductions is conferred upon the Postmaster General, subject to the limitation that he may deduct the price of the trip in all cases where the trip is not made, and not exceeding three times the price, if the failure be occasioned by the fault of the contractor or carrier, and "he may impose fines for other delinquencies." It is held that:

"The power to impose a fine is one which is not known to the common law and cannot be enlarged by inference or intendment. Its remedy must be found in the specific contract which authorizes it." *Parker v. U. S.*, 26 Ct. Cl. 359.

Unless the Postmaster General manifestly abuses, or exceeds, the power conferred upon him, his action is final, and not subject to review by the courts. *Allman v. U. S.*, 131 U. S. 31, 9 Sup. Ct. 632, 33 L. Ed. 51. It must be kept in mind that this provision, for making deductions for default and delinquencies, is not a penalty imposed for breach of a public duty by a public officer. The railroad company,

save in certain exceptional cases, within which defendant does not come, is under no legal obligation to carry the mail; such duty as it assumes in that respect is the result of, and fixed by, the terms of its voluntary contract. *Eastern Railroad Co. v. U. S.*, 129 U. S. 391, 9 Sup. Ct. 320, 32 L. Ed. 730. "A contract may not be forced upon the railway. It may accept, however, and become bound by the action of the Post Office Department." *Chicago, M. & St. P. Ry. Co. v. U. S.*, 198 U. S. 385, 25 Sup. Ct. 665, 49 L. Ed. 1094. The reason assigned by the Court of Claims, in the cases cited, why the government requires that the contract shall vest in the Postmaster General the power to make the deduction and impose the fine, enforcing it summarily, is manifestly correct.

The same reason is found in contracts, more or less analogous, between private citizens, inducing them to fix a stipulated amount, or provide for some method of arbitration for fixing the amount, to be paid by the party in default as liquidated damages—and to withhold such amount from the contract price—that the subject-matter of the contract is of such a nature that the actual damages sustained by a breach could not be readily proved and recovered; hence, in such cases, the courts incline to the view that the sum named, either in the contract, or by the tribunal agreed upon for fixing it, is intended as a liquidation of recoverable damages. The reasons upon which this well-settled rule of construction is based apply, with more than usual force, in the instant case. It would be very difficult for the government to prove in an action at law what amount of damage it had sustained by reason of the failure to carry the mail, or for its destruction. The contractor not being liable to the owner of the mail matter, either for delay in its transmission or for its destruction, the injury sustained by the government by reason of such default would be of uncertain measure and amount. To subject the government to the necessity for bringing civil actions for the many defaults incident to the carriage of mail, more or less serious in their results, would afford a measure of protection "incommensurate to the wrong inflicted, and the mail service might thereby be impaired in that efficiency required by public policy."

Again, if the carrier was subjected to a civil action for every default or delinquency in the performance of the service, the cost incurred in defending such suits would be very great, and out of proportion to the compensation received or the amount involved. It is, as said by the Court of Claims, manifest that both parties to the contract agreed upon the method prescribed by section 3962 for fixing and enforcing the amount to be paid by the carrier for such defaults. Among the advantages accruing to the carrier, compensating for the advantage given the government by permitting its Postmaster General to finally, without notice or hearing, fix the amount to be deducted, is the limitation placed upon the amount which he may deduct. A reasonable construction of the contract leads to the conclusion that it was the intention of the parties that the method prescribed for fixing the amount to be paid by the carrier for defaults and delinquencies excludes the government from suing in the courts for such breaches.

To hold otherwise would subject the carrier to the payment of such amount as the Postmaster General, in view of the circumstances under which the default occurred, should fix, and, in addition thereto, be called upon to answer in a civil action for the same default. This result squares neither with a sense of justice, nor with well-settled rules of construction of contracts.

If it be suggested that, in many cases, the value of the mail matter destroyed, or the damages sustained by the owners or addressees of mail matter, exceeds the limit imposed upon the Postmaster General, an obvious answer is found in the fact that, neither the government nor the contractor being liable to such owner or addressee, such damages could not have been within the contemplation of the parties in making the contract. It will not do to say that the government, in fixing the terms of the contract upon which the compensation depended, reserved the right to fix the amount of damages sustained by it, and, in addition thereto, to prosecute a civil action to recover damages for the benefit of the owners of the mail for which neither the government nor the carrier was liable. In this case the government expressly differentiates, in its complaint, the cause of action for the loss of its own property, the pouches and mail equipment, and the cause of action in which it demands a recovery as bailee for the owners of the diamonds. To hold that the government, under the same contract, may demand for the destruction of the mail equipment \$500, and recover, in this action, the value of the equipment, \$135.85, does not, to say the least, harmonize with a sense of either natural or juristic justice. It is manifest that such construction has not heretofore been put upon these contracts by the Postmaster General.

The court may properly take notice of the fact, of which statistics are carefully compiled, that frequent railroad collisions, derailments, and wrecks occur, in which mail equipment and mail matter is destroyed. The record of the Court of Claims, and doubtless of the Post Office Department, show that the provisions of section 3962 are frequently enforced against mail contractors. This fact very persuasively leads to the conclusion that heretofore the department has construed the contract and the statute as restricting the remedy of the government to the exercise of the power conferred upon the Postmaster General. The language used by the Postmaster General, in this instance, in making the deduction from the compensation due defendant for carrying the mail, "Because of the destruction of mail and equipment in the wreck of train 35, near Lucama, on April 18, 1904, \$500," tends strongly to show that he took into consideration the circumstances, conditions, value of equipment, etc., in fixing the amount, and understood that, by the terms of the contract, such amount was deducted in full settlement of all claims and demands for "the destruction of the mail and equipment." The time, 2 years and 6 months, elapsing between the destruction of the mail and the assessment of the penalty, would indicate that the Postmaster General had been notified, at the time of assessing the property, that the diamonds were in the mail car. This view is further strengthened by the fact that, although the collision occurred April 18, 1904, and the deduction was made

October 2, 1906, no other demand was made on the defendant, or action begun, until September 9, 1907. In *Robertson v. Downing*, 127 U. S. 607, 8 Sup. Ct. 1328, 32 L. Ed. 269, it is said:

"The regulation of a department of the government is not, of course, to control the construction of an act of Congress, when its meaning is plain. But when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons."

And to this effect the authorities are numerous and uniform. Is it not a fair and reasonable conclusion that, in fixing the rate of compensation for carrying the mail, regard was had to the provisions of section 3962 and the construction theretofore put upon it by the department in fixing the extent of the carrier's liability for defaults and delinquencies, and that such construction was in the contemplation of both parties to the contract.

[3] This view applies with equal force to the claim for the value of the diamonds, unless a distinction may be found in the second cause of action, where plaintiff sues as the bailee of the owners of the diamonds. In stating this cause of action, plaintiff alleges that:

"As bailee of the owners of the diamonds, it placed the registered package in the possession of defendant for carriage, and that, by the negligence of the employes, it was destroyed."

National Surety Co. v. United States, 129 Fed. 70, 63 C. C. A. 512, was an action by the defendant in error against plaintiff in error for the breach of a bond given by a letter carrier upon which the plaintiff in error was surety. The mail carrier received, for delivery, letters containing money and rifled them of their contents. The court held that the act of the carrier was a breach of the condition of the bond, for which the government could maintain an action, and that it was entitled to recover the money taken from the letters; that this right was not affected by the fact that the government was not liable to the owner of the money and had not accounted to him for it. Conceding that the language of the condition of the bond was sufficient to cover the default of the carrier, the serious question presented was in respect to the amount of damage which the government was entitled to recover. Judge Sanborn, writing for the Circuit Court of Appeals of the Eighth Circuit, rested the right to recover the full amount of the money taken from the letters upon the theory that the government was the bailee of the owner, and entitled to recover against a wrongdoer the full value of the property taken by the carrier, and that this right was not dependent upon the liability of the government to answer over to the owner. Whether the language used in the opinion, in respect to the relation which the government bore to the sender or sendee of the mail, is in harmony with other decided cases, cited herein, may be open to debate. The opinion of Judge Sanborn was followed by Judge Morris in *U. S. v. Am. Surety Co.* (C. C.) 161 Fed. 149, and by the Circuit Court of Appeals for the Fourth Circuit in the same case, 163 Fed. 228, 89 C. C. A. 658. In the opinions in these cases no authority is cited other than Judge Sanborn's opinion. They were evidently decided upon the authority of that case.

In *United States v. Am. Surety Co.* (C. C.) 155 Fed. 941, in which Judge Sanborn adhered to the opinion expressed by him in the case reported as *U. S. v. Downing*, 129 Fed. 90, 63 C. C. A. 532, it would seem that the principle upon which the conclusion rested was not very clear to his mind. The amounts recovered in each of the cases cited were small and within the penalty of the bonds. No statute is cited authorizing suit, on such a bond, by the owner of the letter—or money. It is not clear whether the condition of the bond is within the reasoning of Mr. Justice Harlan in *Howard v. United States*, 184 U. S. 676, 22 Sup. Ct. 543, 46 L. Ed. 754. There is ample authority for the position that a bailee may sue a third person for the conversion or destruction of the property bailed, and recover its full value for the benefit or use of the owner. The principle has been discussed and applied to the relation between the Postmaster General and the owner of property destroyed in the mail. *The Winkfield*, L. R. Prob. Div. 42. The facts in that case are not analogous to, nor is the opinion decisive of, the instant case, which is so peculiar in many of its phases that it is very difficult to find authority directly, or approximately, in point. The quest for analogies, likewise, presents difficulties.

There is, however, one aspect of the case in which it would seem a decision can be rested upon a ground sustained by a current of decisions more or less analogous, and based upon principles of natural justice and a fair construction of the contract entered into between the government and the defendant for alleged breach of which the action is brought. As we have seen, the defendant is not, in respect to its contractual obligation to carry the mail, a common carrier, and is not, therefore, an insurer of its safe carriage and delivery. No question of public policy can be invoked to control the court in placing a fair, reasonable construction on the language of the contract, or to disturb the application of rules of interpretation founded upon reason and justice. The primary duty of a court in construing a contract is to ascertain and effectuate the intention of the parties. This must be done by examining the language used and looking to the relation which the parties bear to each other and to the subject-matter of the contract. Another well-settled rule is that, for the breach of an executory contract, such damages will be awarded the injured party as proximately flow therefrom and were within the contemplation of the parties at the time the contract was made.

In respect to the contract between the Postmaster General and the defendant, it will be well to keep in mind the fact that the plaintiff, in the performance of a public governmental duty or function, for the purpose of securing the service of the defendant in carrying, over its road, cars in which were placed, in the custody and under the control of its own officers, agents, or employés, mail matter in pouches or bags of its own selection. These pouches are locked or otherwise secured by its own appliances, and the possession of the key is retained by its agents and officers. So far as appears, or is relevant to this case, no employé, servant, or agent of defendant either knew, or was entitled to know, or had any duty imposed upon them to inquire, in respect to the contents of the letters or packages or the pouches in

which they were placed. For the purpose of extending the mail facilities of the government to its own citizens, and those of other nations or countries, the plaintiff entered into treaties or conventions with the governments of such other countries whereby it undertook to receive and carry mail matter by the use of the facilities employed for that purpose. Pursuant to this policy, a convention was entered into between plaintiff and the government of the French republic, by the terms of which, so far as relevant to this case, it undertook to receive and carry for the citizens of the French republic mail matter, subject to certain terms and prohibitions. Article 2 of the convention provides:

"The stipulations of this convention extend to letters, postal cards, both single and with reply paid, printed papers of every kind, commercial papers and samples of merchandise, originating in one of the countries of the Union and intended for another of those countries."

It is further provided that:

"Packets of samples of merchandise may not contain any article having a salable value."

When the defendant, therefore, undertook by contract to carry the mail in the manner set forth at a fixed price per mile, it must be taken that the term "mail" or "mailable matter" referred to such mail or mail matter as, under the laws of the United States, or the postal regulations made by the Postmaster General, or the conventions entered into with the governments of other countries, was entitled to be put in the mail. It was this mail matter which defendant undertook to carry. So, when a citizen of this country, or, as in the instant case, of the republic of France, desired, by paying the rates prescribed by law, to send either open or "registered" mail matter, the right to do so was subject to the limitations and prohibitions contained in the law, regulations, or conventions of the government of which they are citizens. They must be deemed to have notice of such public laws and regulations. *Caha v. U. S.*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415; *State v. So. Ry.*, 141 N. C. 846, 54 S. E. 294.

[4] Recognizing the fact that neither the owners of the diamonds nor the insurance company, which paid their value to such owner, had a right of action against the defendant for their loss, the plaintiff seeks to recover their value as the bailee of the owners. It is manifest that such recovery, if made, will be for the benefit, the use of, or, as is sometimes said, in trust for, the owners. It is only upon this theory that the right to recover against a wrongdoer the full value of the property bailed can be maintained. The general rule undoubtedly is that damages recoverable for trespass or conversion are limited to the actual injury sustained by the plaintiff. It seems to have been held that the right of the bailee to recover from a third party the full value of the property was, by the ancient common law, based upon the fact that the bailee was answerable over to the owner for the property or its value. *Notes to Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670. Judge Sauborn, in *United States v. Am. Surety Co. (C. C.)* 155 Fed. 941, was evidently of that opinion, and found difficulty in

sustaining the conclusion that the government could recover of the surety on the bond the full amount taken by the carrier, when it was not liable therefor to the bailor. After referring to the authorities sustaining the proposition that the reason why the bailee is entitled to recover full damages against one who converts the property bailed is that he is bound to restore the property to the general owner or stand responsible to him for the full value, he says:

"In this case I am inclined to think that, although the regulations limit the liability of the government to \$25, yet, if the government recovers the full value of the package stolen, it will be liable for the balance, if the Court of Claims has jurisdiction to allow a claim for such balance. * * * It seems to admit of no question that, if the government collects money from one person, which is equitably due to another, an implied contract arises to restore or repay the money to the person so entitled."

The right of action against the trespasser, or one who converts the property, was given the bailee by the ancient common law because he was answerable over to the owner, and for the further reason that, in possessory actions for the recovery of chattels, the owner, not having, during the continuance of the bailment, a right to the possession, could not sue for their conversion. For an interesting history of the common law on the subject, see Pollock & Maitland, *History of the English Law*, vol. 2, c. 4, § 7, p. 169; Holmes, *Common Law*, 175. Mr. Bevin says:

"Both the bailor and bailee may maintain an action against a stranger for an injury to, or conversion of, the bailment—the bailor, by virtue of his general property; the bailee, by virtue of his special property and actual possession. This right of action is limited by the interest of the bailee in the bailment." 2 Neg. 733.

He gives an interesting review of the development of the law on the subject:

"Whatever conflict may be found in the decided cases, and the reasons assigned by the courts and writers, it seems to be settled, at this time, that the bailee, although not liable to the owner, may sue a third party, who has either injured or converted the property, and recover its full value or the full amount of the damage sustained. The damage sustained to his special property he recovers for his own use, and the remainder for the use, or in trust for, the owner." Bevin, Neg. 737, citing *White v. Webb*, 15 Conn. 302.

This view is sustained by the best-considered cases, and must, of necessity, be the basis upon which a party is entitled to recover compensatory damages in excess of an injury sustained by him. *Schley v. Lyon*, 6 Ga. 530; *Moran v. Portland Packet Co.*, 35 Me. 55; *Mizner v. Frazier*, 40 Mich. 592, 29 Am. Rep. 562; *Chamberlain v. West*, 37 Minn. 54, 33 N. W. 114; *Woodman v. Nottingham*, 49 N. H. 387, 6 Am. Rep. 526; *Russell v. Butterfield*, 21 Wend. (N. Y.) 300. Considered from this viewpoint, it may be regarded as elementary that, when a plaintiff sues in a representative capacity, and for the benefit of another—that is, as trustee for the cestui que trust, or, as here, the bailee for the bailor—his right of action and extent of recovery must be confined to the right of the party for whose benefit he sues; that any and all defenses which would be open to the defendant in an action by the real party in interest, would be likewise open

to him in the action by the representative. The Code of Civil Procedure of North Carolina requires that every action must be prosecuted by "the real party in interest." C. C. P. 177. So it is held, by the courts of this state, that one, not a party to a contract, but who is a beneficiary thereof, may maintain an action in his own name on the contract. *Gorrell v. Water Supply Co.*, 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598.

While, for the reasons set out in the cases hereinbefore cited, the owners of the diamonds cannot sue defendant for their loss, it is insisted, not only that the same result be accomplished, by means of this action, but the defendant may be deprived of defenses which would be available to it, if the action was brought and prosecuted by the real party in interest. This contention does not harmonize with either principles of law or justice. That the plaintiff is suing for the use and benefit of the owners of the diamonds, and not for the purpose of recovering from defendant damages which it has not and cannot sustain, is manifest from the language of the complaint. It sues "as the bailee of the owners of the diamonds." It would not comport with the dignity of the sovereign to attribute to it a purpose to recover of this defendant the large sum demanded for the purpose of covering it into its treasury and fail to pay it over to the real parties in interest. This is emphasized by the fact that the plaintiff, before bringing this action, demanded and received the penalty assessed against defendant for the injury by it by reason of this default or delinquency in the performance of its contractual duty.

[5] That, in an action prosecuted by the government for the benefit of a private citizen, the same defenses are open to defendant as if prosecuted by the citizen, is settled by a number of decisions of the federal courts. In *United States v. Bebee*, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121, Mr. Justice Lamar says:

"It has not been unusual for this court, for the purposes of justice, to determine the real parties to a suit by reference, not merely to the names in which it is brought, but to the facts of the case as they appear on the record." In *re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216, and other cases cited in the opinion. "When the government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title, or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the government designed for the protection of the rights of the United States alone. The mere use of its name in a suit for the benefit of a private suitor cannot extend its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into the matters pleaded against him by the other party."

He cites, with approval, *Miller v. State*, 38 Ala. 600, in which the defendant, in a suit where the state, though a nominal party, had no real interest in the litigation, was permitted to plead the statute of limitations; *Moody v. Fleming*, 4 Ga. 115, 48 Am. Dec. 210.

In *French Republic v. Saratoga Vichy Co.*, 191 U. S. 427, 24 Sup. Ct. 145, 48 L. Ed. 247, Mr. Justice Brown states the principle involved:

"Where the government is suing for the use and benefit of an individual, or for the prosecution of a private and proprietary, instead of a public or

governmental, right, it is clear that it is not entitled to the exemption of nullus tempus, and that the ordinary rule applies in full force." *United States v. Des Moines Ry. Co.*, 84 Fed. 40, 28 C. C. A. 267.

Applying the principle to this record, the case comes to this: The owners of the diamonds, citizens of the French republic, by virtue of the right conferred to send mailable matter through the French and American postal system, in violation of the terms upon which such right is conferred, place in the post office a sealed package, containing what purports to be mailable matter, but which in fact contains valuable jewels, having a salable value of some \$6,000, addressed to their consignee in Havana for sale on their account. The fact that the sealed package contains this nonmailable matter is concealed from the postal authorities, not by any positive false declaration, but by being so addressed and sealed as to give no intimation of its contents. In view of the public law and provisions of the convention between the two countries, knowledge of which is imputed to all who use the mail, it is immaterial how the result was brought about. It is sufficient that nonmailable matter was put in the mail for transmission over the postal system. Assuming, *pro hac vice*, that by putting the package in the mail and paying the postage the owners of the diamonds established the relation between plaintiff and themselves of bailor and bailee, for carriage, and that, under the contract between the plaintiff and the defendant, the latter became the bailee of the former for the benefit of the owner, the question is presented: What duty or liability is imposed upon the defendant in respect to the diamonds? It must be kept in mind that neither the plaintiff nor the defendant are common carriers or insurers. The relation of bailor and bailee is of contractual origin. It is created by an offer and acceptance, and supported by a valuable consideration. In entering into the contract, certain duties are imposed upon both parties, based upon principles of fair dealing and common honesty.

[6] One cannot be made a bailee of an article as to which, by the conduct of the bailor, in violation of the terms of the contract, he was misled and deceived. This is true, without regard to the relation of the parties or the degree of care imposed by the law. This elementary principle has been announced and enforced from the time of the earliest decided cases, and applied to contracts entered into by common carriers, who are under obligation to carry for the public. Lord Mansfield said:

"The delivery, indeed, must be free from artifice or misrepresentation, made with a view to deceive the carrier; for honesty and good faith are as requisite in this as in every other contract, and consequently any concealment or fraudulent device in the delivery of goods will discharge the carrier." *Gibson v. Paynton*, 4 Burr. 2301.

When the carrier has given notice that he will not be liable for parcels of value, unless they are entered and a proportionate premium paid, this will be equivalent to a special acceptance, and render it incumbent on the owner to disclose the value, in order to make the carrier responsible. The effect of the notice will be, when no special entry is made, to entitle the carrier to consider the parcel as of an ordinary nature, and not falling within that description of goods for

which he refuses to be liable without a compliance with the terms of the notice, and in such cases the holding out as an ordinary risk what is in truth an extraordinary one will be considered as a legal fraud, and the legal maxim applies: "Ex dolo malo non oritur actio." Jones on Bailments (Ed. 1835) Appendix 15.

Batson v. Donovan, 4 Barn. & Alderson, 21, 6 E. C. L. 333, is a leading case on the subject. All of the judges wrote concurring opinions, except Best, J., who dissented. Bayley, J., said:

"The box delivered to the carrier contained bills, checks, and notes amounting to the value of £4,070. The defendants had given notice that they would not be answerable for parcels of value unless they were entered and paid for as such. The plaintiffs knew of this notice. The box was left with defendant with no other observation than this: 'It is the box from New Castle.' Nothing was said of what it contained, nor did any of defendants know it contained articles of value. The only mark on it was the name: 'William Batson, New Castle.' It was locked and corded—not sealed."

It was lost. He said that:

"The holding out as an ordinary risk what is really an extraordinary one is a legal fraud."

The reasons given by the judges for requiring notice, in such cases, to be given the bailee are: (1) That the compensation may be fixed according to the risk assumed; (2) that the bailee might be enabled to bestow a higher degree of care in caring for the property, or, as said in Bignold v. Waterhouse, 1 Maule & S., 261:

"The nature and value of the parcel should be communicated, *to enable him to adopt proper precautions for their safety.*"

The principle was applied in Orange County Bank v. Brown, 9 Wend. (N. Y.) 85, 24 Am. Dec. 129. A person taking passage in defendant's steamboat put in his trunk a large amount in bank bills to be delivered to the bank. Upon going on the boat he placed his trunk behind the door, with the remark to the captain that "it was a trunk of importance"—saying nothing of its containing money. He stepped out of the boat, and during his absence the trunk was stolen. The trial court rendered judgment of nonsuit. Nelson, J., says:

"This case is peculiar in many of its features, and must be determined by a recurrence to some of the general and fundamental principles which govern actions of this kind."

After discussing the liability of common carriers when notice of limited liability is given, he says:

"But in the absence of notice, if any means are used to conceal the value of the article, and thereby the owner avoids paying a reasonable compensation for the risk, this unfairness and its consequence to the defendants, upon principles of common justice, as well as those peculiar to this action, will exempt them from the responsibility."

He says that in such cases the carrier is liable only for gross negligence.

"Instead of committing the several packages of money to the captain, which of themselves generally indicate their value, and in this case would have done so, as the figures could be seen upon them, and thereby enable the captain to exact a reasonable compensation for the risk, *and apprise him of the necessity for greater care and caution, in the safe conveyance of the money*

which he would naturally bestow in proportion to the value, he put them in his trunk and committed it to the captain as his baggage, affording no other indication of the value of its contents than that it was 'a trunk of importance.'"

The judgment of nonsuit was affirmed.

In *Magnin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 442, the plaintiff delivered to the express company a sealed package containing watches, etc., of the value of \$1,491.50, taking a receipt stating that, if the value of the property was not given, the holder would not demand, for its loss, more than \$50. The jury found that the package was lost by the negligence of defendant, and that there was no false statement made as to the character of the property in the package or its value. Folger, J. said:

"A neglect to disclose the real value of a package and the nature of its contents, if therewith there is that in its form, dimensions, and other appearance designed, and even if not designed, if fitted, to throw the carrier off his guard, will be conduct amounting to the fraud. * * * The intention to impose upon the carrier is not material; it is enough if such is the practical effect of the conduct of the shipper. * * * An examination of the testimony for the facts of the case has brought me to the conclusion that there is no proof of fraudulent concealment of value by the plaintiffs, unless their silence be such concealment."

The learned justice reviewed the authorities, and wrote, for a unanimous court, a reversal of a judgment holding defendant liable. The ruling was reaffirmed upon a second appeal. *Magnin v. Dinsmore*, 70 N. Y. 410, 26 Am. Rep. 608. These decisions were not based upon the limitation in the receipt.

In *Southern Express Co. v. Everett*, 37 Ga. 688, wherein it appeared that a small paper box containing a diamond pin of the value of \$500 was delivered to the carrier for shipment, unsealed, tied with a cotton string. No information was given the carrier of the contents of the box at the time of the delivery, and no questions were asked by the agent as to its contents. The charge for carriage was 25 cents. Warner, C. J., said:

"It is insisted that it was the duty of the agent * * * to have required the contents of the box to have been made known to him at the time of delivery, and that, inasmuch as he did not make the inquiry, the defendant is liable for the full value of its contents. * * * It is true the defendant, as a common carrier, may require the nature and value of the goods * * * to be made known; but if the conduct of the shipper was such, at the time of the delivery of the goods, as would be calculated to induce the defendant to believe that the goods delivered were of but little value, or such as would be calculated to conceal from him the true value thereof, and thereby throws him off his guard as to the necessity of making any inquiry as to the nature and value of the goods delivered, in order to deprive the carrier of his lawful freight, such conduct on the part of the shipper would be a legal fraud upon the carrier. The point is not whether the defendant might have inquired as to the nature and value of the goods; but the point in the case is whether the acts and conduct of the shipper in regard to this box and contents were not calculated and intended to conceal from the defendant the nature and value of the contents." 4 Kent, Com. 603. "If the shipper used any artifice whatever to conceal from the carrier the true value of the contents of a package delivered to it for transportation, the carrier is relieved from liability for ordinary negligence to a greater extent than the value indicated by the external appearance of the package. * * * There

is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is less than claimed after its loss." *Moore on Carriers*, 355; *Hutchinson on Carriers*, 211, 212.

I am not inadvertent to the decisions of a number of courts which seem to repudiate the doctrines sustained by the authorities cited. They appear to be based upon the theory that public policy demands that persons who deal with common carriers are not bound by the terms of their contracts, and, notwithstanding terms entered into based upon valuable consideration, may sue for and recover amounts largely in excess of the asserted value of property shipped upon contractual representations, on the faith of which they deprive the shippers of a fair compensation for his services and increased hazard. Whether these decisions do not overlook a fundamental truth—that the highest and best public policy, that which ultimately and permanently makes for honesty and fair dealing, demands that men keep their covenants, although to their own hindrance—is not relevant to this discussion. The Supreme Court of the United States has uniformly so held. In *Mo., Kans. & Tex. Ry. Co. v. Harriman*, 227 U. S. 657, 671, 33 Sup. Ct. 397, 400 (57 L. Ed. —), Mr. Justice Lurton, discussing the legal effect of obtaining a lower rate of freight by reason of an agreed valuation below the actual value of the property said:

"It is neither just nor equitable that he shall benefit by the lower rate, and then recover for a value which he said did not exist, in order to obtain that rate."

Certainly the reason and principle upon which these decisions are based apply with equal, if not greater, force to a case where the defendant is, at most, a mere bailee for carriage. The fact that the diamonds were in a registered package cannot affect the defendant's liability. It had no notice that the package was registered, and assumed no greater or higher degree of care for its safe carriage than if in the ordinary mail. The rules provided by the government for registration of mail matter cannot affect the contractual liabilities of the defendant. There is no suggestion that its agents or employes were given notice that the mail car, or the pouches, contain registered mail. The reason assigned by the judges for holding that the carrier is entitled to notice that packages delivered for carriage contain articles of great value, where there is nothing in the package to indicate the character or value of the contents, applies with special force to this case. The diamonds were not destroyed, nor was their quality or value affected, by the burning of the mail car. If the defendant had been notified that they were in the car, it could have provided an iron safe, as is done by express companies, for packages of money or jewels, which would have protected the sealed package containing the diamonds; or, if notice had been given that they contained diamonds, defendant could have guarded the ashes of the car until the diamonds could have been recovered and saved. The agents, clerks, and employes of the plaintiff, in whose actual possession and control the mail was placed, would, if informed of the presence of diamonds in the registered mail, have protected them from trespassers.

It has been held, and with much reason, that the infirmity in an action by the bailor for loss of goods, secretly or by concealment, inserted into a package, otherwise coming within the terms of the contract of carriage, goes to the "root of the matter," in that the bailee never undertook to carry such matter—that it does not come within the contract. This is illustrated in cases wherein money, jewelry, or other articles of unusual character and large value are placed in trunks and delivered to the carrier as baggage, which it is under obligation to carry as incident to the contract to carry the passenger. In *Orange County Bank v. Brown*, supra, Judge Nelson says:

"It may be difficult to define with technical precision what may be legitimately included in the term 'baggage,' as used in connection with traveling in public conveyances; but it may be safely asserted that money, except what may be carried for the expense of traveling, is not thus included, and especially a sum like the present, which was taken for the mere purpose of transportation. * * * The law is now very properly altered, as a reasonable amount of baggage, by custom or the courtesy of the carrier, is considered as included in the fare for the person; but courts ought not to permit this gratuity or custom to be abused, and under pretense of baggage to include articles not within the sense or meaning of the term, or within the object or intent of the indulgence of the carrier, and thereby defraud him of his just compensation, and *subject him to unknown and illimitable hazards*. If the amount of money in the trunk in this case is not fairly included under the term 'baggage,' * * * Then the conduct of the agent was a virtual concealment of that sum. His representation of his trunk and the contents as baggage was not a fair one, and was calculated to deceive the captain, and it would be a violation of first principles to permit the plaintiffs to recover."

So it is said:

"A mutual assent is always needful, whether evinced by words or acts; but no one can become responsible, even as a gratuitous bailee, when goods are surreptitiously put in his carriage or thrust upon his person without his knowledge or consent, though, if upon ascertainment of this fact he went on with the trust, this might bind him." *Heatherington v. Richter*, 31 W. Va. 860, 8 S. E. 610.

It would seem clear that, in an action by the owners of the diamonds, the defendant would have a perfect defense.

In view of the conceded fact that, in its essential features, this case is of first impression—that, notwithstanding the fact that during all of the years intervening since the establishment of our postal system, and the use of railway companies as one of the agencies used therein by the government, and the many instances in which the mail has been destroyed or lost by the negligence of their employes, no action has been brought by the government upon the theory that it was bailee for the owners—it is the duty of the courts to proceed with caution and examine with care the principle upon which a legal liability for the carriage through the mail of articles of the character and value involved in this action is founded. The ultimate decision of the question presented in this case must have a far-reaching effect upon the liability assumed both by the government and the agencies employed by it in performing this most important governmental function. The owners of the diamonds placed them in the mail in Paris, in violation of the law; they insured themselves against injury by reason of

their loss; the insurance company received, by way of premium, a consideration for the liability assumed; the owners, and the insurance company, for whose benefit this action is prosecuted, were the only persons who knew that the diamonds were in the sealed package. The agents and the employes of the Post Office Department, in Paris and in this country, were the only persons who had an opportunity to know, or the power to inquire, as to the contents of the sealed package; and yet it is sought to hold the defendant—the only agency in the entire transaction which did not, and could not by any possible means, know that in a mail pouch, placed in a car, under the exclusive control of the plaintiff's agents and officers, there was concealed, in a sealed package, diamonds of the value of thousands of dollars—responsible for their loss.

For the reasons stated by the court in *Boston Ins. Co. v. Railroad*, supra, it is very doubtful whether the diamonds were ever in the possession of the defendant, in any proper or legal sense—whether the relation of bailor and bailee was established, either between the government and the owner of the diamonds, or between the former and the defendant. In regard to the interesting question, discussed by counsel, that, the defendant being engaged in the discharge of a governmental function, liable only for corporate negligence, and not for the negligence of its servants and employes, the principle of respondeat superior does not apply, it has much authority for its support. The contention that, if the action was prosecuted by the owners of the diamonds, it could not be sustained, finds support in decided cases so far back as the time of Lord Raymond. *Lane v. Cotton*, 1 Ld. Raym. 646, reviewed and affirmed in *Whitfield v. De Spencer*, 2 Cow. 754. These cases are cited by the courts and standard authors with approval. In *Bankers' Mutual C. Co. v. Minneapolis, St. P., etc., Ry. Co.*, 117 Fed. 434, 54 C. C. A. 608, 65 L. R. A. 397, it is said:

"It seems clear to us that defendant in error was a public agent of the United States in relation to carrying the mail, for the reason that the Constitution of the United States conferred upon it the power to establish post offices and railroads, and this power was granted by the people as one of the sovereign powers, to be exercised by the general government exclusively. By virtue of this grant of power, the United States has always, through its post office department, assumed the exclusive charge of the carriage and delivery of the mail for the benefit of all the people. In doing so, the United States is beyond question engaged in the discharge of a governmental function. All persons or corporations who are engaged in the carriage or delivery of the mail by the authority of the United States, conferred by contract or general laws, are but the instruments used by it to discharge this function. * * * A public officer or agent, provided he has exercised ordinary care to select competent subordinates, is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences of omissions of duty, of the subagents or servants, or other persons properly employed by or under him in the discharge of his official duties"—citing numerous cases.

In that case, the mail sack containing the registered package in which the money, which was the subject-matter of the litigation, was inclosed was delivered by the route agent, in accordance with his duty and the regulations of the department, to the station agent of the de-

fendant, by whose negligence the money was taken from the sack and stolen. The station agent was not a sworn agent or employé. The court held that this fact was not controlling, and in the absence of any evidence of want of care on the part of defendant in the employment of the station agent it was not liable for his negligence. This decision has the additional weight of authority in the fact that a petition for a writ of certiorari was denied by the Supreme Court (187 U. S. 648, 23 Sup. Ct. 847, 47 L. Ed. 348), and a writ of error dismissed (192 U. S. 371, 24 Sup. Ct. 325, 48 L. Ed. 484). Unless the fact that here the action is brought by the government distinguishes the cases, the decision is well-nigh conclusive as authority for the position of defendant. The relation of the defendant to the government in respect to carrying the mail is treated by the Supreme Court as settled in *Atchison, Topeka & Santa Fé R. R. v. U. S.*, supra. Counsel for plaintiff call attention to the fact that the collision resulting in the destruction of the mail car was not caused by any act of negligence on the part of any servant or employé of defendant while engaged in "carrying the mail"; that the engineer in charge of train No. 35, to which the mail car was attached, was not negligent; that the collision was the result of, and caused by, the negligence of the employés in charge of train No. 8. This is true. The cause of action, then, if any, was not the breach of the contract of carriage, upon which the complaint is based, but the wrongful obstruction of defendant's track, resulting in the destruction of the mail car. This was a tort, and not the breach of the contract.

In its third cause of action, plaintiff alleges the negligence of the employés of train No. 8 in obstructing the track and failing to put out proper signals, and that "defendant in plain violation of its duty to plaintiff carelessly and negligently issued to its conductor on its train No. 35, carrying said mail car on said date and time, running orders indicating a clear track at Kenly, a station south at Lucama, where it did know, or ought to have known, that its track at Lucama, on said date, and at the schedule time for its train No. 35 to pass Lucama, was or would be obstructed by freight cars of its train No. 8, etc.

There is no evidence in the record to sustain the allegation in respect to negligence in giving orders to train No. 35, or that any servant, agent, or employé of defendant, upon whom was imposed any duty in regard to giving orders to train No. 35, knew or could have known of the negligence of the servants and employés of train No. 8 at Lucama. If these employés had obeyed the rules of the defendant, it is manifest that there would have been no collision. It is not suggested that any other employés of defendant knew, or could have known, that they had not obeyed such rules.

In the eighth paragraph of the third alleged cause of action, plaintiff alleges that:

"Defendant owed to the plaintiff the duty, in addition to the duties hereinbefore set forth, of caring for, protecting, and guarding the débris of the said burned mail car. That, in violation of defendant's plain duty in this respect, the defendant, with full knowledge that the said mail car had contained mail matter consisting of indestructible valuable stones, nevertheless, regardless of its duty, utterly failed and neglected to guard, protect, preserve, and rescue from said fire, loss, and destruction, and from the depredation of de-

defendant's own agents and employes, and of all other persons, the débris of said railway post office car and the said valuable matter which it contained," etc.

Without pausing to discuss the allegation that defendant was under obligation to guard the ashes and débris of the burned mail car, it is sufficient to say that there is not a scintilla of evidence that either plaintiff's route agents, mail clerks, or any other of its employes, or of defendant's servants or agents, knew or had any intimation of the presence of "indestructible valuable stones" in such débris, unless the facts, testified to by the witnesses in regard to the manner in which the diamonds were found by several persons, fixed them with such notice. This was not seriously contended on the argument. It would be unreasonable to hold that defendant's employes should have anticipated that the registered package contained diamonds, when plaintiff's employes who handled the mail did not do so. To hold the defendant to an entirely different and immensely higher degree of care in protecting the débris of the car than plaintiff's own employes and servants exercised in respect to the same matter is not reasonable. I do not perceive how plaintiff can recover upon this allegation and proof.

In the view taken of the case, it becomes unnecessary to inquire whether the plaintiff is barred by the statute of limitations. The action is based upon a contract not under seal, and is barred after three years from its breach. Rev. N. C. 1905, § 395. Unless the defendant is deprived of this defense by reason of the rule that the government is not within the provisions of the statute of limitations, it is a complete bar to this action. The collision occurred April 18, 1904; the summons was issued September 9, 1907. In addition to the authorities cited relevant to this question upon another phase of the case, the Supreme Court has held that:

"When * * * the suit was brought for the benefit of private persons, and the government had no interest in the result, the United States are barred from bringing the suit, if the persons for whose benefit the suit is brought would be barred." *Curtner v. U. S.*, 149 U. S. 662, 13 Sup. Ct. 985, 1041, 37 L. Ed. 890.

So, in *United States v. Bell Telephone Co.*, 167 U. S. 224, 265, 17 Sup. Ct. 809, 820 (42 L. Ed. 144), the principle of liability to defenses, not otherwise available against the government, is applied when it "is seeking to discharge its obligations to the public. When it has brought the suit simply to help an individual, making itself, as it were, an instrument by which the right of that individual * * * can be established, then it becomes subject to the rules governing like suits between private litigants." That was an action to vacate a patent for fraud. The principle is too well settled to call for further citation of authority. It would seem to be applicable to the instant case. The equity of the rule is manifest here. Those in whose behalf the plaintiff is suing knew, certainly within a short time, that the diamonds had not reached their destination. They recovered their value from the insurance company nearly four years before this action is brought for their benefit.

I am therefore of the opinion that, taking the view most favorable to those for whom the plaintiff sues, and therefore for the plaintiff,

the defendant is not liable for the value of the diamonds. I am further of the opinion that the fine imposed by the Postmaster General operated as an accord and satisfaction of all claims accruing to plaintiff by reason of the destruction of the mail car. *U. S. v. Oliver* (C. C.) 36 Fed. 758. Postal Regulations, § 1335, provides that fines will be imposed under the authority vested in the Postmaster General by section 3962 for each of the following delinquencies:

"Suffering the mail, or any part of it, to become wet, lost, injured, or destroyed, or conveying or keeping it in a place or manner that exposes it to depredation, loss, or injury."

The act complained of, and for which the fine of \$500 was imposed, is clearly within this enumeration of causes, etc.

Upon a careful consideration of the entire record, including the verdict of the jury, I am of the opinion that the plaintiff is not entitled to recover upon either of the causes of action. A judgment may be drawn that defendant go without day. The defendant will not recover costs against the government. *Pine River L. & T. Co. v. U. S.*, 186 U. S. 279, 22 Sup. Ct. 920, 46 L. Ed. 1164.

ELK GARDEN CO. v. T. W. THAYER CO.

(District Court, W. D. Virginia, at Abingdon. May 20, 1913.)

1. JUDGMENT (§ 948*)—PLEADING—PLEAS—VIRGINIA STATUTE.

Code, Va. 1904, § 2734, which provides that, in actions of ejectment, "the defendant may demur to the declaration as in personal actions or plead thereto, or do both; but he shall plead the general issue only, which shall be that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff in the declaration," was intended to simplify the proceedings, and should be construed as applying to those pleas in bar only which go to the merits of the case and not to pleas setting up legal estoppels, as a plea of *res judicata*.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1787-1793; Dec. Dig. § 948.*]

2. COURTS (§ 339*)—FEDERAL COURTS—FOLLOWING STATE PROCEDURE.

The federal conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]) vests the court with a discretion as to following state trial statutes, and it should decline to follow such a statute where it appears that it would unnecessarily prolong the litigation and add to the expense.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 914; Dec. Dig. § 339.*]

3. JUDGMENT (§ 649*)—JUDGMENTS OPERATIVE AS BAR—JUDGMENTS NOT REVIEWABLE.

The conclusiveness between the parties of a judgment of a court of competent jurisdiction directly determining a matter in issue does not depend upon whether or not the law subjects such judgment to review by an appellate court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1161; Dec. Dig. § 649.*]

4. JUDGMENT (§ 747*)—RES JUDICATA—EJECTMENT—PRIOR JUDGMENT IN TRESPASS.

Under the law of Virginia, which, by Code Va. 1904, § 2756, makes a single judgment in ejectment conclusive, and also permits title to be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

relied on as a defense and litigated under the general issue in an action of trespass, and where on a plea of *res judicata* evidence aliunde is admitted to show what was litigated and decided in the former action, a judgment rendered in an action of trespass actually determining the question of title is a bar to a subsequent action of ejectment between the same parties or their privies.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1053, 1284-1296; Dec. Dig. § 747.*]

5. JUDGMENT (§ 720*)—*RES JUDICATA*—*EXTENT OF ESTOPPEL*.

Where the cause of action is different, a former judgment is an estoppel only as to a matter which was actually litigated and decided.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1251; Dec. Dig. § 720.*]

At Law. Action by the Elk Garden Company against the T. W. Thayer Company. On objections by plaintiff to filing of pleas of *res judicata*. Overruled as to one plea, and sustained as to one.

See, also, 179 Fed. 556.

H. E. Widener and Page, Fulkerson & Widener, all of Abingdon, Va. (J. C. Padgett, of Independence, Va., on the brief), for plaintiff. White, Penn & Penn, of Abingdon, Va., for defendant.

McDOWELL, District Judge. This is an action of ejectment, instituted in 1910, for a tract of land in this district which is alleged in the declaration to have been conveyed to the plaintiff by the Douglas Land Company on November 29, 1909. The defendant has filed a disclaimer as to all of the land described in the declaration except as to a certain parcel thereof, which it is admitted is the same parcel that was in controversy in the litigation to be hereinafter mentioned. The defendant has also tendered two pleas of *res judicata*, to the filing of which the plaintiff objects. The first plea is in brief to the following effect: That in 1905 this defendant brought in a court of competent jurisdiction an action of trespass *quare clausum fregit* against the Douglas Land Company, the predecessor in title of the plaintiff, in which action the Douglas Land Company (the defendant) pleaded only the general issue. On the trial the title to the land was put in issue, and was the only question litigated in that action. This action resulted in a final judgment for damages in favor of the Thayer Company, which stands unreversed. It is also alleged that the Elk Garden Company has no other title or claim to the land in controversy than the title which was adjudicated in the action of trespass. The record, including a transcript of the evidence and the instructions of the action of trespass, is exhibited as a part of the plea. It may be well to state here that the reversal reported in *Douglas Land Co. v. Thayer Co.*, 107 Va. 293, 58 S. E. 1101, was followed by a new trial resulting in the same verdict and judgment as before, and that this judgment has not been reversed. The second plea is to the following effect: That pending the action of trespass, mentioned in plea No. 1, the Douglas Company again commenced to cut the timber on the land in controversy and the Thayer Company brought its bill in chancery to enjoin this second trespass and to recover damages therefor; that the Doug-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

las Company by its answer admitted the cutting of the timber, but contended that it owned the land; that each party in the chancery suit introduced and relied upon the same titles that were relied upon in the action of trespass, and that the question of title was the only question actually placed in issue in the chancery suit; that the Elk Garden Company succeeded to the title of the Douglas Company in 1909, and has no title or claim other than that asserted in the action of trespass and in the chancery suit. It is further alleged that the chancery suit was finally decided in favor of the Thayer Company, and that this judgment stands unreversed. The record of the chancery suit is exhibited with the plea.

[1] The first ground of objection to filing these pleas is based on the language of section 2734, Va. Code 1904:

"The defendant may demur to the declaration, as in personal actions, or plead thereto, or do both; but he shall plead the general issue only, which shall be, that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff in the declaration."

This provision first appeared in the Code of 1849. A glance at 1 Code 1819, p. 496, sufficiently indicates the chief purpose intended by the language in question. It was, as I conceive, to simplify the proceedings in ejectment and to abolish the numerous and technical special pleas to the merits in use prior to 1849. That pleas in abatement are not forbidden by this statute was decided in *James River Co. v. Robinson*, 57 Va. 434, 438. And although it is there said that pleas in bar, other than pleas of not guilty, are forbidden, this statement is a dictum. A statute which was intended to simplify proceedings should not be held to have just the opposite effect. A plea of *res judicata*, true in fact and well taken in point of law, can only have the effect of simplifying and shortening the litigation and saving expense. It would seem, therefore, that the statute should be construed as applying only to those pleas in bar which go to the merits of the case, and not to pleas setting up legal estoppels. Moreover, if it be technical error to admit a plea of *res judicata*, which is sound in law, it is assuredly harmless error. *Reynolds v. Cook*, 83 Va. 817, 825, 3 Atl. 710, 5 Am. St. Rep. 317.

[2] In this court there is a further objection to giving full effect to this statute, even if it be construed as forbidding pleas of *res judicata*. So to do is to unwisely incumber the administration of justice in this court. If either of these pleas is true in fact and sound in law, this cause can be justly brought to a speedy conclusion. The plaintiff need only fail to file a replication. Judgment for the defendant, final and open to review by the appellate court, will immediately follow. If, however, leave to file both pleas is refused, a trial by jury will be necessary, and in prudence the defendant will resist the plaintiff on every point. The defendant's first opportunity to raise the question of estoppel will be by introducing the record of the former trial in evidence. And, in view of the room for controversy as to the question to be hereinafter discussed, the defendant in the exercise of reasonable prudence will undoubtedly also introduce all of its evidence of title. That the trial thus conducted will occupy many days and involve the

parties in great expense is highly probable. There is certainly some discretion vested in the federal trial courts in respect to following state trial statutes. *R. Co. v. Horst*, 93 U. S. 291, 301, 23 L. Ed. 898; *Shepard v. Adams*, 168 U. S. 618, 625, 18 Sup. Ct. 214, 42 L. Ed. 602; *Chappell v. U. S.*, 160 U. S. 499, 514, 16 Sup. Ct. 397, 40 L. Ed. 510. And this seems a proper occasion for declining to follow a practice directed by a literal construction of section 2734 of the Code.

[3] The next ground of objection is based on the theory that a judgment in trespass, or at least such judgment where the title was not put in issue on the record by special plea of title, is not an estoppel in a subsequent action of ejectment. It seems that there is not only no settled course of decision, but not even a single reported case, on this precise point in Virginia. In the minority opinion in *Douglas Co. v. Thayer*, 113 Va. 239, 74 S. E. 215 (the review of the chancery cause above mentioned), it is argued that, because in this state a judgment in trespass in which damages of less than \$300 are awarded is not reviewable at the instance of the defendant, it should be held that such judgment is not an estoppel in a subsequent action of ejectment. But even if the premise be admitted as settled, and of this I must confess to some lingering doubt, the argument drawn from the premise is most effectively rebutted by *Johnson Co. v. Wharton*, 152 U. S. 252, 256, 14 Sup. Ct. 608, 609 (38 L. Ed. 429), in which case it is said:

"Does the principle of *res judicata* in its application to the judgments of courts of general jurisdiction depend, in any degree, upon the inquiry whether the law subjects such judgments to re-examination by some other court? Upon principle and authority these questions must be answered in the negative. We have not been referred to, nor are we aware of, any adjudged case that would justify a different conclusion."

To which it may be added that, if the foregoing is not accepted as conclusive, every statement of the doctrine of *res judicata* found in the standard authorities must be forthwith amended so as to embody a new rule to the effect that a final judgment of a trial court of competent and general jurisdiction can not be *res judicata* unless such judgment was appealable.

Although the precise point here presented has not been adjudicated in Virginia, the principle involved seems to me to be thoroughly settled in this state. See *R. Co. v. Rison*, 99 Va. 18, 32, 37 S. E. 320, 324, in which it is said:

"There is no doubt that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies, whenever the existence of that fact is again in issue between them, not only when the subject matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court, except on appeal, writ of error, or other proceeding provided for its revision. * * * This principle has been frequently recognized and applied in this state (*Shelton v. Barbour*, 2 Va. 64; *Preston v. Harvey*, 2 H. & M. 63; *Douglass v. Fagg*, 35 Va. 588; see also 7 Rob. Prac. pp. 237, 240 et seq.), and has been fully recognized in cases where it was held not to apply; *Chrisman v. Harman*, 70 Va. 500 [26 Am. Rep. 387]; *Blackwell v. Bragg*, 78 Va. 540."

[4] In this connection it should be said that in this state in trespass *q. c. f.*, under plea of not guilty only, title may be relied upon and as fully and freely litigated as in any other form of action. *Doug-*

las Co. v. Thayer, 113 Va. 239, 249, 74 S. E. 215; Callison v. Hedrick, 56 Va. 244, 248. And in this state it is wholly unnecessary to plead specially a defense which may be made under the general issue. Indeed, it was at one time held to be error to permit this. It is further to be borne in mind that since 1849 by statute in this state (section 2756 Code 1904) a single judgment in ejectment is conclusive. In jurisdictions, if any now, in which a plea of *res judicata* may be supported only by the pleadings and judgment in the former trial, it is necessary to hold that a judgment in trespass on a plea of not guilty only does not sustain the defense of *res judicata* in a subsequent action of ejectment. But in this state evidence aliunde is always admitted to show what was litigated and decided in the former suit. See *Kelly v. Board*, 66 Va. 755, 761; *Allebaugh v. Coakley*, 75 Va. 628, 637; *Withers v. Sims*, 80 Va. 651, 660; 1 *Barton*, Law Pr. (2d Ed.) p. 535. So also, in those jurisdictions in which a single judgment in ejectment is not conclusive, there is strong reason for holding that a judgment in trespass may not be *res judicata* in a subsequent action of ejectment. But, as in Virginia a single judgment in ejectment is conclusive, I am unable to think of any satisfactory reason supporting the plaintiff's contention.

If, however, the question should be regarded as entirely open in this state, the weight of authority generally seems to be clearly with the defendant. *Campbell v. Rankin*, 99 U. S. 261, 263, 25 L. Ed. 435; *Miles v. Caldwell*, 2 Wall. 35, 17 L. Ed. 755; *Railroad Co. v. U. S.*, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. Ed. 355; 1 *Freeman*, Judgments (4th Ed.) § 311, and note *King v. Chase*, 41 Am. Dec. 683; 23 *Cyc.* 1304, 1319, 1334; *Wells*, *Res Judicata*, § 287; 1 *Herman*, *Estoppel*, § 208; *Van Fleet*, *Former Adj.* § 404. No detailed discussion of the decisions from other states supporting the opposite view seems necessary. Every such case that I have been able to find is based on some one or more reasons which are without weight under the rules of law prevailing in this state.

It follows that the objections to the first plea must be overruled. The second plea on its face presents the same question; but an examination of the record of the chancery suit, which is exhibited with and as a part of the plea, shows that in fact the title to the land was not litigated and decided in that suit. The chancery suit was, in effect, decided on an issue of *res judicata*. The court held that the judgment in the action of trespass, which had been concluded before final decree in the chancery cause, which fact was set up in an amended bill, estopped the Douglas Company from relying upon title and therefore the court did not consider the question of title. Doubtless the title might have been litigated in the chancery cause. But the cause of action in that suit was a trespass, the cutting of timber in October, 1905, while the cause of action at bar is an ouster and retention of possession by the defendant in 1909.

[5] Notwithstanding some unguarded expressions of opinion in some of the Virginia cases, I think it is as well settled in this state as it is generally that, where the cause of action is different, a former judgment is an estoppel only as to a matter which was actually litigat-

ed and decided. *Miller v. Wills*, 95 Va. 337, 353-4, 28 S. E. 337; *Harrison v. Walton*, 95 Va. 721, 724, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830; *Cromwell v. County*, 94 U. S. 351, 24 L. Ed. 195; *Davis v. Brown*, 94 U. S. 423, 428, 24 L. Ed. 204; *Roberts v. R. Co.*, 158 U. S. 1, 29, 15 Sup. Ct. 756, 39 L. Ed. 873.

It is argued that the decision in the chancery cause is *res judicata*, because in that case the question which we now have under discussion was litigated and decided. But it seems to me that this is a misapprehension of the question which was an issue in the chancery cause. The question there decided was whether or not the judgment in a previous action of trespass was *res judicata* in a chancery suit used as a substitute for a second action of trespass. The question here is as to the effect of a previous judgment (whether in trespass or in an equity suit used as a substitute for trespass) as *res judicata* in a subsequent action of ejectment.

It follows that the judgment in the chancery suit cannot be relied upon as an estoppel in the present action, and that the objection to the second plea must be sustained.

Of the partial reversal of the trial court's decree in the chancery cause in 113 Va. 239, 74 S. E. 215, *supra*, it may here be noted that that decree, as construed by the Court of Appeals, was erroneous, in that it undertook to adjudicate a question which was *coram non jndice*.

UNION FURNITURE CO. et al. v. WALKER-COOLEY
FURNITURE CO. et al.

(District Court, N. D. Georgia. May 3, 1913.)

1. BANKRUPTCY (§ 386*)—PROCEEDINGS TO SET ASIDE COMPOSITION—PROOF OF FRAUD.

A composition accepted by the requisite number of creditors of a bankrupt cannot be set aside on the ground that it was procured by fraud, where all the facts relied on to constitute the fraud were disclosed at the examination which preceded the composition, and were then known to the creditors accepting.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 606; Dec. Dig. § 386.*]

2. BANKRUPTCY (§ 386*)—PROCEEDINGS TO SET ASIDE COMPOSITION—SUFFICIENCY OF EVIDENCE.

A petition to set aside a composition by a bankrupt is not sustained by evidence which merely creates a suspicion as against the positive undisputed testimony of witnesses.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 606; Dec. Dig. § 386.*]

In Equity. Suit by the Union Furniture Company and others against the Walker-Cooley Furniture Company and others. Decree for defendants.

F. M. Hughes and Westmoreland Bros., all of Atlanta, Ga., for complainants.

W. W. Visanska, of Atlanta, Ga., for defendants Walker-Cooley Furniture Co., G. W. Cooley Mfg. Co., and G. W. Cooley Furniture Co.

Rosser & Brandon, of Atlanta, Ga., for defendants Fourth Nat. Bank, of Atlanta, and Atlanta Woodenware Co.

Morris Macks, of Atlanta, Ga., for defendants Cooley Furniture Co. and Garner Furniture Co.

NEWMAN, District Judge. This is a proceeding to set aside a composition in bankruptcy made by the Walker-Cooley Furniture Company, against whom an involuntary petition in bankruptcy was filed the 21st day of October, 1912. There was a stay of adjudication for the purpose of allowing the offer of composition to be made, which was made and the same was referred to the referee. A meeting of creditors was held on December 12, 1912, at which the president of the alleged bankrupt corporation was examined in open court. At this meeting of creditors unsecured claims to the amount of \$14,058.72 were filed and allowed, and it was found that the appraisers had valued all of the property of the alleged bankrupt corporation at \$10,373.33. The referee's report shown that 51 creditors, making a majority in number of the claims, and \$12,272.38, making a majority in amount, had accepted the offer of composition. On the hearing for the confirmation of the composition by the court it seems that other creditors had come in and accepted, at all events it was represented, and appeared to be true, that a very large majority in number and amount had accepted the composition offered by the alleged bankrupt corporation, and no objection whatever, of any kind, was made to the confirmation of the composition. Therefore the composition was duly confirmed by the court.

This proceeding is instituted to set aside the composition on several grounds. After the defendant had filed an answer denying all the alleged grounds, the case was referred to a master to take testimony, and testimony has been taken and is before the court. The Walker-Cooley Furniture Company was engaged in the furniture business on Forsyth street in Atlanta, Ga. It might be called, as it has been frequently called in the argument, the parent company. There were two other corporations engaged in the same business in which G. W. Cooley, who is the main man in all the business, was a stockholder. After the matter had been fully gone into in taking testimony and after argument before the court, the grounds relied upon to set aside the composition were very clearly stated by counsel for the creditors seeking to set aside the composition. In addition to the Walker-Cooley Furniture Company, there were three other corporations, the Cooley Furniture Company, in which G. W. Cooley and H. O. Cooley, his brother, were stockholders, having a place on Decatur street in Atlanta, Ga., the G. W. Cooley Manufacturing Company, incorporated at the same time as the Cooley Furniture Company with a capital stock of \$1,000, and the G. W. Cooley Furniture Company, with a capital stock of \$10,000, in which G. W. Cooley and his wife were stockholders, in-

incorporated in July, 1912. These three corporations, and especially the Cooley Furniture Company and the G. W. Cooley Furniture Company, bought their furniture from the Walker-Cooley Furniture Company, and all were engaged in selling furniture on what are called leases—that is, on the installment plan—selling generally, if not entirely, to negroes. The G. W. Cooley Manufacturing Company cuts little figure in the case as it is finally presented to the court.

Mr. G. W. Cooley, who was the main actor in all these matters, would have the bookkeeper for the Walker-Cooley Furniture Company credit the G. W. Cooley Furniture Company and the Cooley Furniture Company with the entire amount of their indebtedness at the end of each month and charge the same to him individually, then, according to his testimony, he would pay the Walker-Cooley Furniture Company such amounts by paying off the bills of the Walker-Cooley Furniture Company and otherwise. The movants in this proceeding claim that this was not true according to the whole record as presented to the court. G. W. Cooley claims positively that such was the case, and has so testified. The books show that the matter was handled as he claims; that is, so far as the accounts of these two outside concerns having been charged to him. The bank books of the respective corporations are in evidence, but it is almost impossible for me to ascertain anything definite about them. Also what are said to be extracts from the books of the Walker-Cooley Company. The general claim is that all of these concerns were simply one establishment, being run by G. W. Cooley himself, and that his brother and his wife were mere figureheads, and that all of the assets of the three concerns should have gone into the composition.

It appears that in February last the Cooley Furniture Company had \$700 worth of furniture in stock and about \$8,000 worth of leases, and the G. W. Cooley Furniture Company had \$800 worth of furniture in stock and about \$10,000 worth of leases. It is assumed that this is something like what they had at the time of the confirmation of the composition in the Walker-Cooley Company Case. This, except some notes made by the Garner Furniture Company, as the contentions are now made, is the property that it is claimed was fraudulently withheld from the knowledge of the creditors for the Walker-Cooley Furniture Company at the time the composition was proposed, when G. W. Cooley was examined, and when the composition was confirmed.

I think as to the Garner notes a fair showing has been made that these notes were used at the Fourth National Bank of Atlanta prior to the time the bankruptcy proceedings were instituted against the Walker-Cooley Furniture Company. My understanding is that, while the amount was due to the Walker-Cooley Furniture Company, the notes were made to G. W. Cooley, who says he used the notes in the Fourth National Bank for the benefit of the Walker-Cooley Furniture Company. There seems to be no denial of this, except the general suspicion that the whole transaction was wrong. I understand Mr. Garner and Mr. Cooley both to have testified that these notes were in the Fourth National Bank, and they are probably the property of the bank.

As to the furniture and leases in the hands of the Cooley Furniture Company and the G. W. Cooley Furniture Company, no very clear showing is made by the movants, while they do raise a very strong suspicion. G. W. Cooley's testimony is positive that the amounts due by the G. W. Cooley Furniture Company and the Cooley Furniture Company for furniture bought by them from the Walker-Cooley Furniture Company were paid to him by notes and he used the notes for the benefit of the Walker-Cooley Furniture Company. His testimony on this subject is only contradicted by circumstances because it is impossible, as I have stated above, to get anything definite from the transcripts from the books or from the bank books or otherwise. It is said that G. W. Cooley had these outside concerns for the purpose of putting his property into them and outside of the Walker-Cooley Furniture Company so as to be ready for bankruptcy with the Walker-Cooley Furniture Company. This is hardly supported by the evidence, because it seems to show very clearly that Mr. Cooley tried every way to avoid the bankruptcy of the Walker-Cooley Furniture Company. He seems to have been trying every way possible to raise money to tide him over and thereby avoid bankrupt proceedings. But, be this as it may, I do not believe any one would ever be able to reach any very satisfactory conclusion upon this branch of the case. The proceeding here is controlled, it seems to me, by another matter.

[1] It is said that the property of these outside concerns was fraudulently withheld from the knowledge of the creditors at the time the composition was proposed and carried through. It is shown that a regular meeting of creditors was called, that they all had the usual notice and the opportunity to be present. G. W. Cooley, the leading man of the Walker-Cooley Furniture Company, and president of the same, was examined by counsel for the petitioning creditors and many other creditors at the time of this examination, Mr. W. S. Dillon. Mr. Dillon is a lawyer of character and standing at the bar in Atlanta, and has testified in the present proceeding. He states in his testimony that the firm with which he is connected, Anderson, Felder, Rountree & Wilson, were the attorneys for the petitioning creditors in the bankruptcy proceeding against the Walker-Cooley Furniture Company, and represented the majority in number and amount of the creditors. He says that he represented the Union Furniture Company, one of the complainants in this application to set aside the composition, that he represented the Blue Ridge Furniture Company, another complainant in this proceeding, and, in fact, all of the original petitioners in the present matter except the Teschner Leaf Company. Mr. Dillon further testifies that practically all the facts that were brought out on the examination before the special master in the present matter were brought out in the examination before the referee looking to the acceptance of the composition. Mr. Dillon states that he had had correspondence with clients of his out of town, and had had the matters which are made the subject of this motion brought to his attention, and that he thoroughly investigated the same. He states that he knew of the relationship of G. W. Cooley to the G. W. Cooley Furniture Company, and that the statement made by Mr. Cooley in the present

matter was in no wise different from that made by him on his examination before the referee. He says:

"The substance of his evidence on that question before the referee was the same as it was before the master."

He says that he knew of Mr. Cooley's relation to the Cooley Furniture Company also, that he learned of it in various ways, that he learned it in detail by examining him under oath before the referee, and that he knew of the transactions of the Garner Furniture Company, he "knew it as it is stated now by Mr. Garner and Mr. Cooley." Mr. Dillon said that he would not be positive about it, but he thinks he represented the majority of the claims against the Walker-Cooley Furniture Company at the time of the composition. On a very thorough cross-examination Mr. Dillon reiterated all this, and adhered to the statement that he knew at the time of the examination of Mr. Cooley before the referee and at the time of the confirmation of the composition all that it now known or claimed by the movants here. It will be impossible, therefore, to hold that these assets of the G. W. Cooley Furniture Company and the Cooley Furniture Company and the Garner Furniture Company notes were fraudulently withheld from the knowledge of the creditors of the Walker-Cooley Furniture Company or from the bankrupt court unless we reject entirely the testimony of Mr. Dillon. If, with the knowledge of all the facts, a composition is accepted, and if the alleged bankrupt disclosed fully the extent of his assets, I do not see how it can be set aside on the ground of fraudulent representations.

It appears further to me that it is shown with reasonable satisfaction that the alleged bankrupt corporation got every dollar it could to effect this composition. I do not understand that any fraudulent conduct of any character or anything wrong could be attributed to Mr. Gershon in this matter, and he declined, according to the evidence here, to lend more than the \$6,100 to make this composition and pay the expenses. The Walker-Cooley Furniture Company not only transferred to Mr. Gershon all the property of the Walker-Cooley Furniture Company to secure him for this money, but G. W. Cooley transferred to him his one-half of the stock in the G. W. Cooley Furniture Company and the Cooley Furniture Company and gave a mortgage on a certain small piece of real estate, probably subject to some other incumbrance.

It seems, also, from this record that the true state of affairs must not only have been known to Mr. Dillon, of counsel for the creditors, but from what he states as to his correspondence it must have been known to many people having an interest in the matter. Notwithstanding all this, every creditor either expressly accepted the composition, which was true of a considerable majority in number and amount, or they failed to make any objection to the same although having notice of the offering and of the hearing.

There has been offered in evidence a report made by the Walker-Cooley Furniture Company to the Dunn Mercantile Agency, showing a much larger amount of assets than seemed to be on hand at the time of the filing of the petition in bankruptcy, certainly a much larger amount if the leases are considered as being worth anything like their

face value. If creditors have been deceived and defrauded by such statement, they have their remedy under a recent decision of the Supreme Court of the United States in the case of *Henry Friend et al., Petitioner, v. James Talcott*, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. —, decided April 7, 1913, which is a very interesting case as to fraudulent representations and the rights of creditors.

[2] Since the argument I have gone over the evidence, that which was material here very carefully indeed, and the more I examine it the stronger the conviction grows on me that this is not a case in which the composition can be set aside. Mere suspicion should not be allowed to prevail over the positive testimony of undisputed witnesses. The prayer to set aside the composition, reopen the case, and appoint a receiver is denied, and the temporary restraining order heretofore granted is dissolved.

I find a bill in the record in favor of the stenographer for taking the testimony before Mr. Callaway, the master in this case, for \$215. Inasmuch as this evidence was taken by both parties and used for the benefit of both parties on the hearing, I think the expense of the same should be divided. The fee of Mr. Callaway, the master, can be charged when same is fixed.

MEESE et al. v. NORTHERN PAC. RY. CO.

(District Court, W. D. Washington, N. D. July 10, 1913.)

No. 2,489.

1. CONSTITUTIONAL LAW (§ 46*)—DETERMINATION OF CONSTITUTIONAL QUESTIONS.

The question of the constitutionality of the Workmen's Compensation Law (Laws Wash. 1911, c. 74), in compelling contribution from an employer for death of a workman through the negligence of a third person not in the same employ, is not before the court where, the third person being sued, the complaint is demurred to on the ground of the statute abolishing right of action against him.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43-45; Dec. Dig. § 46.*]

2. DEATH (§ 11*)—RIGHT OF ACTION—ABOLISHMENT.

Right of action for death by wrongful act does not exist at common law, but solely by statute, and so by statute may be taken away.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 10, 15; Dec. Dig. § 11.*]

3. MASTER AND SERVANT (§ 87½, New, vol. 16 Key-No. Series)—WORKMEN'S COMPENSATION LAW—ABOLISHMENT OF RIGHT OF ACTION.

Right of civil action for death of a workman, not merely against the employer, but against a third person, where the accident occurs "at the plant" of the employer, is abolished by the Workmen's Compensation Law (Laws Wash. 1911, c. 74); section 3 providing that all civil causes of action for injury to or death of workmen are abolished, "except as in this act provided," the only relevant exception being the proviso that if the injury to a workman occurs "away from" the plant of the employer, through negligence of a third person not in the same employ, he, or in case of his death his family, may elect to take under the act, or to sue such third person; and section 5 providing for payment to a workman injured, or in case of his death to his family, of industrial insurance

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from the fund created by the act, which, "except as in this act otherwise provided, * * * shall be in lieu of any and all right of action whatsoever against any person whomsoever."

At Law. Action by Mary A. Meese and others against the Northern Pacific Railway Company. Demurrer to complaint sustained.

Teats, Teats & Teats, of Tacoma, Wash., for plaintiffs.
C. H. Winders, of Seattle, Wash., for defendant.

CUSHMAN, District Judge. This suit was brought to recover for the death of the husband and father of the plaintiffs, alleged to have been caused by the wrongful act of the defendant. Defendant demurs to the complaint upon several grounds, the only one argued being:

"That there is no authority in law under which the plaintiffs' action can be maintained as against this answering defendant, it appearing from the complaint that Benjamin Meese, on account of whose wrongful death this action was brought, sustained the injuries of which complaint is made at the place of work and plant of his employer, and that plaintiffs' claim comes within the terms of chapter 74 of the Session Laws of the State of Washington for 1911, being an act relating to compensation of injured workmen."

The complaint alleges:

"On the 12th day of April, 1913, and for a long time prior thereto, Benjamin Meese, deceased, was in the employ of the Seattle Brewing & Malting Company, in its plant located at Georgetown, in the city limits of the city of Seattle, King county, Washington, and as part of his duty under his employment with the said brewing company was to assist in loading beer upon the cars and also to place government stamps upon the barrels, half barrels, and quarter barrels, when filled with beer and before the same were loaded into the railroad cars spotted at the proper place at said brewing plant for said loading. That at the plant the said defendant had a railroad track running alongside of the warehouse and buildings containing the finished products to be shipped by said brewing company, which said siding was connected with defendant company's switches, siding, and main tracks; and the said defendant company furnished the said brewing company with cars on said track to be loaded with products of said plant to be carried by said defendant company to their different points of destination. That after the said cars are placed upon said siding of said defendant company, the cars were spotted and moved by the brewing company to different places necessary for the loading on said siding, with appliances furnished and operated by the said brewing company; and when the said cars were so placed upon the said siding and spotted at the proper places for loading the cars, said brewing company used skids and other appliances extending from the car into the warehouse of the brewing company, for the purpose of rolling the kegs, barrels, quarter barrels, or half barrels of the finished product of the brewing company from the plant into the car; and the said brewing company employed a crew of men called 'loaders' for the purpose of loading said car with their said finished product, and also with ice sometimes necessary in the shipment of the said finished product, and at the same time of loading the said car the said brewing company employed workmen to place the necessary government stamps upon each of the receptacles of the said finished product, which was usually done while said receptacles were moving along the said skids; and the workmen who performed said work usually stood upon the floor or platform beneath the skids, and which platform ran alongside of the building and plant of the brewing company and into the opening in the building or plant where the finished product was taken from the storehouse or plant. That while loading and filling the said car, the movement of the said car, especially without notice to the loading crew and the employé who placed the government stamps upon the receptacles, was dangerous to the workmen of the brewing company, as the movement of the said

car would cause the skids and receptacles of the finished product to fall upon the employes of the brewing plant and injure them. That at the time of the accident herein complained of the deceased husband and father was placing government stamps upon the receptacles, half barrels, of the finished products of the brewing company, in his regular course of employment with the brewing company, and located to the south of the skids and half barrels as they moved from the plant of the brewing company into the car. That while the said deceased, Benjamin Meese, was so employed, placing the government stamps upon the half barrels and filling and loading a car upon said siding, on the 12th day of April, 1913, at about the hour of 6:10 o'clock of the evening of said day, the said defendant company, by and through its switchman, locomotive engineer, and employes, carelessly and negligently, without warning to the deceased, Benjamin Meese, and without warning to any of the loading crew, then in the employ of the said brewing company, loading the car upon the said siding, knowing that said men were at that time loading the car, caused a number of cars to come down the said siding alongside of the plant of the said brewing company with tremendous force and momentum, striking the car then being loaded with tremendous force and momentum, knocking the car along the track, causing the skid then being used by loading crew to load the said car to fly backwards and against the deceased, causing a large number of half barrels loaded with the finished product of the brewing company upon the said skids to fall upon the deceased, maiming and injuring him so that, from said injuries so received through the carelessness and negligence of the defendant company, the said Benjamin Meese, deceased, died on the morning of the 17th day of April, 1913, leaving his widow and children, parties plaintiff herein."

The Workmen's Compensation Law (Session Laws Wash. 1911, p. 345) provides:

"* * * The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents, is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided. * * *" Section 1, pp. 345, 346.

"Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer: Provided, however, that if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case. Any such cause of action assigned to the state may be prosecuted, or compromised by the department, in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department."

* * * Section 3, pp. 347, 348.

"Each workman who shall be injured whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of

his employer, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and, except as in this act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever." Section 5, p. 356.

No question is made but that the employment of the deceased was of an extrahazardous character and within those employments provided for in the act. The question presented is purely one of statutory construction.

[1] Upon the argument much was said concerning the constitutionality of a legislative act compelling contribution from one person, or employer, to be used in paying for the negligence of another. This phase of the act is not now before the court. That is a defense only to be made by those obliged to contribute to, or those charged with the duty of administering, the funds contributed. The question of legislative power may, in this case, only be considered as, possibly, one of the guides to be resorted to in determining the legislative intent manifested by the law as written.

[2] There is no right of action at common law to recover for death occasioned by the wrongful act of another. 13 Cyc. 310. It is a right solely given by statute. A right such as this, which the Legislature gives, it may, of course, take away.

[3] The sole question, therefore, is: What was the legislative intent concerning this matter? Was it to end all suits at law for the injury or death of employes while engaged in certain occupations, no matter by whom injured or killed? Or, was it only to end such controversies between employer and employe?

Parts of the act, taken alone, would justify either conclusion. The title provides:

"An act relating to the compensation of injured workmen in our industries."

This shows a broad purpose—broad enough to include all injuries caused by any one to such "workman in our industries." Section 1 announces:

"The common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions."

This shows a narrower view; but, as shown by the parts of the act quoted above, it does not stand alone. Section 3 of the act, above quoted, provides that, when the deceased workman is killed "away from the plant of his employer," through the negligence of another "not in the same employ," his wife or children may elect whether to take, under the act, the industrial insurance therein provided for, or seek to recover from such other—that is, recover in an ordinary law action for such other's negligence.

In this case, the complaint shows that the deceased was—giving the ordinary meaning to the words—killed, not "away from," but at, the plant of his employer. Sections 3 and 5, in classifying the injuries by the place where they occur, both contain the expression:

"Whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer."

"At the plant" may include less or more than "on the premises," depending on the relative extent of the two; but these two expressions show an intention not to limit the application of the law to real property boundaries.

The proviso, expressly preserving the right of action at law for the death of an employ , resulting from an injury "occurring away from the plant of the employer," clearly shows an intent to except from that provision of the act, abolishing all private controversies and all rights of civil action, what, but for such provision, would have been abolished, and, as the right of civil action is alone preserved when the injury occurs "away from the plant of the employer," then it is not preserved, but is abolished, when it occurs at the plant of the employer.

This intent is further manifested by section 5 of the act, providing for the payment of industrial insurance from the fund created by the act, which "shall be in lieu of any and all rights of action whatsoever against any person whomsoever," "except as in this act otherwise provided." The only relevant exception is, without doubt, the one referred to in the provision of the act providing:

"That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case." Page 348.

Courts have often had occasion to point out that the intent may frequently more satisfactorily be shown by the nature of an exception than in any other way. This seems to be such a case.

Demurrer sustained.

THE JACOB LUCKENBACH.

THE SIGMARINGEN.

(District Court, D. Maryland. July 3, 1913.)

COLLISION (§ 102*)—STEAM VESSELS—MUTUAL FAULTS.

The steamship Sigmaringen, which had been anchored at night near the north end of the Baltimore quarantine anchorage grounds, got under way after daylight to proceed up the main channel to Baltimore, and began swinging around while the steamship Luckenbach was approaching down the Curtis Bay channel, which enters the main channel from the westward on the north of the anchorage grounds. As the Sigmaringen got upon her course she increased her speed, and at the intersection of the two channels, on the west side of the main channel, the two vessels came into collision, being then on crossing courses. Neither vessel heard the other's signal. *Held*, that the Sigmaringen could not rely on the starboard hand rule for crossing vessels, as she did not comply with such rule, which required her to keep her course and speed, and that she was in fault for not keeping a lookout and navigating with reference to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Luckenbach, and that the latter was also in fault for not sooner reducing speed, so as to be under control when the course of the other vessel was finally ascertained.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 102.*]

In Admiralty. Suit for collision by Hermann Grantz, master of the steamship Sigmaringen, against the steamship Jacob Luckenbach, with cross-libel by Edgar F. Luckenbach and others, owners of the Luckenbach, against the Sigmaringen. Decree against each vessel for half damages.

R. E. Lee Marshall and Charles W. Field, both of Baltimore, Md., for the Sigmaringen.

Daniel H. Hayne, of Baltimore, Md., and James K. Symmers, of New York City, for the Jacob Luckenbach.

ROSE, District Judge. There was a libel and a cross-libel. By consent the cases have been consolidated. Two vessels were in collision. Each claims to be free from fault and says that the other was solely to blame. Both of them are ocean-going steamships. One of them, the Sigmaringen, flies the German, the other, the Jacob Luckenbach, the American, flag. At about 6:11 on the morning of April 28th last they came together in broad daylight at or near the intersection of the Curtis Bay and Ft. McHenry channels of the Patapsco river. There is less dispute as to facts than is usual in such cases. The parties differ principally as to what rules of navigation were applicable to the situation in which the ships found themselves. That difference began before the collision and was in part its cause.

The quarantine anchorage of the port of Baltimore lies to the westward of the Ft. McHenry or main ship channel. In a direction parallel to that of the channel it appears to be in the neighborhood of 3,500 feet long. It is 600 feet wide. In other words, for a distance of about 3,500 feet the channel is here widened from 600 to 1,200 feet. The northernmost side of this anchorage is formed by the Curtis Bay channel. The latter extends from the Baltimore & Ohio coal pier at Curtis Bay to the Ft. McHenry channel. It is perfectly straight, running almost due east from the pier, its compass course being east one-half south. It is about 2 miles long, is 30 feet deep, and, except where it widens at its mouth, is 250 feet wide. The intersection of its southernmost side with the westernmost side of the Ft. McHenry channel is marked by can buoy No. 23. Some 900 feet to the east and north of that buoy is a white spar buoy, which marks the north-westernmost corner of the anchorage. This latter buoy is in the southern line of the Curtis Bay channel.

The parties substantially agree as to the east and west line upon which the collision took place. The Luckenbach came straight down the Curtis Bay channel. After passing buoy No. 1, and while under the observation of the Sigmaringen, it never made any perceptible change in its course. Shortly before the two ships came together its helm was put to starboard, but before the ship appreciably responded thereto its engines were reversed at full speed. The influence of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

propeller under such conditions offset that of the helm. The captain of the Luckenbach says he passed down the channel slightly to the south of its center. It is safe to say that the ships came together not far from the center line of the Curtis Bay channel, or from a prolongation of that line. Such line is, perhaps, 400 feet north of buoy 23. The collision may have happened somewhat nearer that buoy, and did, if the course taken by the Luckenbach after going by buoy No. 1 was parallel to the line passing from buoy No. 1 through the white spar buoy to buoy No. 23. A number of witnesses on the Luckenbach speak of buoy No. 23 appearing under the stern of the Sigmaringen after the latter moved up the Ft. McHenry channel subsequent to the collision. As the Sigmaringen is 394 feet long, and was struck about 130 feet from her stem, the probabilities are that her stern was at the moment of the collision a very few feet from the east and west line which passed through buoy No. 23. More attention has been given by the parties to fixing the north and south line upon which the collision happened.

The Sigmaringen says that for some time before she was struck she had been on the Ft. McHenry channel course, and at the moment of collision was to the right of the center of that channel. The Luckenbach says that the ships came together in the Curtis Bay channel, and not in the Ft. McHenry channel.

The steamship City of Norfolk passed up the latter channel immediately before the accident, which, to the eyes of Mr. Brooks, the first officer of that ship, even then was imminent. He says he had never seen a collision and he was very much interested. He watched the two vessels concerned until the crash came. He says that the Sigmaringen passed very close to buoy No. 23, which is on the westernmost side of the Ft. McHenry channel. He thinks that she went to the westward of that buoy, but he is not sure. An instant before the collision the Sigmaringen's stem was thrown to starboard; that is, towards the east. I think that it was this movement which shut in the buoy from Mr. Brooks' observation.

On the whole, I am persuaded that Mr. Brooks, who struck me as a singularly impartial, intelligent, and well-informed witness, was right in supposing that the Sigmaringen passed to the westward of buoy No. 23, and very close to it. In any event if the Sigmaringen was at the time of passing such buoy on the channel course, as its witnesses swear it was, or upon any approximation of that course, it must have been well to the westward of the center line of the channel when the Luckenbach struck it. Certain it is that when the ships came together the Sigmaringen was not very far from the line of the west side of the Ft. McHenry channel, and probably a little to the west of that line. The circumstances of the collision confirm this view. The Luckenbach had reversed before the collision; how long before it may not be possible to say with certainty. Its speed had, however, been reduced, or the damage done by its blow, considerable as it was, would doubtless have been still more serious. If the Sigmaringen had not been in the way, the Luckenbach would not have reversed. If the Luckenbach had not, it would inevitably have gone still farther to the eastward. If the Sigmaringen at the time of the collision was in the

eastern half of the channel, the Luckenbach's course would have carried it, had it not reversed, and had the Sigmaringen not been in the way, aground to the east of the channel. It is not probable that the Luckenbach was navigated in that manner.

I find, therefore, that the collision happened at or about the line of the westernmost side of the channel, and at a point from 200 to 400 feet north of buoy No. 23.

The night before the Luckenbach had completed loading a full cargo of 4,000 tons of coal. It was 300 feet long, and drew so laden about 24 feet of water. Between 5 and 6 on the morning of the collision it got under way for sea. Its master says he intended to stop and anchor temporarily at the quarantine anchorage. The Luckenbach was not a fast boat. Its maximum speed was only 8 knots. On the morning in question its engines were at half speed. It was making, perhaps, 5 knots through the water.

The Sigmaringen was on a voyage in ballast from Cienfuegos to Baltimore. It had arrived at quarantine about 1:30 on the morning of the collision and had there anchored. There has been some controversy as to the precise point at which it dropped its anchor. Taking all the testimony into consideration, I find that it anchored near the westernmost side of the anchorage grounds and 1,000 feet or more from the white spar buoy. The captain of the Sigmaringen says it was anchored not less than 700 feet from such buoy. Some of the other witnesses put it closer. The conclusion at which I have arrived is based upon the testimony of the chief engineer of the Sigmaringen that in the two minutes preceding the collision at which its engines were run at full speed it traveled 317 meters, or 1,070 feet. Allowing for the distance it made under half speed, it does not appear that it could have been anchored less than 1,000 feet away from the white spar buoy, and perhaps a few hundred feet more. Towards morning the wind came from the westerly direction. Preceding the collision it was blowing about 6 miles an hour. The ship consequently headed to the west. The witnesses differ as to whether its bow pointed north or south of west. I do not think it is material to attempt the settlement of the controversy on this question. It weighed anchor at 6:06. The collision happened certainly as early as 6:12, probably about 6:11; the time used being that of the Sigmaringen.

When the Sigmaringen broke ground, the Luckenbach had been for some time on its course down the Curtis Bay channel. The collision took place 5 or 6 minutes later. The Luckenbach was making 5 knots, or about 500 feet a minute. Its engines were reversed before the collision. How long before is uncertain. Probably for a very short time, yet sufficiently long to reduce her speed.

From all the circumstances, I find that the Luckenbach was not more than half a statute mile from the place of collision at the time the Sigmaringen got under way; that is, the Luckenbach was then something over 400 feet to the east of buoy No. 1 and about half a knot or a little more from the Sigmaringen. At that time the two ships were so headed that they were approaching each other head to head, or nearly so. At 6:06 the Sigmaringen's engines were started. They were worked at slow until 6:07. During that time the ship sim-

ply turned to starboard without otherwise materially altering its position. The Luckenbach at 6:07 was about 2,000 feet from the point at which the collision afterwards happened; that is to say, it had just about passed buoy No. 1. There was then probably something less than a half mile between the two ships. During the next minute the engines of the Sigmaringen were at half speed and the ship continued to swing to starboard. During this minute it is not probable that the ship could have moved forward more than a couple of hundred feet, if so much. At 6:08 its engines were put at full speed. At that moment the Luckenbach must have been not much over 1,500 feet from the point of collision; that is to say, it was nearly half way between buoy No. 1 and the white spar buoy. The Sigmaringen's pilot said that the Luckenbach was then only 200 or 300 yards off. He was perhaps confused when he said so. Up to one minute or more after the time at which the order "Full speed ahead" was given—that is to say until 6:09—the Sigmaringen had been navigated without thought of the Luckenbach, and in ignorance, so far as everybody on board of her, except, perhaps, her pilot, was concerned, of the existence of the collier. He says he saw the latter when he was getting under way. If he did, he paid no further attention to it until a minute, as he says, after the Sigmaringen's engines had been put at full speed, and when the Luckenbach must have been within 1,000 feet of the point of collision. The pilot is very young, not yet 22. He was confused and contradictory in his testimony, not, I think, because he wanted to deceive, but because his responsibility seems to have been too heavy for his experience and ability. No lookout was stationed on the Sigmaringen, and with the possible exception of the pilot no one in fact did look out. If he did, he might as well not have done so. He had too many other things to think about. It follows that, if the absence of a proper lookout could in any way have contributed to the accident which subsequently followed, the Sigmaringen must be held in fault.

When the Luckenbach was in fact noticed by those on board the Sigmaringen, the former was within 1,200 feet, if not less, of the place at which the collision subsequently took place. The Sigmaringen was still, in my opinion, steaming diagonally across the upper end of the anchorage ground. If it held the course and speed at which to that time it had been progressing, it would have been a dangerous experiment for the Luckenbach to have attempted to pass around the white spar buoy under its stern. Indeed, if the Sigmaringen had not begun to move faster, as it in fact did, it probably would have been impossible. Up to that time it had been moving very slowly. When it saw the Luckenbach, its pilot and master had little time to think. They assumed that the fifth position was presented, because the vessels were at that moment on crossing courses. They failed to realize that they were not keeping their speed, but were constantly accelerating it, and would, had the collision not have taken place, have continued to do so for some time to come. The Sigmaringen, with its engines at full speed, would have ultimately traveled at the rate of 12 knots an hour. It had not gotten up to more than about 6 when its engines were reversed. Those in charge of its navigation overlooked the fact that they had, moreover, according to their own testimony, changed

their course within 1,000 or 1,200 feet of the Luckenbach. If they were seeking to charge it with the responsibility of a burdened vessel, they should have kept course and speed. They, however, blew one blast to the Luckenbach. For some reason the latter did not hear it. A moment after the Luckenbach blew two blasts to the Sigmaringen. Nobody on the latter ship heard either of them. Some of those on board of it did notice a single puff of steam, and supposed that the Luckenbach had assented to their proposition that it should pass under the stern of the Sigmaringen. It is possible that each ship signaled the other so nearly together as to prevent one from hearing the other's signal. The master of the Luckenbach claims that he thought that, as the ships were on opposite courses when they were within half a mile or so of each other, he was entitled to treat them as still on those courses. He felt that he had started first. He had a heavily laden vessel going down a relatively narrow channel. He supposed that he had the right of way. He impressed me as a man rather markedly inclined to stand up for what he thinks to be his rights. In a brief moment after each had sounded the signals, all appreciated that a collision was almost inevitable. Then each ship did what should have been done before—they reversed at full speed and blew three times. It was too late. The master of the Luckenbach says he did not earlier attempt to exchange signals with the Sigmaringen because he feared that if he did so he would have confused a couple of steamers which were proceeding up the main ship channel. If so, he should, in view of the position and actions of the Sigmaringen, have gotten his vessel more thoroughly under control, so that, when it became possible to interchange signals with the other ship, he would have been in a position to act as such exchange indicated. He should not have waited, as he did, until the vessels were so close that the slightest misunderstanding or delay on the part of either would make collision inevitable. Under the circumstances as they must have been apparent to all parties, there was quite obvious danger that the two ships might differ as to what rule of navigation was applicable. If the master of the Luckenbach thought an interchange of signals was impracticable, it was clearly his duty to reduce speed at once.

There has been much discussion as to whether the two ships were in the fifth position. That they were on crossing courses at the moment of the collision was clear. They came together at right angles. It is equally certain that, when the vessels were already near enough to require each of them to be navigated with some relation to the other, they were not on crossing courses. It is no less certain that the Sigmaringen, from the time it got under way to the time of collision, was constantly changing its speed, and during that time must have made several changes of course. The prime fault on the part of the Sigmaringen was not keeping a lookout. If it had not done so, I am persuaded the collision would have been prevented, either by an earlier interchange of signals or by different navigation on its part.

I have already said that in my view the Luckenbach was clearly also in fault for approaching so close to the Sigmaringen without effecting an interchange of signals and without checking its speed with sufficient promptness.

It follows that the usual decree for a reference to a commissioner to ascertain the damages and for a division of them between the two ships must be made.

MORSE v. BROWN.

Ex parte MORSE.

(District Court, D. Connecticut. July 30, 1913.)

No. 1,762.

CRIMINAL LAW (§ 13*)—DISORDERLY HOUSE (§ 5*)—STATUTES—VALIDITY—"REPUTED."

Acts Conn. 1907, c. 122, provides for sentence by fine or imprisonment on any person who shall be convicted of keeping a house which is, or is reputed to be, a house of ill fame, or which is resorted to, or is reputed to be resorted to, for purposes of prostitution and lewdness. *Held* that, since the Connecticut Supreme Court of Errors prior to the adoption of such statutes had held that the word "reputed," as so used in other statutes, would be construed as limited to reputation founded on facts, and not on mere irresponsible rumor, the statute, so construed, was not unconstitutional, as violating the federal Constitution, as justifying a conviction of an offense on irresponsible rumor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 13, 14; Dec. Dig. § 13.* Disorderly House, Cent. Dig. §§ 5, 9-13; Dec. Dig. § 5.*

For other definitions, see Words and Phrases, vol. 7, p. 6118.]

Habeas corpus by Marion A. Morse against Sidney A. Brown to obtain petitioner's discharge from imprisonment under a conviction for keeping a disorderly house. Writ dismissed.

Charles W. Comstock, of Norwich, Conn., for petitioner.

Charles B. Whittlesey, of New London, Conn., for defendant.

MARTIN, District Judge. The petition is referred to and made a part of these findings of the court, and the same was filed July 2, 1913. The writ of habeas corpus was issued July 2, 1913, and the sheriff brought the petitioner into court on, to wit, the 14th day of July, 1913, and then made return to the writ. The return is referred to and made a part of these findings. Thereupon the petitioner asked for time to formulate and file demurrer, which was granted, and the cause was continued to the 30th day of July, 1913, at the United States courthouse in Hartford, Conn. And on the 30th day of July, 1913, the petitioner demurred to the return of the sheriff, which demurrer is referred to and made a part of these findings. No witnesses were introduced on either side. The case was argued by counsel upon the petition, answer, and demurrer.

The sheriff's return alleges that he holds the petitioner in the New London county jail by virtue of a mittimus directed to him, setting forth that at a term of criminal court of common pleas held at New London county the petitioner was convicted of the crime of unlawfully keeping and maintaining a house reputed to be a house of ill fame and which is reputed to be resorted to for the purpose of prostitution and lewdness, and that she was by said court sentenced, etc.

No question was made but what that court had jurisdiction of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cause. The petitioner's case rests solely upon the language of the Connecticut statute (Acts of 1907, p. 674, c. 122), which provides for a sentence by fine or imprisonment upon any "person who shall keep a house which is, or is reputed to be, a house of ill fame, or which is resorted to, or is reputed to be resorted to, for the purposes of prostitution and lewdness." It is claimed that the words "or is reputed to be" annul the statute, in that it is in violation of the Constitution of the United States, for that this statute makes it a crime for a person to keep a house of ill repute, though such repute is unjust and not founded upon facts.

This cause was heard by the Supreme Court of Errors for the state of Connecticut, and is reported in *Morse v. Brown*, 83 Conn. 550, 78 Atl. 430. It appears that the state of Connecticut has enacted other statutes in which the word "reputed" is used, notably statutes relating to the sale of intoxicating liquor, and these statutes have been construed by the Supreme Court of Errors to the effect that said reputation means the keeping of a place of which said reputation was founded upon facts. The state court so construes such statutes that the accused may always overthrow such reputation by proving that such was not the real character of the place. A reputation made by wanton remarks of unreliable people, or by enemies, is not a reputation founded on fact, and therefore, under the construction of the court of last resort, such reputation is not contemplated by the statute.

It is not within my province to discuss the propriety of the use of the words "or as reputed to be." It is self-evident that these words in the statute, as construed by the Supreme Court of Errors, have no force whatever, unless it may be as to the admissibility of evidence upon the question of reputation. Thus limited, those words are not in conflict with any provision of the Constitution of the United States. This construction of the use of the words "reputed to be" by the Supreme Court of Errors for the state of Connecticut occurred long before the making of the complaint in the case at bar. The petitioner's counsel well knew that, had she pleaded "not guilty," instead of demurring to the complaint and pleading guilty, the question of fact as to whether she was keeping a house of ill fame, or a house which is resorted to for the purpose of prostitution and lewdness, could be tried by a jury, and that question of fact would control the verdict of guilt or innocence. She voluntarily chose to demur to the complaint and plead guilty. In view of the construction given to this statute by the highest court for the state of Connecticut, it seems unnecessary for me to discuss the meaning of the words "ill fame"—as to whether it is the reputation that gives to a house its ill fame, or to discuss the moral side of the question; neither is it necessary to discuss the right of the state to enact such a statute without interference by the federal court.

No right-minded person can question, for a moment, that the keeping of a house that is reputed to be a house where disreputable people congregate for lewd and lascivious purposes is a detriment to the community, and where the state court so carefully guards the rights of a person charged with such a reputation the federal court should not interfere.

The writ of habeas corpus is dismissed.

CARTWRIGHT v. SOUTHERN PAC. CO.
(District Court, D. Oregon. July 21, 1913.)

No. 3,669.

1. INJUNCTION (§ 195*)—JURISDICTION—RETAINING CASE TO GIVE COMPLETE RELIEF.

Where the jurisdiction of a court of equity was properly invoked to compel the removal by defendant of dikes which were deflecting the current of a river against complainants' lands to their serious injury, such court will retain the case and assess complainants' damages, although by reason of the lapse of time the injunctive relief has become inappropriate.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 415; Dec. Dig. § 195.*]

2. LIMITATION OF ACTIONS (§ 32*)—NATURE OF SUIT—INJURY TO REAL PROPERTY—"TRESPASS."

Where the direct result of such dikes was to cause the washing away of the soil of complainants' land destroying the freehold, the suit is one in the nature of "trespass" within the meaning of the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 143-145; Dec. Dig. § 32.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7088-7092.]

In Equity. Suit by J. R. Cartwright against the Southern Pacific Company. On final hearing. Decree for complainant.

A. C. Woodcock, of Eugene, Or., and Martin L. Pipes, of Portland, Or., for plaintiff.

Wm. D. Fenton and Ben. C. Dey, both of Portland, Or., Jas. E. Fenton, of San Francisco, Cal., and Kenneth L. Fenton, of Portland, Or., for defendant.

BEAN, District Judge. This case was submitted some months ago. Its decision has been delayed waiting briefs which the court understood counsel desired to file. No briefs have been submitted, and, as more than a reasonable time for filing the same has elapsed, it is assumed that none will be.

The suit was commenced in June, 1910, to enjoin and restrain the defendant company from maintaining four certain dikes in the Willamette River above the Harrisburg Bridge, erected by it in 1905, and for damages on account thereof.

Before the construction of the dikes the river made quite a sharp turn to the left or west at or just below the bridge, and the current, avoiding plaintiff's land, closely hugged the west bank and was eroding and washing it away and endangering defendant's bridge and roadbed. The dikes are permanent structures and extend from the west bank into the river several hundred feet; the purpose being to deflect the current and protect the bank. At the time their construction was commenced, the plaintiff, who owns a valuable farm on the opposite side of the river and extending below the bridge, objected thereto on the ground that the effect would be to change the channel of the stream and throw the current against his land, washing away his soil and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

destroying his property. The defendant therefor constructed a wingdam on the east side of the river, where damage was likely to occur to plaintiff's property, for the purpose of protecting the same, but shortly thereafter removed the dam with dynamite on a public holiday, notwithstanding the vigorous protest of the plaintiff and his request to the defendant's agents to postpone the matter until the following day so that he could institute legal proceedings to prevent or enjoin the destruction thereof. The result of the erection of the dikes on the west side of the river and the removal of the wingdam on the east bank was to deflect the current and throw it against the opposite bank, causing the river to abandon its former channel and cut a new one through the plaintiff's land, carrying away his soil to his great injury.

The change in the course of the stream occurred and the damage was inflicted prior to the commencement of this suit, and it is not probable that the river would have returned to its original channel if the dikes had been removed at the time, nor will it do so now. A decree requiring an abatement of the obstructions would therefore be of no benefit to the plaintiff, but a substantial injury to the defendant, as they are necessary to the preservation of its roadbed by preventing the river from cutting away the banks.

[1] The only question in the case therefore is one of damages. I have been in doubt whether, under the circumstances stated, the plaintiff's remedy is at law or in equity, and whether the court should proceed to assess the damages or transfer the case to the law side of the court, as provided in Equity Rule 22 (198 Fed. xxiv), but have concluded that inasmuch as the jurisdiction of a court of equity was properly invoked to compel the removal of the dams or dikes, if the facts warrant (*Morton v. Ore. Short Line*, 48 Or. 444, 87 Pac. 151; 1046, 7 L. R. A. [N. S.] 344, 120 Am. St. Rep. 827), it will retain the suit for the adjudication of the entire matter in controversy, although it may not be able to grant the entire relief demanded (*U. S. v. Bernard* [C. C. A.] 202 Fed. 728).

[2] The defendant contends that, as the permanent structures were erected and the change in the channel of the river occurred more than two years prior to the commencement of the suit, the claim for damages is barred by the statute of limitations, and that depends on whether the acts of the defendant and the results thereof constitute a trespass on real property. There are authorities holding that the remedy for overflowing the lands of another where the obstruction causing the overflow is not on plaintiff's land, and there was no physical entry thereon, is an action on the case and not in trespass (*Hicks v. Drew*, 117 Cal. 305, 49 Pac. 189); but it seems to me that, where the direct result of the obstruction is to wash away the soil of another and thereby destroy the freehold, it amounts in effect to the taking of property and is a "trespass" within the meaning of the statute of limitations, whether the obstruction is upon plaintiff's land or not, and as a consequence the present suit is not barred. *Lords Ore. Laws*, § 6; 38 Cyc. 994-997; *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557; *Gulf, C. & S. F. Ry. v. Mosely*, 161 Fed. 72, 88 C. C. A. 236, 20 L. R. A. (N. S.) 885.

The evidence shows that a considerable area of plaintiff's land has already been washed away as a direct result of the dikes erected by the defendant; but the nature and value thereof is not easily ascertainable from the record. The present and apparently permanent channel of the river caused by such dikes is through and across the plaintiff's property. The current sets steadily against the east bank, which is rich sandy loam and is constantly being undermined and destroyed. The area covered by the stream at the time the evidence was taken and which was not within the former channel is about 20 acres. A part of this, however, was a gravel bed before the erection of the dikes and of no substantial value.

Without referring to the evidence in detail, it is sufficient that after a careful consideration of the record my conclusion is that \$3,500 is a fair estimate of the damage, present and prospective, suffered by the plaintiff on account of the wrongful acts of the defendant in erecting and maintaining the structures complained of.

A decree will therefore be entered in favor of the plaintiff for that amount.

In re UNITED STATES LUMBER CO.

(District Court, W. D. Washington, N. D. June 20, 1913.)

No. 5,021.

1. BANKRUPTCY (§ 188*)—LIENS—DETERMINATION—WHAT LAW GOVERNS.

The validity of a lien on the property of a bankrupt is to be determined by the state law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-289, 291-295; Dec. Dig. § 188.*]

2. BANKRUPTCY (§ 184*)—CONDITIONAL SALE—FILING—PLACE—"RESIDENCE."

Rem. & Bal. Code Wash. § 3670, provides that all conditional sales of personal property, the possession of which is delivered to the vendee, shall be absolute as to purchasers, incumbrancers, and subsequent creditors in good faith, unless within ten days after taking possession by the vendee a memorandum of the sale shall be filed in the auditor's office of the county wherein the vendee then resides. *Held* that, since the "residence" of a corporation is the place designated in its articles as its principal place of business, regardless of the fact that its principal activities are conducted in another county, where a conditional contract for the sale of personal property to the corporation was filed in the latter county, but not in that specified in the corporation's articles as its principal place of business, it was invalid to reserve title as against the corporation's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6151-6161; vol. 8, p. 7788.]

3. BANKRUPTCY (§ 184*)—PETITION—ESTOPPEL.

Where a petition in bankruptcy against a corporation stated that its principal place of business was in S. county, where its principal activities were conducted, though its articles of incorporation fixed K. county as the principal place of the corporation's business, such allegation in the petition did not estop the bankrupt's creditors from claiming that a contract of conditional sale of personal property to the bankrupt, filed in S.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

county, and not in K. county, was invalid, because not filed in the county wherein the buyer resided, as required by Rem. & Bal. Code Wash. § 3670.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

Bankruptcy proceedings against the United States Lumber Company. Petition by the Reynolds Electric Company for the return of certain personal property in the possession of the trustee, alleged to have been sold to the bankrupt under a conditional bill of sale. The referee entered an order dismissing the petition, and the claimant filed petition for review. Affirmed.

S. G. Climenson, of Seattle, Wash., for trustee.

Gill, Hoyt & Frye, of Seattle, Wash., for petitioning creditor.

CUSHMAN, District Judge. This cause is for decision upon a petition to review an order of the referee dismissing the petition of the Reynolds Electric Company. The petition of this company prayed the return of certain personal property in the possession of the trustee, which property had been sold to the bankrupt by the electric company under a conditional bill of sale. This conditional bill of sale had been filed in the office of the county auditor of Snohomish county, state of Washington. The articles of incorporation of the bankrupt corporation showed its principal place of business to be in the city of Seattle, King county, state of Washington, and these articles were filed in the office of the auditor of King county.

The petition for adjudication stated that the bankrupt had its principal place of business at Darrington, in the county of Snohomish, and offices at Seattle, King county, state of Washington, and Western district of Washington. The order of adjudication recites nothing concerning the principal place of business of the bankrupt. The order of reference recites that its principal office and place of business is at Seattle, King county.

The trustee relies upon the following authorities: First Nat. Bank of Everett v. Wilcox (Wash.) 130 Pac. 756; 1 Loveland on Bankruptcy (4th Ed.) 903; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; Hiscock v. Varick Bank, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945; Wood Co. v. Eubanks, 169 Fed. 929, 95 C. C. A. 273; Ex parte Hall, Fed. Cas. No. 5,919, 5 Law Rep. 269; In re Plymouth Cordage Co., 135 Fed. 1000, 68 C. C. A. 434; Ryan v. Hendricks, 166 Fed. 94, 92 C. C. A. 78; 1 Loveland, § 358, p. 738; Id. § 437, p. 968.

In addition to certain authorities cited by the trustee, the petitioning creditor relies upon the following: Bankr. Act July 1, 1898, c. 541, § 2, cl. 1, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420); General Orders in Bankruptcy, rule 38, form 3 (89 Fed. xxviii, 32 C. C. A. lii); Galveston, etc., R. R. v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248; In re First Nat. Bank, 152 Fed. 64, 81 C. C. A. 260, 11 Ann. Cas. 355; Cook v. Robinson, 194 Fed. 791, 114 C. C. A. 505; In re Hecox, 164 Fed. 824, 90 C. C. A. 627; In re American Brewing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Co., 112 Fed. 752, 50 C. C. A. 517; *In re Hintze* (D. C.) 134 Fed. 141; Bankruptcy Act, §§ 67a, 70; *Id.* § 47, subd. "a," cl. 2, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1501).

[1] The validity of a lien on the property of the bankrupt is determined in conformity with the local or state law. *Collier on Bankruptcy* (9th Ed.) pp. 908 (b), 912 (c). The statute of the state of Washington provides:

"All conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to the purchasers, incumbrancers, and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides." Section 3670, Rem. & Bal. Code.

Creditors of the bankrupt and the trustee will only be affected by the lien of the conditional sale contract when the same is filed in the county in which its articles of incorporation state its principal place of business to be, and the residence and domicile of said corporation is in such county. *First Nat. Bank of Everett v. Wilcox* (Wash.) 130 Pac. 756.

[2] The petitioner contends that, in this case, the rule above stated does not control; that, upon a petition reciting the principal place of business of the bankrupt to be in Snohomish county and principal office in Seattle, King county, an adjudication of bankruptcy being made, it is conclusive upon all creditors of the facts recited in the petition, and that they and the trustee are now estopped to claim in any connection that the bankrupt's principal place of business was other than in Snohomish county; that, therefore, the conditional sale contract must be upheld, because it was filed in Snohomish county.

The question is one of statutory construction, and it does not necessarily follow that the expressions "principal place of business" and "residence" should be held to have the same meaning in different statutes. The meaning is to be determined by the connection in which the expressions are used and the purpose of the law in which they are found. So far as the bankruptcy law is concerned—section 2, subd. 1, giving that court jurisdiction in the district and division wherein the bankrupt corporation, for the preceding six months, had its principal place of business—it has been held that the principal place of business stated in the articles of incorporation does not control, but rather the place where its principal business was actually conducted. *Collier on Bankruptcy* (9th Ed.) p. 33 (2). The reason for this, probably, is that thereby a greater number of persons interested would be inconvenienced, and that such was the controlling purpose of the act.

In a recording statute, designating the place for the recording of instruments, certainty would be the most important feature, and it might be reasonably held that that object would be best attained by holding the principal place of business or residence to be that designated in the articles, about which there could be no question.

[3] Though the adjudication of bankruptcy may estop all the cred-

itors, concerning the insolvency of the bankrupt and, possibly, other matters, yet estoppel has no place in this controversy. The filing of the articles of incorporation and the filing of the conditional bill of sale long preceded the filing of the petition for the adjudication of bankruptcy. The recital in this petition could not estop the holder of the conditional bill of sale, because his record had been made and could not be unmade. Estoppels must be *mutual*. While the recital in the petition for adjudication, under petitioner's contention, now makes for the validity of the petitioner's lien, if it were turned around, and the petition erroneously recited the principal place of business or residence to the prejudice of the lienor, it would be abhorrent to justice and equity to hold that thereby his lien was defeated.

The referee's order is confirmed.

UNITED STATES v. GONZALES.

(District Court, W. D. Washington, N. D. July 8, 1913.)

No. 2,341.

CRIMINAL LAW (§ 190*)—FORMER JEOPARDY—CONVICTION OF LOWER OFFENSE—NEW TRIAL.

Under the rule of the federal courts, a defendant, indicted for murder in the first degree, but convicted of an included crime, by procuring such conviction to be set aside by the trial court or an appellate court, waives the right to use the judgment by plea of former jeopardy, and may be again tried for murder in the first degree.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 375; Dec. Dig. § 190.*]

Criminal prosecution by the United States against Pedro Rodriguez Gonzales. On motion by defendant for new trial. Denied.

C. F. Riddell, U. S. Atty., and John J. Sullivan, Asst. U. S. Atty., both of Seattle, Wash.

Carmody & Tammany, of Seattle, Wash., for defendant.

CUSHMAN, District Judge. Defendant moves for a new trial, after conviction upon a second trial of murder in the first degree at Ft. Lawton.

At the first trial, defendant was convicted of murder in the second degree, and, upon his motion, the verdict of conviction was vacated, and a new trial granted. At the commencement of the second trial, defendant moved to quash the indictment, upon the ground that defendant had been acquitted of the charge of murder in the first degree, by being found guilty of murder in the second degree, and to be again put on trial for murder in the first degree would be placing him again in jeopardy, in violation of the fifth amendment to the Constitution. The motion to quash was overruled. The motion now made for a new trial is urged upon the same ground.

The prosecution relies upon the following authorities: *Trono v. United States*, 199 U. S. 521, 26 Sup. Ct. 121, 50 L. Ed. 292, 4 Ann.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Cas. 773; *State v. Ash*, 68 Wash. 194, 122 Pac. 995, 39 L. R. A. (N. S.) 611; 12 Cyc. 278.

Defendant relies upon the following authorities: *In re Bennett* (D. C.) 84 Fed. 324; *State v. Murphy*, 13 Wash. 229, 43 Pac. 44; *State v. Chapman*, 64 Wash. 140, 116 Pac. 592; *Sylvester v. State*, 72 Ala. 201; *Johnson v. State*, 29 Ark. 31, 21 Am. Rep. 154; *People v. McFarlane*, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245; *Golding v. State*, 31 Fla. 262, 12 South. 525; *State v. Heim*, 92 Iowa, 540, 61 N. W. 246; *State v. Joseph*, 40 La. Ann. 5, 3 South. 405; *Rolls v. State*, 52 Miss. 391; *State v. Steeves*, 29 Or. 85, 43 Pac. 947; *Brennan v. People*, 15 Ill. 511; *People v. Gordon*, 99 Cal. 227, 33 Pac. 901; *State v. Martin*, 30 Wis. 216, 11 Am. Rep. 567; *Slaughter v. State*, 6 Humph. (Tenn.) 410; 12 Cyc. 284, div. "D," with notes; *Clark on Criminal Procedure*, 392.

Upon the question presented the decisions are not uniform.

"The authorities are hopelessly at variance upon the question whether, where the accused, being indicted for murder, is convicted of manslaughter, or of some degree of homicide less than murder in the first degree, and obtains a new trial, he can be indicted and tried for murder. Some cases hold that the conviction of the less degree of homicide is an implied acquittal of the murder, and bars a subsequent indictment for it. Other cases deny this doctrine altogether." 12 Cyc. subdivision "D," pp. 284, 285.

It appears that the federal courts have uniformly held that the defendant, by asking and securing a new trial, either by petition to the trial court, or upon appeal, waives his right to the defense of former jeopardy in such cases. In a decision of the Supreme Court of the United States, it is said:

"We may regard the question as thus presented as the same as if it arose in one of the federal courts in this country, where, upon an indictment for a greater offense, the jury had found the accused not guilty of that offense, but guilty of a lower one which was included in it, and upon an appeal from that judgment by the accused a new trial had been granted by the appellate court, and the question was whether, upon the new trial accorded, the accused could be again tried for the greater offense set forth in the indictment, or must the trial be confined to that offense of which the accused had previously been convicted, and which conviction had, upon his own motion, been set aside and reversed by the higher court. * * * In our opinion, the better doctrine is that which does not limit the court or jury, upon a new trial, to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy, and acts upon the original judgment as if it had never been. The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place. We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment; but if he chooses to appeal from it, and to ask for its reversal, he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense, contained in the judgment which he has himself procured to be reversed." *Trono v. U. S.*, 199 U. S. 521, at 530, 533, 26 Sup. Ct. 121, at 123, 124 (60 L. Ed. 292, 4 Ann. Cas. 773).

The authority of this decision necessarily binds this court.
Motion denied.

GALLOWAY v. MICHIGAN SAVINGS & LOAN ASS'N.

(Circuit Court of Appeals, Sixth Circuit. July 22, 1913.)

No. 2,352.

1. BUILDING AND LOAN ASSOCIATIONS (§ 42*)—INSOLVENCY—CLAIMS—EVIDENCE.

In an action to settle the affairs of an insolvent building and loan association, evidence *held* to require a finding that claimant, who had loaned money to the secretary of the association as an individual, but in fact for the association, which received the benefit of the loan and issued to the secretary a certificate therefor, which he assigned to claimant, was entitled to prove his claim for the amount of the certificate and receive dividends thereon.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 63, 66, 86-88; Dec. Dig. § 42.*]

2. EQUITY (§ 23*)—INCONSISTENT PORTIONS.

A court of equity will not refuse to enforce a contract merely because complainant had contracted for an additional, somewhat inconsistent, status, which additional status he is in the same case prevented from enforcing.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 63-68; Dec. Dig. § 23.*]

Appeal from the District Court of the United States for the Eastern District of Michigan; Alexis C. Angell, Judge.

Proceedings for the settlement of the affairs of the Michigan Savings & Loan Association through a receiver. From an order denying the claim of James S. Galloway, he appeals. Reversed and remanded.

The Michigan Savings & Loan Association, being insolvent, was put into the hands of a receiver, by the court below, in 1901. The various phases of the existing and resulting situations have been before this court in *Aldrich v. Gray*, 147 Fed. 453, 77 C. C. A. 597, 8 Ann. Cas. 832, *Standard Co. v. Aldrich*, 163 Fed. 216, 89 C. C. A. 646, 20 L. R. A. (N. S.) 393, and *Amberg v. Aldrich*, 205 Fed. 498, decided May 6, 1913. After the order was made for the proving of claims, the appellant herein, Mr. Galloway, filed his claim as the holder of certificate No. 8,198 for 228 shares of prepaid stock in the Association. The certificate appeared to have been issued January 3, 1899, to Fred B. Wemple (then the secretary and general manager of the Association), and to have been by him transferred to Galloway. It purported also to stand for and represent a cash payment of \$15,000 to the Association, and to entitle the holder, at the maturity of the certificate, to receive \$22,500. It also entitled the holder, on conditions not now important, to withdraw the original investment; and it is conceded that, if no sufficient reason intervenes, Galloway was entitled, as holder of this certificate, to have his claim allowed as a quasi creditor, at \$15,000, and to receive whatever dividend might ensue. The claim was allowed without objection, and so remained for several years. The receiver then procured the matter to be reopened, the claim was eventually disallowed, and Galloway appeals.

The receiver's position, sustained by the court below, was that the company received no consideration for the certificate, that the same was issued to Wemple without authority, and that Galloway was not a good-faith purchaser. Except as hereinafter noted, there is little dispute about the facts. Wemple approached Galloway and endeavored to sell him stock of the Association. Galloway refused. He then held the Association's note for \$25,000, which he had loaned to it. Wemple then stated that there was real estate in Galveston, Tex., which had been taken over by the Association on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 206 F.—16

foreclosure and really belonged to the Association, but the title to which stood in Wemple's name, and that it was desired to borrow \$15,000 on the security of this real estate; and he proposed that, if Galloway would loan this sum, he (Wemple) would execute his personal note and deed of trust for the lands, and also would take the money and with it buy from the Association a prepaid \$15,000 certificate and turn this over to Galloway as additional security. Galloway investigated the real estate security (which was then ample, and apparently would so have remained, except for the great storm of 1900, which utterly destroyed the property), accepted the proposition, and received the note, deed of trust, and the certificate in question. Galloway paid the money in the manner hereafter stated. When his claim was reopened for contest, he undertook to make the additional claim that the loan, although in form to Wemple, was really for the use and benefit of the Association, and that he was entitled to its allowance as an ordinary creditor, and not as a mere certificate holder, and so was entitled to receive payment in full before certificate holders received anything.

F. A. Lyon, of Hillsdale, Mich., for appellant.

M. B. Whittlesey, of Detroit, Mich., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Appellant's argument in this court is largely devoted to maintaining the position just stated, viz., that the loan was for the use and benefit of the Association, entitling him to the position of an ordinary creditor. We think he cannot be heard to claim this result. Upon the claims hearing before the master, the receiver objected that this position was inconsistent with Galloway's original claim, and on motion of the receiver the master required Galloway to strike out all his testimony and pleadings based on this aspect of the matter and to confine himself to his claim as a certificate holder. On the hearing of exceptions before the District Court, this order of the master was affirmed. When, later, Galloway came to appeal from the final decree, he did not make any assignment of error which, fairly considered, indicated that he intended to reserve or rely upon this objection. It is too late to do so for the first time by brief and argument in this court.

[1] Both the master and the District Court found, as a fact, that the company did not receive any consideration for this certificate. Such a concurrent finding will be reversed by this court only in the plainest case. *Haines v. Bank* (C. C. A. 6) 203 Fed. 225. We are satisfied, however, that it grew out of a misapprehension, rather than out of a balancing of conflicting evidence. The former manager, Wemple, testifying regarding a list of certificates before him, and coming to this certificate, said: "Nothing paid in on this certificate." The record suggests that the attention of the court below was not directed to any other evidence, and that the counsel then acting for Galloway relied mainly upon the claim that Galloway was entitled to recover as a good-faith holder, even if this testimony by Wemple was accepted as the fact. The original books and records of the Association, which had been offered in evidence, but were not included in the printed record, have been furnished to us at our suggestion, and we have examined them at length as bearing on this point. We think it clear that

Wemple's statement, "Nothing paid in on this certificate," was either an inadvertence on his part or a stenographer's mistake. The witness was giving, as concerned each certificate in the list before him, the dates and the amounts when withdrawal payments had been made. The other certificates had been withdrawn or paid off—some of them in whole and some of them in part—and it seems probable that what he intended to say or did say was "nothing paid on this certificate," meaning "nothing paid off" or "nothing withdrawn." However this may be, the fact is perfectly clear, and it is established beyond doubt, that the Association did receive and have the benefit of the entire \$15,000.

Galloway testifies that, although the arrangement was not completed until early in January, 1899, yet the negotiations had been pending for some time, and about November 30, 1898, in anticipation of this loan, he furnished the Association \$3,250, taking the Association note therefor, and that, when the loan was closed, about December 30, 1898, this note was considered as an advance on the loan. He says the Association owed him about \$500 of interest on a prior loan, which interest debt was merged in the \$3,250 loan, so that his cash advance, on November 30th, was about \$2,700; but he is not able to produce check, draft, or other evidence of payment. The cash book of the Association shows that on December 1, 1898, it received cash from Galloway \$3,250, and paid him for interest and discount \$480, leaving \$2,770 as its net cash receipt from him; and it further shows that part of this money served to make up an existing overdraft, and the surplus was checked out, apparently in the ordinary course of business, on that day and the next.

On January 4, 1891, a letter was written to Galloway as follows:

"Michigan Savings & Loan Association,

"January 4, 1899.

"Mr. James S. Galloway, Hillsdale, Mich.

"Dear Sir: I sent all papers to Galveston, and they will no doubt reach you the first of next week. We have some \$8,000 or \$10,000 to pay the first of the week, and if you feel disposed to advance us \$3,500 upon this loan, it will be quite an accommodation. We inclose note for \$15,000, and certificate of stock, which are assigned as collateral. Balance of the papers will reach you in due time. There will be no question but what the title will be clear.

"Yours truly,

The Mich. Sav. & Loan Assn.

"F. B. Wemple, Sec'y."

Mr. Galloway testified that he then had on hand a certificate of deposit for \$3,551.89, which he forwarded in response to this request, and the canceled certificate is produced. It was payable to the order of J. S. Galloway, was by him indorsed to "F. B. Wemple, Sec'y," and further indorsed to the collecting bank by "The Michigan Savings & Loan Association, by F. B. Wemple, Sec'y." The Association's cash book shows that it received this exact amount from Mr. Galloway on January 9th, and that this money served, as far as it would go, to provide funds to meet checks drawn by the Association on that day, some of which were apparently to pay bank loans and others to pay certificate withdrawals. The receipt of this money was acknowledged

by the Association in a letter to Mr. Galloway, dated January 6th. This letter further stated that the title to the Galveston property was being put in perfect shape and the papers would soon be received.

As to the next payment, Galloway testifies that on January 21st, it having developed that there were about \$4,000 of back taxes against the Galveston property, and acting at Wemple's request, he sent a draft for \$4,000 to attorneys in Galveston to be used to clear up taxes, and the draft is produced payable to, and bearing the indorsement of, these attorneys, and paid through a Galveston bank. The cash book of the Association, under date of December 30, 1898 (though following entries of January 18, 1899), gives credit to Mr. Galloway for \$4,000 as cash received, and charges this amount with other items, to an account which is sometimes called "Galveston Account," and sometimes called "R. J. Wilson, Agent."

Galloway says that at the time of sending this draft to Galveston he made a further advance of \$3,098.11, composed of a New York draft for \$2,159.69, and his own check or a local certificate for \$938.42. The check or certificate he is unable to find, but the draft he produces. It is payable to his order, indorsed over by him to the Michigan Savings & Loan Association, and indorsed by the Association to the collecting bank. The Association cash book, under date of January 23, gives Galloway credit for this sum of \$3,098.11 as cash received, and indicates its immediate use to help out an overdraft and meet current disbursements.

The sums so far given amount to \$14,000. Galloway explains that he withheld \$1,000 because the title was not entirely perfected, but gave his duebill for that sum, which duebill is produced and reads as follows:

"Hillsdale, Mich., January 21, 1899.

"Due Michigan Savings & Loan Association one thousand dollars, on return of abstracts of title of lands in Galveston, Texas, completed; all loans discharged, trust deed recorded, and insurance policies delivered to me on said property.
J. S. Galloway."

He says this duebill was paid by later applying it against interest due him from the Association on a prior loan and upon this loan, and he produces a letter, dated June 23, 1899, signed "F. B. Wemple, Sec'y," stating this adjustment. The Association cash book, under date of June 30th, credits Galloway with items amounting to \$1,000 and charges them to the interest account ("coupons"). The details of the adjustment partially differ, as stated by Galloway, by the Wemple letter, and by the cash book, but the substantial result is the same under all three methods.

The ledger and cash book contain other entries, some of which are not intelligible without explanation, indicating that Wemple, or whoever kept the books, at the close of 1900, transferred into Wemple's account the credit of \$15,000 which had thus been given to Galloway, and the certificate register shows that at some time and by some one this certificate was (falsely) marked "Canceled"; but these things (without proof of Galloway's knowledge or consent) do not detract from the force of the proof that the Association did in fact receive

and have the benefit of the entire \$15,000 said to be represented by the certificate in question. Galloway not only would naturally rely upon Wemple's statement that the amount of money which this certificate purported to represent was or would be paid into the Association treasury, but the statement was true.

It is further urged that the judgment is right, because Galloway deliberately elected to make his loan to Wemple and take Wemple's personal liability, and that the same money cannot be considered as money loaned to Wemple to support his note and mortgage and as money paid to the Association to support its paid-up certificate. We see no inconsistency in these positions, when related to each other as they are in this record. We do not find serious challenge, if any, of the truth of Wemple's story, as told to Galloway, that the title to this Galveston property was held by Wemple for the Association, and that the fund would really be for its use and benefit. In view of his large existing loan to the Association and its lack of power to borrow money for some of the purposes for which it was in fact using what it did borrow (*Standard Co. v. Aldrich*, *supra*), it was not unnatural or imprudent for Galloway to refuse to loan to the company and to take obligation and security directly from Wemple. In view of Wemple's trust relation to the Association, and his existing power of management, it was not unnatural for him to be willing to give his personal note for the benefit of the Association. Under these circumstances, Galloway and Wemple had a perfect right to agree, as they did, that the \$15,000 should be loaned by Galloway to Wemple, that Wemple should take the money and invest it in a paid-up Association certificate, and should turn over the certificate to Galloway as an additional, collateral security. This is the form and the primary effect of what was done. The fact that the loan was advanced in installments, some of them postponed until after the certificate was actually issued, cannot be material as between Galloway and the Association, when we remember that all the remainder of the price of this certificate was shortly afterwards paid into the Association treasury. The premature delivery of the certificate did not, in the slightest, prejudice the Association; and no question is made, and apparently no question could be made, as to Wemple's full authority to issue and deliver the certificate if and when he received for the Association the full price thereof.

[2] The claim that Galloway's money is made to serve two inconsistent purposes is met by what has been said, if the transaction is viewed in the form which the parties selected, viz., a loan to Wemple and a paid-up certificate issued to him. The proof that Wemple did in fact account for or pay over to his beneficiary the money that he borrowed on the security of property which equitably belonged to his beneficiary removes any question that might otherwise exist as to the rightfulness of the loan by Galloway to Wemple upon the security of property which, to Galloway's knowledge, really belonged to the Association. If, however, the transaction should be viewed by a court of equity according to its ultimate substance (as between Wemple and the Association) and as a loan from Galloway to the Association in which Wemple

was a mere convenience or in which his personal liability was additional and secondary, is there, then, any inconsistency in permitting Galloway to enforce this certificate? We may well assume, for the purposes of this question, that Galloway, if he had been dealing directly with the Association, could not, at the same time and for the same money, become a general creditor and a certificate holder, so that he would be entitled to pursue and enforce both positions; but it does not follow that he cannot enforce either. Upon the hypothesis we are now considering, Galloway could have contracted with the Association to become, in exchange for his \$15,000, either a general creditor or a certificate holder. Let us assume that he undertook to get himself into both positions; but in this very proceeding now here pending he has been refused permission to sue as a general creditor, and we hold him bound by this refusal. We are not aware of any principle by which a court of equity may deny to Galloway the right to rely upon his certificate contract merely because he may have contracted for an additional, somewhat inconsistent, status, which other status he has not enforced, and has been, by the same court, in the same proceeding, prevented from enforcing.

The order appealed from must be reversed, with directions to enter an order recognizing Galloway's right as the holder of this certificate and entitled to receive any dividends properly applicable thereto. Galloway will recover the costs of this appeal and the costs in the court below apportionable to this proceeding.

McLAUGHLIN v. JOSEPH HORNE CO.

(Circuit Court of Appeals, Third Circuit. June 9, 1913.)

No. 1,707.

1. MASTER AND SERVANT (§ 289*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY.

Plaintiff was employed in defendant's store. On the second floor there was a toilet room which she was accustomed to use and which was entered by two steps upward from the floor and through a door. The floor in this room had been taken out in making repairs, but plaintiff had not been notified and did not know it, and, as she stepped through the door, she fell a distance of 10 feet and was injured. The door was not fastened, but there was a large card upon it with a notice that the place was closed for repairs. Plaintiff testified that she did not see the notice; that she was looking down; that the approach was through a narrow space between two showcases which was also incumbered to some extent by boxes. *Held*, that the evidence was not so clear as to warrant the court in directing a verdict on the ground that she was guilty of contributory negligence as a matter of law, but that the question was one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

2. TRIAL (§§ 142, 143*)—DIRECTION OF VERDICT—POWER OF COURT.

It is sometimes the duty of the judge to direct a verdict for one party or the other, but he has no power to do so where the testimony is oral and conflicting, or where, although the facts are not directly disputed,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it is uncertain what inferences should be drawn from them. Inferences of fact are themselves facts, and ordinarily the jury must draw them, and not the judge; and this is especially true when the inquiry has to do with the standard of ordinary care under circumstances where no previously defined standard exists.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 337, 342, 343; Dec. Dig. §§ 142, 143.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

Action at law by Luema McLaughlin against Joseph Horne Company. Judgment for defendant, and plaintiff brings error. Reversed.

T. M. & R. P. Marshall and Walter P. Rainbow, all of Pittsburgh, Pa., for plaintiff in error.

John M. Freeman, of Pittsburgh, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. [1] In this action of tort for personal injuries the plaintiff obtained a verdict, but judgment non obstante veredicto in favor of the defendant was afterwards entered; the learned judge having come to the conclusion that the jury should have been charged as matter of law that the plaintiff had been guilty of contributory negligence. He thus states some of the circumstances of the case:

"* * * The facts necessary to an understanding of the case are: The plaintiff was employed by defendant in its store on Penn avenue in the city of Pittsburgh. Upon the second floor of the store defendant provided a toilet room which was entered by two steps upward from the floor and through a door. Prior to July 2, 1909, the floor of this toilet room was removed by the destruction of the building in which it was. On July 2, 1909, the plaintiff, intending to go to the toilet room, passed from the store to the steps leading up to the door, pushed the door open, stepped through the doorway, and fell a distance of ten feet or more and was injured.

"The negligence alleged by plaintiff was the failure to notify plaintiff of the removal of the toilet room, the allowing the door to be unlocked, the failure to have a notice or warning placed upon the door, and the failure to properly safeguard its employes from injury when it knew the floor of the toilet room had been removed. The evidence upon these different questions, except as to the allegation of a notice or warning upon the door of the toilet room, is conflicting, and upon a careful examination of it we are of opinion that the question of defendant's negligence was for the jury. It is unnecessary to discuss or comment upon this evidence because we believe the whole case turns upon the question of plaintiff's contributory negligence."

The belief thus stated, and afterwards reasserted in the opinion, has also been supported in this court by an earnest and capable argument from the defendant's counsel; but we have not been convinced that no other inference of fact can fairly be drawn from the evidence except the inference that the plaintiff heedlessly failed to make the ordinary use of her eyes, and therefore did not observe her surroundings—especially the warning notice on the door—and negligently walked

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

into a dangerous place. The rest of the opinion below discusses the subject in the following language:

"The undisputed evidence shows that at the time of the accident there was upon the door a white cardboard sign 11 by 14 inches, upon which was printed in large black letters, 'Closed for Repairs'; that one approaching this door, as the plaintiff approached it, had an unobstructed view of the door and of the sign upon it; and that at the time of the accident there was a light burning over the door. The plaintiff testified on cross-examination as follows:

"Q. Were you looking up or were you looking down?

"A. I was looking down when I got to the toilet room door.

"Q. You were looking down when you got to the toilet room door?

"A. Yes, sir.

"Q. When you got in the door were you still looking down?

"A. Looking down to see where I was going.

"Q. Looking down to see where you were going; that is, down towards your feet?

"A. Yes, sir.

"Q. You were not looking ahead of you at that time?

"A. No.

"Q. Did you look to see if there was any sign on the door?

"A. I did not. I had no reason to think there would be one there.

"Q. You didn't look to see whether there was or wasn't?

"A. No.

"Q. And just opened the door and went through without looking?

"A. I turned the knob and pushed the door, and when I saw the open space, it was too late to save myself; I tried to, but couldn't.

"Q. After you passed these showcases, did you look at the door at all?

"A. No.

"Q. And the showcases were some distance from the door, were they not?

"A. A very short distance.

"Q. Well, how many feet would you say from the door?

"A. Well, I should say not more than three or four feet at the most from the wall.

"Q. When you got to the steps, did you look at the door?

"A. No, I had no reason to look at the door; I wasn't expecting anything.

"Q. You had no reason to look at the door?

"A. No.

"Q. How many steps are there up to that door?

"A. Two.

"Q. Then the door sill is pretty wide, also, is it not?

"A. I couldn't say that.

"Q. You wouldn't say, then, or you don't know, whether there was a sign on the door or not?

"A. I don't know; I didn't see any.

"Q. The reason you say is that you didn't look at the door?

"A. I had no reason to look at the door."

From the facts thus stated the court then draws this conclusion:

"It is perfectly clear, under this evidence, that the accident happened to plaintiff because she failed to use her eyes as she approached the door. Had she done so, she unquestionably would have seen the notice on the door, and that notice was sufficient warning to prevent her from passing through the door. She was clearly guilty of such carelessness in approaching the door and passing through it as to amount to negligence on her part, and this prevents her from recovering from defendant. *Gallagher v. Snellenburg*, 210 Pa. 642 [60 Atl. 307]; *Sickels v. Philadelphia*, 209 Pa. 113 [58 Atl. 128]; *Greis v. Hazard Mfg. Co.*, 209 Pa. 276 [58 Atl. 474]; *Stewart v. Pennsylvania Co.*, 130 Ind. 242 [29 N. E. 916]; *Sparks v. Siebrecht* [19 App. Div. 117, 45 N. Y. Supp. 993]; *Brenstein v. Mattson*, 10 Daly (N. Y.) 336; *Day v. Railway Co.*, 137 Ind. 210 [36 N. E. 854].

"The facts of this case being undisputed, it is clearly the duty of the court to determine the question of negligence as a matter of law. *Southern Pacific Co. v. Pool*, 160 U. S. 440 [16 Sup. Ct. 338, 40 L. Ed. 485]; *Union Pacific Ry. Co. v. McDonald*, 152 U. S. 262 [14 Sup. Ct. 619, 38 L. Ed. 434]; *Custer v. Railroad Co.*, 206 Pa. 529 [55 Atl. 1130]."

As already intimated, we do not think that the court below has given due weight to the evidence, taken as a whole. In addition to the foregoing facts, there was also testimony to the effect that the plaintiff was going to a place where she had a right to go; that she had been allowed, and was accustomed, to use the toilet room in question, and was familiar with its surroundings; that on the morning of the accident she was approaching it in some haste; that she had received no notice that repairs were in progress, and had no actual knowledge otherwise of the fact; that the pathway leading to the door was narrowed by a showcase on each side, and was to some extent incumbered with boxes on the floor, these engaging her attention in part as she neared the door; and that the light in the neighborhood, natural and artificial, may not have been adequate. We do not refer to the weight of the evidence on these matters, but merely call attention to the fact that such evidence was offered, although in the end it was apparently regarded as unimportant. In this attitude we find ourselves obliged to differ from the court below; in our opinion the case was for the jury and not for the trial judge.

[2] Undoubtedly it is sometimes the duty of the judge to direct a verdict in favor of one party or the other; but he has no power to do so if the testimony be oral, and be conflicting. And a conflict may exist among the witnesses, not only where facts are directly disputed, but also where it is uncertain what inferences should be drawn from the facts after these have been established. Inferences of fact are themselves facts, and ordinarily the jury must draw them, and not the judge. Especially is this true when the inquiry has to do with the standard of ordinary care, care according to the circumstances, where no previously defined standard exists, and where our system of jurisprudence commits to the judgment of a jury the duty of determining the shifting rule for the particular case. The present controversy belongs to this class, and it was therefore erroneous to hold that the plaintiff's contributory negligence had been incontestably proved, so that the judge was authorized to declare it as matter of law. *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 417, 12 Sup. Ct. 679, 36 L. Ed. 485; *Texas, etc., Ry. Co. v. Harvey*, 228 U. S. 319, 33 Sup. Ct. 518, 57 L. Ed. —, decided April 14, 1913; *Slentz v. Western, etc., Co.* (C. C. A. 3d Circuit) 180 Fed. 389, 103 C. C. A. 535; *U. S. v. Kansas, etc., Ry. Co.* (C. C. A. 8th Circuit) 202 Fed. 835.

But we cannot enter judgment for the plaintiff on the verdict; for a question that may seriously affect the defendant's liability is fairly raised by the evidence, and was not properly submitted by the charge. The defendant called several witnesses whose testimony tended to prove that the door had been securely barred for some days before the accident, and that if the bar had been removed on the morning in question the removal was without the defendant's knowledge and contrary

to its order, and might have been the act of some unauthorized person. Whether the defendant would be liable, under such circumstances, was evidently a question of importance, but the point was neglected or overlooked; for the charge barely refers to it, and certainly the jury did not receive adequate instructions thereon. So far as we can discover, the following sentence contains the only allusion to this matter:

"Evidence tending to show warnings given of the prospective repairs, evidence tending to show the location of the door, the posting of notice on the door, evidence showing the lights about the door, and evidence as to *the barring of the door*, has been offered by the defendant."

Nothing more was said; no instruction was given concerning either the defendant's duty, or the presence or absence of the bar at the time of the accident, or the defendant's actual or constructive knowledge on this subject, or the bearing of any of these facts (and perhaps of other related facts) upon the defendant's liability; and the jury was therefore left without guidance upon what may have been a vital point in their deliberations. The defendant is entitled to have this question fairly presented and considered.

The judgment is reversed, with costs, and a new venire is awarded.

TOOF v. CITY NAT. BANK OF PADUCAH, KY.

(Circuit Court of Appeals, Sixth Circuit. June 3, 1913.)

No. 2,305.

1. BANKRUPTCY (§ 152*)—TITLE OF TRUSTEE—TIME OF VESTING.

The title of a trustee to property or funds of the bankrupt is fixed by relation as of the time of filing the petition, and not as of the date of adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 194; Dec. Dig. § 152.*]

2. BANKRUPTCY (§ 164*)—ACTION BY TRUSTEE—RECOVERY OF PREFERENTIAL PAYMENT.

Payment of a debt by a bankrupt after the filing of the petition in bankruptcy against him is unauthorized, and ordinarily the trustee is entitled to recover the amount paid; but, if the debt was one wholly or in part enforceable as against the trustee, it is a proper exercise of discretion for the court to deny such recovery, either in whole or pro tanto.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. § 164.*]

3. BANKRUPTCY (§ 326*)—BANK AS CREDITOR AND DEBTOR—RIGHT OF SET-OFF.

On the bankruptcy of a depositor, a bank which holds a note against him has the right to apply thereon a balance standing to his credit as a set-off, and it does not lose that right by accepting the bankrupt's check in payment of the note, even though drawn after the filing of the petition against him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. § 326.*]

4. BANKRUPTCY (§ 184*)—VALIDITY OF CHATTEL MORTGAGE—KENTUCKY STATUTE.

Ky. St. § 1908, providing that every voluntary alienation of or charge upon personal property not accompanied by delivery until recorded shall

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be void as against purchasers in good faith without notice or "any creditor" under the Kentucky decisions, avoids such a transfer only as to creditors who have acquired liens and not as to general creditors; and under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), bankruptcy does not operate through the agency of the trustee to materialize and attach the mere right of a general creditor to obtain a lien so as to defeat a chattel mortgage or contract lien good as between the parties.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

Appeal from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

In the matter of the Foreman Bros. Electric Company, bankrupt. E. L. D. Toof, trustee, appeals from an order dismissing his petition to recover a payment made by the bankrupt to the City National Bank of Paducah, Ky. Modified and affirmed.

On July 29, 1909, the bankrupt borrowed from the bank on its demand note \$2,285 for the purpose of taking up a draft, then in the bank for collection, attached to a bill of lading for three automobiles which had been shipped to Paducah, with instructions to deliver to bankrupt on surrender of bill of lading. On the back of the note was the following indorsement, signed by the bankrupt: "The within note is secured by the pledge and deposit of the following securities, to wit: three Ford motor cars, as per bill of sale attached." The invoice for the cars was at the same time delivered to the bank and attached to the note, and at the foot of the invoice the bankrupt wrote and signed: "We hereby transfer and assign the above cars to the City National Bank." Thereupon the bank delivered the bill of lading to the bankrupt, and the latter took the cars from the railroad station to its own place of business.

On August 23d it had sold two of the cars and deposited the proceeds in its general bank account, mingled with other funds. On that day it sold the third car for \$850, but the purchaser's check therefor had not been deposited with the bank when, on August 24th, before banking hours, involuntary petition in bankruptcy was filed at Louisville, 150 miles from Paducah.

At the close of business on August 23d, the amount of the bankrupt's general deposit in the bank was \$1,293. Shortly after the opening for business on August 24th, the bankrupt deposited the \$850 check, and also \$406 of miscellaneous receipts, making a total credit of \$2,549. Thereupon it gave the bank its check in full payment of the note of July 29th.

August 26th an adjudication in bankruptcy was made. The trustee later filed his petition seeking to recover from the bank the \$2,285 so paid. The petition was dismissed by the referee, and the District Court, on petition to review, affirmed this action. The trustee brings the matter here upon appeal.

Bradshaw & Bradshaw, of Paducah, Ky., for appellant.

Wheeler & Hughes, of Paducah, Ky., for appellee.

Before WARRINGTON, KNAPPEN and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1]
1. So far as concerns interests of the class here involved, when a trustee is appointed, his title is fixed, by relation, as of the time of filing the petition, and not merely as of the date of adjudication. This is made clear by Supreme Court decisions rendered since the making of the order now under review. *Acme Co. v. Beekman Co.*, 222 U. S.,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

300, 32 Sup. Ct. 96, 56 L. Ed. 208; *Everett v. Judson*, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. —, April 28, 1913.

[2] 2. Payment of such a debt as this by the bankrupt after filing of petition, is unauthorized, and the trustee is ordinarily entitled to recover the amount so paid. However, if the payment is one to which the creditor was entitled as against the trustee, and which the court would have directed the trustee to make, it would be a useless formality to compel its refunding to the trustee and then direct him to pay it back to the creditor. In such case, it is a proper exercise of discretion to refuse the trustee's petition.

[3] 3. At the time the petition in bankruptcy was filed, the bank was entitled to set off the \$1,293 deposit against the depositor's demand note. *Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380; *Bank v. Loeb* [C. C. A. 6] 188 Fed. 285, 110 C. C. A. 263. The bank did not lose this right by accepting the depositor's check against the same account. This was not such a recognition of the depositor's general right of disposition as to be inconsistent with the lien or right to set-off which was thereby carried into effect, but was only a convenient and customary method of making the application. *Walsh v. Bank* (C. C. A. 6) 201 Fed. 522. See, also, *Studley v. Bank*, decided by Supreme Court June 9, 1913, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. —.

[4] 4. It is clear that the indorsement on the note and the assignment at the foot of the invoice constituted, as between the parties, a valid contract lien upon, or pledge of, these cars and their proceeds, as security for the money then presently loaned; and that, at the moment of bankruptcy, the bank was, as between the parties, and pursuant to this lien, rightfully entitled to the \$850.

However, it is said that this pledge or lien cannot be enforced against the bankruptcy trustee by reason of section 1908 of the Kentucky Statutes, quoted in the margin.¹ This statute is as to the present question substantially equivalent to section 496. The meaning and effect of this latter section have been more than once under consideration by this court, the last time in *Crucible Steel Co. v. Holt*, 174 Fed. 127, 98 C. C. A. 101 (and see *In re Martin*, 193 Fed. 841, 113 C. C. A. 627, and *In re Huxoll*, 193 Fed. 851, 113 C. C. A. 637). Our opinion was reviewed and affirmed by the Supreme Court in *Holt v. Crucible Steel Co.*, 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756. These cases construe the decisions of the Kentucky Supreme Court as holding that the statutory term "creditors" includes only those who have affirmatively fastened a lien upon the property, and not those who have only a right to get a lien; and as it had been held in *York v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, that bankruptcy did not operate, through the agency of the trustee, to materialize and attach such a mere right to have a lien, it followed that an unrecorded mortgage was, in Kentucky, good as against the general rights of a bankruptcy trustee.

¹ "§ 1908: Every voluntary alienation of or charge upon personal property, unless the actual possession, in good faith, accompanies the same, shall be void as to a purchaser without notice, or any creditor, prior to the lodging for record of such transfer or charge in the office of the county court for the county where the alienor or person creating the charge resides."

We see no reason to differentiate between "creditors" in section 496 and "any creditor" in section 1908; nor are we persuaded that the decision of the Kentucky Supreme Court in *Burns v. Daviess County Bank*, 135 Ky. 355, 122 S. W. 182, 25 L. R. A. (N. S.) 525, 135 Am. St. Rep. 467, operates to overturn the established definition of "creditors" as declared in *Holt v. Crucible Steel Co.*, *supra*, or requires us to give to section 1908 a different construction from that now fixed upon section 496. The Daviess County Bank Case cannot have this effect, because it was essentially a construction of the Kentucky assignment law, rather than of section 1908, and holds, in effect, that an assignee, under the state law, takes a title which enables him to assert rights which creditors under section 496 and section 1908 might have asserted, but had not. Though there may be no logically satisfactory distinction between the nature of the title of an assignee under the Kentucky law and that of a trustee under the bankruptcy law, we cannot apply to this case the holding in the Daviess County Bank Case, because we are here construing a federal law, and are bound to follow *York v. Cassell*, *supra*, and to say that a bankruptcy trustee does not have the right of avoidance given to "any creditor" by section 1908. The trustee in this case, therefore, cannot deny the right of the bank to receive and keep the \$850 upon which this contract lien existed.

5. The bank's right to lien or set-off attached only to the deposit as it existed when the petition in bankruptcy was filed. It cannot attach to the deposits made at a later hour. No question of intent to give or receive a preference is reached in this case, and it is immaterial whether either the bank or the bankrupt knew that the petition had been filed; the payment of the remainder of the note was unauthorized. True, the lack of power to make the payment was dependent on the contingency that the proceedings should ripen into an adjudication, but the contingency did happen, and the bankrupt's title failed, by relation, as of the moment of filing the petition. *Everett v. Judson*, *supra*. The trustee is entitled to decree for \$142, with interest at the legal rate since the payment.

The trustee will recover the costs of this court upon the appeal, and the record be remanded for further proceedings in accordance herewith.

LAMSON BROS. & CO. et al. v. BANE.

(Circuit Court of Appeals, Eighth Circuit. May 2, 1913.)

No. 3,803.

GAMING (§ 2*)—GAMBLING CONTRACTS—ACTION TO RECOVER MARGINS FROM BROKERS—LAW GOVERNING—PLACE OF CONTRACT.

Plaintiff sued defendants, who were brokers having their main office in Chicago, with one of their branch offices in Des Moines, Iowa, to recover certain margins paid by him on contracts for the purchase of railroad stocks, alleging that they were merely wagering contracts on the future price of the stocks and that no actual purchase or delivery was intended. He testified that he applied to make the purchases to defendant's manager in Des Moines; that the manager telegraphed to the Chicago office,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and on receipt of an answer notified him that the stocks had been brought, and he paid the margins to such manager. *Held* that, on plaintiffs' allegations and testimony that no actual purchases of stocks were to be made in Chicago or elsewhere in the execution of the contracts, they were consummated in Des Moines and were governed by the law of Iowa, by which money lost in such transactions is not recoverable.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 2; Dec. Dig. § 2.*]

Sales or purchases under agreements for settlement of differences between contract price and market price as wagering contracts, see note to *Ware v. Pearsons*, 98 C. C. A. 368.]

In Error to the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Action at law by I. W. Bane against Lamson Brothers & Company and others. Judgment for plaintiff, and defendants bring error. Reversed.

Joseph W. Moses, of Chicago, Ill. (Moritz Rosenthal, Henry H. Kennedy, Julius Moses, Hamilton Moses, and Walter Bachrach, all of Chicago, Ill., N. T. Guernsey, of New York City, and W. E. Miller and A. C. Parker, both of Des Moines, Iowa, on the brief), for plaintiffs in error.

Jerry B. Sullivan, of Des Moines, Iowa (John B. Sullivan, of Des Moines, Iowa, on the brief), for defendant in error.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

SMITH, Circuit Judge. The defendant in error, I. W. Bane, is a lawyer engaged in the practice of his profession at Des Moines, Iowa, and will hereafter be called the "plaintiff." Lamson Bros. & Co. are composed of L. J. Lamson, W. A. Lamson, and L. F. Gates, and will hereafter be called the "defendants." They have for a considerable period been engaged in business at Chicago, Ill., as brokers and commission merchants. They maintained branches in 14 Iowa cities, one at Des Moines, where three men, including a manager, were employed. The Des Moines office received considerable sums of money which were deposited in a bank in that city, and notice was sent directly to the Chicago office of the amount of these deposits and to whom they should be credited. On December 27, 1909, the plaintiff entered into a contract through the defendants' manager at Des Moines for the purchase of 100 shares of M. K. & T. stock at 48¼, and after being notified that the stock had been purchased he paid \$500 as a margin upon it. On January 8, 1910, he similarly contracted to buy 100 shares of Wabash preferred at 57¼, and after being notified that the stock had been purchased paid as a margin thereon the sum of \$600. Subsequently he from time to time deposited other sums of money to meet declines in the market until his total deposits amounted to \$3,800 including \$500 deposited at Chicago while there. Both M. K. & T. stock and Wabash preferred were listed at the Stock Exchange in New York, but neither of them was so listed at Chicago.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

When the plaintiff authorized the purchase of the 100 shares of M. K. & T. stock, the defendant's manager or agent at Des Moines wired them at Chicago to purchase the stock. Defendants telephoned J. J. Townsend & Co., of Chicago, to make the purchase, and they wired to Sternberger, Sinn & Co., of New York, to make the purchase, and upon their reply that they had done so Townsend & Co. notified the defendants, they sent the news to their Des Moines agency, and it was there delivered to the plaintiff, and he then paid \$500 as a margin.

On February 4th, this stock having fallen, the defendants notified J. J. Townsend & Co., to sell the same. They in turn notified Sternberger, Sinn & Co., who reported that they had sold the stock at $39\frac{3}{4}$. In a similar way when the plaintiff gave his order for the purchase of 100 shares of Wabash preferred the defendants' agency at Des Moines telegraphed the home office at Chicago, which telephoned J. J. Townsend & Co., who in turn wired Sternberger, Sinn & Co., at New York, to purchase the stock. They wired back to J. J. Townsend & Co. that the order had been complied with and the stock cost $57\frac{1}{4}$. They notified the defendants by telephone, who wired the information to their Des Moines agency, which notified the plaintiff, and thereupon he deposited a margin of \$600.

On July 26, 1910, the defendants telegraphed to S. B. Chapin & Co., of New York, to sell the Wabash preferred. They telegraphed back that it had been sold at $30\frac{1}{4}$. This left a balance due the plaintiff on the defendants' theory of \$58.64 for which they sent him a check.

It is the theory of the plaintiff that these were mere gambling transactions, that there was no intention that these stocks should ever be delivered to him, and that if the defendants bought stocks they were "hedging" against loss on their wager.

Under the general law, if these were wagers the plaintiff could not recover the money lost thereon, and this is conceded to be the law of Iowa. Code 1897, §§ 4967, 4968; Counselman & Co. v. Reichart, 103 Iowa, 430, 72 N. W. 490; People's Savings Bank v. Gifford, 108 Iowa, 277, 79 N. W. 63.

But certain states have believed that gambling could be better suppressed by providing that money lost in gambling may be recovered, among them New York, California, Tennessee, and Illinois. The statutes of Illinois contain the following:

"Sec. 130. Gambling in Grain, etc. Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than \$10 nor more than \$1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.

"Sec. 131. Gaming Contracts. All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages, or other securities or conveyances made, given, granted, drawn or entered into, or executed by any person whatsoever, where the whole or any part of the consideration thereof, shall be for any money, property or other valuable thing, won by any gaming, or playing at cards, dice, or any other game or games, or by betting on the

side or hands of any person gaming, or by wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election or unknown or contingent event whatever, or for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such play or bet, to any person or persons so gaming or betting, or that shall, during such play or betting, so play or bet, shall be void and of no effect.

"Sec. 132. Losses by Gaming. Any person who shall, at any time or sitting, by playing at cards, dice or any other game or games, or by betting on the side or hands of such as do game, or by any wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election of unknown or contingent event whatever, lose to any person, so playing or betting, any sum of money, or other valuable thing, amounting in the whole to the sum of \$10, and shall pay or deliver the same or any part thereof, the person so losing and paying or delivering the same, shall be at liberty to sue, for and recover the money, goods or other valuable thing, so lost and paid or delivered, or any part thereof, or the full value of the same, by action of debt, replevin, assumpsit or trover, or proceeding in chancery, from the winner thereof, with costs, in any court of competent jurisdiction. In any such action at law it shall be sufficient for the plaintiff to declare generally as in actions of debt or assumpsit for money had and received by the defendant to the plaintiff's use, or as in actions of replevin or trover upon a supposed finding and the detaining or converting the property of the plaintiff to the use of the defendant, whereby an action hath accrued to the plaintiff according to the form of this act, without setting forth the special matter. In case the person who shall lose such money or other thing, as aforesaid, shall not, within six months, really and bona fide, and without covin or collusion, sue, and with effect prosecute, for such money or other thing, by him lost and paid or delivered, as aforesaid, it shall be lawful for any person to sue for, and recover treble the value of the money, goods, chattels and other things, with costs of suit, by special action on the case, against such winner aforesaid; one-half to use of the county, and the other to the person suing." Hurd's Rev. St. 1911, c. 38.

Assuming that under the Illinois law these were gambling contracts, it then becomes material whether the contracts are governed by the laws of Iowa or of Illinois.

It must be borne in mind that it is the contention of plaintiff that these were gambling contracts, and that he did not in fact buy the M. K. & T. and Wabash preferred, but that he in effect made a wager that the stock would go up against the defendants' wager that it would go down and what defendants did, if anything, in the way of buying such stock or an option thereon, was a mere "hedging" against loss with which he had nothing whatever to do. Consequently upon his theory the contract was never to be performed or executed in the sense of buying the stock, and the court properly charged the jury that:

"If you find that the defendants never intended to deliver the actual stock to the plaintiff upon the payment of the purchase price, and you should then find that defendant did purchase stocks as it did for the purpose of 'hedging' or protecting itself, then the fact that the defendant purchased stock in New York City would not avail it, and there would be no defense here."

It follows that upon the plaintiff's theory that these were gambling contracts there was nothing to do in Illinois or New York with reference to the purchase of stocks. This is important, as it is conclusive that upon the plaintiff's theory the contracts were not to be performed by the purchase of stocks either in Illinois or New York. It is important because in many cases where contracts are made to be per-

formed in another state the law of such other state governs the construction of the contract. This contract was to be governed solely by the place of its execution and not at all by the law of the place of its performance. If these were Illinois contracts, it must be because they were made in Illinois. The court charged the jury in this connection:

"The defendants' main office was in Chicago and the state of Illinois. For a time at least it had a branch office here in the city of Des Moines. With the exception of one transaction as I recall the evidence, so far as the plaintiff is concerned, he said and did here in Des Moines what he did say and do. Now upon this question you are instructed that if you find from the testimony that the defendant had a branch house in Des Moines, and that it had an agent with authority to solicit business, enter into deals, and receive money, but without authority to make contracts, and if you find that the order to purchase said stock made by the plaintiff on December 27, 1909, and January 8, 1910, was transmitted by the agent of defendants in Des Moines to the defendants' office at Chicago, Ill., and there accepted, then you are instructed that the contract would be an Illinois contract and covered by the Illinois laws, and so far as that branch of the case was concerned, in that event you find for the plaintiff if you find the other matters already alluded to in his favor.

"Now it is in testimony that Mr. Roovart and Mr. Williams represented the defendants at Des Moines, and as such did solicit the order or orders from the plaintiff, and at the time of the solicitation did not make and execute a contract, but wired the order to Chicago, and it was there, within the state of Illinois, executed in the state of Illinois. It is not decisive where the money was paid. The question is: Where was the contract to be executed, in Iowa or Illinois? And if you find that it occurred in Chicago, then it becomes an Illinois contract."

The defendants had their principal place of business at Chicago and a branch at Des Moines. If these were bona fide contracts to buy stocks, then they were governed by the law of the state where the stocks were to be bought, and if the defendants held themselves out as selling such stocks, and plaintiff contracted with them to buy, and nothing was said as to where they would be obtained, it might be contended that plaintiff understood they were to be bought where defendants' principal business was; but the plaintiff insisted that he never knew any stocks were to be bought or sold, that he merely made a wager with defendants that the stock would go up and they wagered that it would go down. There was no agreement, on plaintiff's theory, that could change the applicable law from the place of the making of the contract to the place of performance.

The plaintiff testified that Mr. Roovart, the defendants' manager at Des Moines, said:

"That the adjustment would be just in this way: That if I would buy the stock and put up a little money and the stock raised, then the raise in the price—why, I would gain that much. If it went down, I would lose the difference between the amount I put up for it and the amount I sold for after it went down; and if it went up I would gain that difference; there wasn't to be any actual delivery of the stock, he said; the way we would buy them and deal in stock was on the rise and fall in the market. If it fell, why I would make; if it decreased, I would lose."

"The next transactions afterwards with the defendant company was December 27, 1909. I went in the office. Mr. Roovart was their manager, and gave him an order to purchase a hundred shares of M. K. & T. It was December 27th.

"Q. You gave him an order. I wish you would explain to the jury just how that order was—what you did, and what Mr. Roovart did, and what the defendants did.

"A. I went into the office. Mr. Roovart was there, and we talked the matter over again; and the prices was coming all the time over the telegraph instrument, and they would be marked by a chalk on the board, and we could see just what the price was for this M. K. & T. stock. I finally says to Mr. Roovart, 'Buy,' and gave him this order, 'Buy 100 shares of M. K. & T.,' and then he immediately turned around, or had one of his men there at the office with the telegraph instrument, telegraph. Probably three minutes afterwards, maybe five, just a short time, he came back and says, 'We have bought for you a hundred shares of M. K. & T.'

"Q. What did you then do with reference to payment?

"A. After I got this word back that he had, as Mr. Roovart said he had, bought a hundred shares of M. K. & T., then I says, 'I suppose I will have to put up my money.' He says, 'Yes, 10 per cent. of the amount purchased.' That was 10 per cent. of the M. K. & T. stock—I think the order was at 48¼, and I think I gave him a check for \$500."

The undisputed evidence is that whatever this contract was, whether a contract for future delivery as it purported to be, or a gambling contract, plaintiff went to the defendants' manager at Des Moines and there authorized the purchase of the stock in question; the defendants' agent claiming it was a bona fide purchase wired the Chicago office. Defendants wired back, not to plaintiff, but to their agent at Des Moines, that the purchase was made. The Des Moines agency so notified the plaintiff at Des Moines and he there paid the 10 per cent. margin.

Importance is attached to the fact that the wire from Chicago to Des Moines was to the defendants' agent and not to the plaintiff.

It is plaintiff's theory that the defendants' agent at Des Moines did not have general authority to close the contract. Let it be so conceded. Plaintiff, nominally at least, ordered the purchase of the M. K. & T. and Wabash preferred. This he did with the Des Moines and not directly to the Chicago office. The Chicago office sent no message to the plaintiff, but sent a message to its agent at Des Moines. Thus far the transactions tending to a contract were wholly between the plaintiff and the defendants' agent at Des Moines. There was nothing in that to constitute an agreement. The Des Moines agent then told the plaintiff the stock had been bought and plaintiff put up his margin. That closed the contract at Des Moines. There was no evidence of legal acceptance at Chicago.

Owing to the fact that insurance companies usually conduct their business in states other than their home office, insurance cases are cited by both sides to this controversy and they bear a very considerable analogy to this case.

If the application for insurance be made in one state and sent to the home office in another state and is there accepted and a policy issued upon it and sent by mail to the applicant, it is delivered the moment it is deposited in the mail, and consequently is deemed to have been executed in the state of the home office of the company. *Tuttle v. The Iowa State Traveling Men's Ass'n*, 132 Iowa, 652, 104 N. W. 1131, 7 L. R. A. (N. S.) 223.

On the other hand, if an application be made to an insurance solicitor who has no authority to make contracts of insurance and is by him sent to the home office of the company and is accepted by the company and a policy is issued and sent to the soliciting agent and delivered by him and he collects the premium, the contract is deemed to have been made in the state where the application was made and the policy delivered by the soliciting agent. *Brewer, Circuit Judge, in Wall v. Equitable Life Assur. Soc. (C. C.) 32 Fed. 273.*

That case was considered by the Supreme Court in *Equitable Life Assurance Society v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497, and Mr. Justice Gray in that case said:

"The petition further alleges that the policy was delivered in Missouri; and the answer admits that the policy was 'at the request of the said Wall, transmitted to the state of Missouri and was delivered to said Wall in said state.' If this form of admission does not imply that the policy was at the request of Wall transmitted to another person, perhaps the company's agent, in Missouri, and by him there delivered to Wall, it is quite consistent with such a state of facts; and there is no evidence whatever, or even averment, that the policy was transmitted by mail directly to Wall, or that the company signified to Wall its acceptance of his application in any other way than by the delivery of the policy to him in Missouri. Upon this record, the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract and governed by the laws of Missouri."

Berry et al. v. Knights Templars' & Masons' Life Indemnity Co. (C. C.) 46 Fed. 439. That case was affirmed by this court in 50 Fed. 511, 1 C. C. A. 561. *Mutual Benefit Life Ins. Co. v. Robison (C. C.) 54 Fed. 580.* This case was appealed to this court, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325, but doubtless out of deference to our opinion in *Knights Templar & Masons' Life Indemnity Co. v. Berry*, 50 Fed. 511, 1 C. C. A. 561, the question was not again urged in this court and appears not to have been considered. *Equitable Life Assur. Soc. of the United States v. Winning*, 58 Fed. 541, 7 C. C. A. 359; *Northwestern Mutual Life Ins. Co. v. Elliott et al. (C. C.) 5 Fed. 225;* *In re Petition of Insurance Co. of the State of Pennsylvania (D. C.) 22 Fed. 109;* *Kelley v. Mutual Life Ins. Co. (C. C.) 109 Fed. 56;* *Albro v. Manhattan Life Ins. Co. (C. C.) 119 Fed. 629.*

If the Des Moines agency had no authority to make the alleged wagering contract with the plaintiff and had telegraphed the home office, and it in turn had telegraphed directly to the plaintiff that his proposition was accepted, and he had then gone and paid the first margin at the Des Moines agency, there would be room for the contention that the contract was closed when the defendants delivered the telegram for transmission at Chicago; but, taking the most favorable view of the case for the plaintiff, if this was a wagering contract, and if the Des Moines agency had no authority to make it and telegraphed to Chicago and the defendants there decided to accept the contract and so telegraphed the agency at Des Moines, and that agency notified the plaintiff and took his money, the contract was consummated at Des Moines, and under the policy of Iowa the plaintiff could not recover even

though he afterwards paid upon the contract a subsequent margin at Chicago.

There being no evidence that the contract was accepted in Illinois, within the meaning of the instruction given by the court, it was necessarily error to submit that question to the jury, and the case is reversed and remanded, with directions to set aside the verdict and grant a new trial.

CONSTAM v. HALEY.

In re THE HUB.

(Circuit Court of Appeals, Sixth Circuit. June 13, 1913.)

No. 2,346.

1. APPEAL AND ERROR (§ 1094*)—FINDINGS—REVIEW.

A finding of fact made and sustained by two different tribunals will not be set aside on appeal, unless there is a demonstration of mistake.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.*]

2. BANKRUPTCY (§ 166*) — PREFERENCE — INSOLVENCY — NOTICE — NOTICE TO AGENTS.

Where payees of a note against a bankrupt assigned it to claimant, and after maturity claimant intrusted it to the payees' credit man, who made a trip to see the bankrupt, and was advised of facts sufficient to give him reasonable cause to believe that insolvency existed, after which several payments were obtained, he was claimant's agent for the collection of the note, and claimant was charged with notice of the facts which such agent did or could have ascertained.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

3. BANKRUPTCY (§ 166*)—PAYMENT—PREFERENCES—KNOWLEDGE OF AGENT.

Where an agent was intrusted with a note against the bankrupt to collect or adjust for the holder, and the agent, on his trip, obtained notice of facts which would indicate the maker's insolvency, the holder was not only charged with notice thereof as to payments obtained by the agent, but also with reference to subsequent payments made by the bankrupt direct to the holder.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

Appeal from the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

From an order requiring claimant, Isaac Constam, to return certain alleged preference payments to J. M. Haley, as trustee of the estate of The Hub, bankrupt, as a condition to claimant's right to prove his claim, he appeals. Affirmed

J. S. Fletcher, of Chattanooga, Tenn (Strang & Fletcher, of Chattanooga, of counsel), for appellant.

P. V. Connolly, of Cincinnati, Ohio, and Chas. C. Moore, of Chattanooga, Tenn., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DENISON, Circuit Judge. The question for decision here is whether the payments which Constam received and indorsed on his note against the bankrupt within four months before the bankruptcy were received with such reasonable cause to believe that they would effect a preference that they must be repaid to the trustee before Constam can prove his claim. Sections 57g, 60b, Bankr. Act (Act July 1, 1898, c. 541, 30 Stat. 560, 562 [U. S. Comp. St. 1901, pp. 3443, 3445]). Such payment was required by the referee, and on petition for review the district judge affirmed the referee. Constam appeals. We find only two distinct questions presented: (1) Did Constam, through his agent, and before receiving the first of the payments in question, have reasonable cause to believe that the debtor was insolvent and that payments would effect a preference; and, if so, (2) what was the effect of that notice upon later payments not coming directly through this agency?

[1] 1. The first question is one of fact. Appellant finds against him the concurring decisions of two successive tribunals which have heard his case; and such concurring conclusions raise a strong presumption of their correctness. They will be overturned only in cases where there is a demonstration of mistake. *Wabash Ry. Co. v. Compton* (C. C. A. 6th Cir.) 172 Fed. 17, 21, 96 C. C. A. 603; and see *Haines v. Bank* (C. C. A. 6th Cir.) 203 Fed. 225.

[2] We have considered the arguments urged by appellant's counsel and all parts of the testimony cited in that connection, and we think the utmost conclusion to which they may properly lead is that the matter is doubtful, and that, if the conclusion of the trial court had been the other way, it would have been well supported by the evidence. This is not enough; it is a very different thing from being satisfied that the conclusion below was wrong. Constam lived in Baltimore. He had purchased the note from Schloss Bros. & Co., the payees. After the maturity and nonpayment of his note he gave it to Schloss Bros. & Co., and they intrusted it to Caston, their "credit man," to take to Chattanooga, where the debtor was in business, and to collect or adjust. Caston's Chattanooga trip was, primarily, in the interest of his regular employer, but he was at the same time in this transaction authorized to represent and act for Constam. Caston's activity resulted in the making, at that time or shortly afterwards, of the first two or three of the payments now in question. We think it fairly inferable from all the facts and circumstances which it would be unprofitable to recount that Caston, on this occasion, learned enough of the actual situation to give him reasonable cause to believe that insolvency existed. His categorical denial of such knowledge cannot control the situation, nor conclusively rebut the presumption that a man of his skill and experience in such situations would draw the inferences which the circumstances justified.

[3] 2. At a later period, and after a considerable interval, others of the payments in question were made by the bankrupt directly to Constam; and it is claimed that he was chargeable with no notice of the situation, except such as resulted through the knowledge acquired by Caston while acting as Constam's agent, and that these later pay-

ments came as the direct result of Constam's personal demands, and without any cause and effect relation to Caston's earlier agency. The record does not justify us in assuming the accuracy of these claims, as against the import of the findings of the referee and the district judge. Though Schloss Bros. & Co. had not indorsed the note, they regarded themselves as morally bound to see that it was paid; and, no doubt, Constam continually put some reliance upon this obligation. Some of the later payments were made to and through Schloss Bros. & Co. It is not clear that their collecting agency ever ceased, or that any one of the payments made directly from the bankrupt to Constam was wholly disconnected from the original agency and continuing efforts by Caston and by Schloss Bros. & Co. to get full payment of this note. Under such circumstances, it is unnecessary to determine what the rule would be if the later payments in question were quite independent of connection with the agency.

However, if we may assume, for the purposes of this opinion, the accuracy of these claims by Constam, we reach the same result. The theory which his counsel urges us to apply, viz., that constructive notice to the principal, resulting from actual notice to the agent, will not be imputed to the principal afterwards acting for himself, is thought to be based upon *Blackburn v. Vigors*, L. R., 12 App. Cas. 531. Although there is analogy between the relation to each other of the earlier and later transactions there had and the relation to each other of the earlier and later payments here involved, yet we think that case finally depends upon its finding that the agency was peculiarly limited in character. As was there said, the agent was employed to effect insurance, not to "get information." In the instant case Caston's employment and duty were relatively general in scope. It was his duty to do whatever was for Constam's interest, and to acquire and communicate to Constam all he could learn about the debtor's pecuniary condition. It must be presumed that he performed that duty, and hence comes the necessary imputation that his principal then had knowledge of the insolvency. *Thomson-Houston Co. v. Capitol Co.* (C. C. A. 6) 65 Fed. 341, 343, 12 C. C. A. 643; *American Nat'l Bk. v. Miller* (C. C. A. 6) 185 Fed. 338, 343, 107 C. C. A. 456. It seems of necessity to follow that the notice which the law declares Constam then received must have remained with him and continued to operate upon him with full force in his further conduct of the same subject-matter, even after the termination of the agency through which the notice was derived. It was not merely that knowledge of an agent which burdens a benefit received through the agent and goes no farther, as was the case with reference to the earlier one of the two insurance policies mentioned in *Blackburn v. Vigors*, and a recovery upon which was denied in *Blackburn v. Haslam*, L. R., 21 Q. B. 144. Reading these *Blackburn* cases together, their net result was not made to turn so much upon the duty of the agent to inform his principal, thus imputing notice, as upon the agent's duty to disclose all the facts which he knew to the third party whom he approached; and they are not inconsistent with the continued operation and effect of that notice which the law has once imputed to the principal.

It follows that the order of the court below must be affirmed. An undue expansion of the record seems to have resulted from appellee's insistence, and the affirmance will not only be without costs, but the appellant will recover the cost of printing 100 pages of the record, and the fees of the clerk below for so much of the transcript.

McDONALD et al. v. PLESS et al.

(Circuit Court of Appeals, Fourth Circuit. June 9, 1913.)

No. 1,125.

NEW TRIAL (§ 143*) — GROUNDS — IMPEACHMENT OF VERDICT — TESTIMONY OF JUROR.

The testimony of a juror will not be received to impeach a verdict found by a jury of which he was a member respecting a matter inherent in the verdict itself.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 290-296; Dec. Dig. § 143.*]

In Error to the District Court of the United States for the Western District of North Carolina, at Asheville; James E. Boyd, Judge.

Action at law by J. W. Pless and J. W. Winbourne, partners as Pless & Winbourne, against D. J. McDonald and United States Fidelity & Guaranty Company. Judgment for plaintiffs, and defendants bring error. Affirmed.

The facts in the case, briefly stated, are as follows: The defendants in error, plaintiffs in the court below, instituted their action at law in the superior court of McDowell county, N. C., to recover from the plaintiffs in error, defendants in the court below, an alleged indebtedness of \$4,000. The suit was by appropriate proceedings removed to the United States District Court for the Western District of North Carolina, where the defendants by proper plea denied liability for the claim as a whole, and, upon issue joined, the same was submitted to a jury, who rendered a verdict in favor of the plaintiffs for \$2,916, with interest. This verdict the defendants, plaintiffs in error here, sought to have set aside, because of alleged misconduct of the jury in rendering the same, and in support of their motion filed two affidavits of the defendant D. J. McDonald, setting forth in substance that, after the jury retired to consider of their verdict, it was proposed by one of the jurors, and acquiesced in by the others, that each member of the jury would state what amount he thought the plaintiffs were entitled to recover, and that the aggregate sum arrived at should be divided by 12, and the quotient or net result of the division should be the verdict returned by the jury; that the agreement was made and entered into, and the jurors, in pursuance thereof, named different amounts, ranging from \$500 to \$4,000; that one of the jurors was for nothing, and two for \$5,000 each; that the verdict thus arrived at was by a division of the total of the sums stated by each juror. The plaintiff in error D. J. McDonald stated these facts in these affidavits, and that he could prove the same, and also that there was in existence, and in the possession of one of the jurors, a paper showing how the verdict was arrived at. The trial court ruled that it would hear evidence to show that the jury arrived at their verdict in the manner set forth in the affidavits; whereupon counsel for the plaintiffs in error called A. K. Hider, one of the jurors, and three other members of the jury, to the clerk's desk, and had them sworn, and propounded to Juror Hider the following question: "Q. Mr. Hider, I wish you would state to his honor and the jury what was said by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the foreman of the jury when the jury retired to their room, as to the manner in which they should arrive at their verdict, and all about the method by which the jury did arrive at their verdict." To this question counsel for defendants in error excepted, and the exception was sustained. Thereupon the following occurred: The court said: "You propose to prove that when the jury went to their room to consider their verdict, the foreman suggested to them that each juror should put down on a piece of paper the amount he thought the plaintiffs ought to have, that that amount then be added up and divided by 12 and that the quotient should be their verdict; they did that, and some of them, as you allege, went above the \$4,000, one perhaps for nothing, and that they arrived at their verdict in that way.

"Mr. Rollins: Yes, sir.

"The Court: I hold that the testimony of a juror is not competent to impeach his verdict. You may have an exception."

To this ruling and action of the court, the defendants below excepted, and duly preserved their bill of exception, which, among other things, recited that no other testimony or witness than said juror was offered; and the court being of opinion that the testimony of the juror was incompetent to prove the facts alleged in said affidavits, and thereby impeach their verdict, upon objection by counsel for plaintiff below, excluded said testimony, and refused to consider the same. Thereupon judgment was duly entered on the verdict in favor of the plaintiff, to which action and judgment of the court in excluding the testimony aforesaid, and in entering judgment on the verdict, this writ of error was sued out, and the plaintiffs in error in their second assignment fully set forth their objection to the ruling of the court, rejecting the testimony of the juror, which is the only assignment relied on in the appellate court for the reversal of the action of the court below.

Thomas Rollins, of Asheville, N. C. (Martin, Rollins & Wright, of Asheville, N. C., on the brief), for plaintiffs in error.

A. Hall Johnston, of Marion, N. C. (Locke Craig, of Asheville, N. C., on the brief), for defendants in error.

Before PRITCHARD, Circuit Judge, and WADDILL and ROSE, District Judges.

WADDILL, District Judge (after stating the facts as above). The facts of the case briefly stated, and the one error insisted upon of those embraced in the assignments, present but a single issue for the determination of the court; that is to say, whether a juror may be called to impeach a verdict found by a jury of which he was a member, respecting a matter inherent in the verdict itself.

In the view of this court, but little need be said regarding this assignment, as the same is clearly without merit, certainly under the decisions of the federal courts, and of the courts of most of the states of the Union. The courts of but few states take the view that jurors can be called for the purpose of assailing their verdicts, or inquiring into the methods and purposes that actuated them in reaching their conclusions, or the manner whereby they arrived at the amount awarded by the verdict.

Under decisions of the state of Tennessee, and perhaps those of other states, the inquiry attempted here might be made; but it is almost the uniform rule, especially where the subject of investigation relates to a matter that inheres within the verdict itself, that a juror will not be heard orally, or by affidavit or otherwise, to impeach the verdict, or in any way disturb the result arrived at by himself and his fellows.

Such practice is forbidden by public policy, and would bring about unseemly squabbles and contentions, and quickly result in the overthrow of the jury system.

The federal decisions sustain this view without variation, unless it be perhaps in one or two cases following the state practice in a state where the exceptional doctrine, as in Tennessee, prevails.

The Supreme Court of the United States has emphasized the doctrine in the recent decision of *Hyde v. United States*, 225 U. S. 347, 381, 384, 32 Sup. Ct. 793, 56 L. Ed. 1114, and to the same effect will be found the following federal authorities (and others might be cited): *Mattox v. United States*, 146 U. S. 140, 148, 13 Sup. Ct. 50, 36 L. Ed. 917; *United States v. Daubner* (D. C.) 17 Fed. 808; *Chandler v. Thompson* (C. C.) 30 Fed. 38, and cases cited. In the last-named decision, an opinion of Judge Dick of the Western district of North Carolina, from which jurisdiction the present case came, it is said:

"It is an old rule, and well settled, that, on motion for a new trial, a jury would not be allowed to explain the grounds of their verdict."

In *Glaspell v. Northern Pacific R. R.* (C. C.) 43 Fed. 909, it is said that:

"Upon the grounds of public policy, the courts have almost universally agreed upon a rule that no affidavit, deposition, or sworn statement of a juror shall be received to impeach the verdict or to explain it, or show on what grounds it was rendered."

In *Pelzer Man'g Co. v. Hamburg-Bremen Fire Insurance Co.* (C. C.) 71 Fed. 826, Judge Simonton, of this circuit, said:

"None of the cases permit a juror to impeach a verdict because of his own misconduct or that of other jurors in the jury room, or to divulge the motives or method by which they reached their verdict."

Also *Callahan v. Chicago, M. & St. P. R. R.* (C. C.) 158 Fed. 994.

The state decisions, and none more so than those of the state of North Carolina, strongly adhere to the view herein announced, and the same may be said of the leading text-writers on the subject. *State v. Smallwood*, 78 N. C. 561, 562; *State v. Brittain*, 89 N. C. 481, 504; *Lafoon v. Shearin*, 95 N. C. 391, 394; *State v. Best*, 111 N. C. 638, 642, 15 S. E. 930; *Gordon v. Commonwealth*, 100 Va. 825, 834, 41 S. E. 746, 57 L. R. A. 744; *Houk v. Allen*, 126 Ind. 568, 25 N. E. 897, 11 L. R. A. 706; *Murphy v. Murphy*, 1 S. D. 316, 47 N. W. 142, 9 L. R. A. 820, 822, and cases cited; *Goodman v. Cody*, 1 Wash. T. 329, 34 Am. Rep. 808; *Thom. & Mer. on Juries*, §§ 364-366; *Ency. of Evidence*, vol. 8, pp. 964, 968; 14 *Ency. Plead. & Prac.*, 905, 906, 911 (where cases from nearly every state in the Union are cited); *Thompson's Trials*, vol. 2, p. 1963.

It follows from what has been said that there is no error in the action of the lower court, and the same will be affirmed.

Affirmed.

HALEY v. POPE.

In re HALEY.

(Circuit Court of Appeals, Ninth Circuit. July 14, 1913.)

No. 1,997.

BANKRUPTCY (§ 405*)—RIGHT TO OPPOSE DISCHARGE—"PARTY" IN INTEREST.

One scheduled by a bankrupt as a creditor is *prima facie* a "party in interest," and entitled to oppose the granting of a discharge, although he has not proved his claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 709-711; Dec. Dig. § 405.*

For other definitions, see Words and Phrases, vol. 4, pp. 3702-3706.]

Petition to Revise in Matter of Law a Certain Order of the District Court of the United States for the Southern Division of the Southern District of California; Olin Wellborn, Judge.

In the matter of A. L. Haley, bankrupt. On petition to revise an order refusing a discharge. Affirmed.

R. L. Horton, of Los Angeles, Cal., for petitioner.

Shankland & Chandler, of Los Angeles, Cal., for respondent.

Before GILBERT and ROSS, Circuit Judges, and DIETRICH, District Judge.

ROSS, Circuit Judge. This being a petition to revise an order of the District Court affirming the findings of fact and the report made by the special master, we must accept the facts as found by him as conclusive, as our inquiry concerns only matters of law. From the findings so made it appears that Haley was duly adjudged a bankrupt June 17, 1909; that a meeting of his creditors was duly called, and held before the referee July 13, 1909, at which meeting the Los Angeles Trust Company was duly appointed trustee of the bankrupt's estate. It further appears from the findings and report of the special master that Haley, being an architect, caused a corporation to be organized under the laws of the state of California on the 16th day of March, 1906, called A. L. Haley Architect Company, to which corporation he transferred all of the business and good will theretofore acquired by him as such architect, and that he had 1 share of the stock of the corporation issued to himself, 1 share each issued to L. M. Lucas and A. Reef, and 1,250 shares for the "good will of the business" issued to one Allen B. Butt—the directors of the company being A. L. Haley, L. M. Lucas, and A. Reef; Haley being the president and Lucas the secretary, and Reef being employed in the office as chief draftsman.

It appears that after the organization of the corporation all of Haley's business as architect was done through it, and that he procured Butt to assign the 1,250 shares of stock issued in his name to one Mrs. Greenwood as security for a loan in the sum of \$2,000 claimed by Haley to have been made by Mrs. Greenwood to him.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The findings are to the effect that Haley was the real owner of the 1,250 shares. No dividends were paid on any of the stock. Haley continued to transact all of the architect business after the formation of the corporation as before, and drew a salary of \$250 a month under the guise of an employé of the company, and took from the company, under a resolution authorizing him to do its business, moneys aggregating over \$10,000. The stock was not mentioned in the schedules of the bankrupt, either as his property or as his having any interest in it. On the books of the corporation it continued to stand in the name of Butt. The master found that Haley took up the "scheme of converting his property and the good will of his business into a corporation known as 'A. L. Haley, Architect, Incorporated,' so that it might not be within the reach of his creditors, and that he could enjoy the benefits of it without accounting therefor to any one whomsoever." It appears from the findings that one Fish, prior to the bankruptcy proceedings, recovered a judgment against Haley in the superior court of Los Angeles county for \$1,054.66, which judgment, in the name of Fish as creditor, was listed as a claim by the bankrupt in his schedules filed June 17, 1909, and which judgment was assigned by Fish to John D. Pope. Pope did not prove his claim, but more than a year after the adjudication filed objections to the bankrupt's application for his discharge, in which opposition the objecting creditor was joined by the trustee company—the grounds of the opposition being that the bankrupt had made a false oath in respect to the transfer of the 1,250 shares of stock to Mrs. Greenwood as security for a pretended loan for \$2,000, and that the bankrupt, with intent to conceal his financial condition, failed to keep books of account or records from which such condition might be ascertained, and had concealed, while bankrupt, from the trustee, the 1,250 shares of the stock of the A. L. Haley Architect Company.

The particulars in which the court is alleged to have committed error are the following:

"1. In sustaining the findings that John D. Pope could object to the discharge of said bankrupt upon the ground that he failed to show himself as a party in interest, as required by law.

"2. In sustaining said report that the said bankrupt concealed his property, or any part or portion thereof.

"3. In affirming the finding of the said master that the bankrupt has been guilty of having made false oath.

"4. In affirming the report of the said master that he failed to keep books of account.

"5. In denying the application for the discharge of the said bankrupt.

"6. In allowing the said John D. Pope costs."

It is manifest that the matters embraced by the above subdivisions 2, 3, and 4 relate to the facts of the case, and, inasmuch as the master found affirmatively in respect to each of them, and the court affirmed the findings, they are here conclusive.

Upon the facts as appearing from the record Pope was not precluded from making objection to the discharge applied for, for it appears that when the bankruptcy matter first came up for hearing before the referee it was stipulated by the parties that the assignment

made by Fish of the judgment obtained by him against Haley to Pope should be received in evidence subject only to objection to its relevancy. Subdivision b of section 14 of the Bankruptcy Act approved July 1, 1898 (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1496), provides:

"The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court."

As said by the court in the case of *In re Levey* (D. C.) 133 Fed. 572, there is no express provision in the statute declaring who may oppose the discharge. In the case cited the court held that a trustee in bankruptcy, so long as the estate is unsettled, and so long as he is claiming and seeking to recover property or money from the bankrupt alleged to belong to the estate and to be wrongfully withheld or concealed, is a "party in interest," and may file and prosecute specifications of objections to the bankrupt's discharge.

In the case of *In re Barrager* (D. C.) 191 Fed. 247, it was held that, where certain persons were named in the bankrupt's schedules as creditors, that fact constituted prima facie evidence that they were creditors and entitled to oppose the granting of a discharge, though they had not filed or made formal proof of their claims—citing numerous cases.

In the present case, as has been seen, the bankrupt had listed the judgment held by Pope in the name of Pope's assignor. See, also, *Collier on Bankruptcy* (10th Ed.) p. 262; *Brandenburg on Bankruptcy*, § 347; *Loveland on the Law and Proceedings in Bankruptcy*, pp. 738, 739.

The petition is dismissed, with costs against the petitioner.

THE GEORGE W. ELDER. †

(Circuit Court of Appeals, Ninth Circuit. July 7, 1913.)

No. 2,202.

1. ADMIRALTY (§ 6*)—JURISDICTION—"VESSEL"—EFFECT OF WRECK.

A steamship, engaged in commerce when she struck on a rock and was sunk, being so badly injured that she was abandoned to the underwriters and was not raised for nearly a year and a half, during which time

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied October 20, 1913.

her enrollment was surrendered, did not lose her identity as a "vessel," and remained subject to the admiralty jurisdiction.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 86-98; Dec. Dig. § 6.*

For other definitions, see Words and Phrases, vol. 8, pp. 7297-7301.]

2. MARITIME LIENS (§ 60*)—OREGON STATUTE—DRY DOCK CHARGES.

B. & C. Comp. Or. § 5706, which provides that every boat or vessel used in navigating the waters of the state shall be subject to a lien for wharfage or anchorage, etc., gives a lien for charges for the use of a dry dock by a vessel while being repaired, which is enforceable in a court of admiralty.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 98; Dec. Dig. § 60.*

Maritime lien created by state laws, see note to *The Electron*, 21 C. C. A. 21.]

3. WHARVES (§ 16*)—PORT OF PORTLAND—RIGHT TO CHARGE FOR USE OF DRY DOCK.

B. & C. Comp. Or. § 4639, which authorizes the port of Portland to construct and maintain a dry dock, also gives it authority to charge a vessel for its use while being repaired.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. §§ 13-18; Dec. Dig. § 16.*]

Appeal from the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Suit in admiralty by the Port of Portland against the steamship *George W. Elder*; J. H. Peterson and C. P. Doe, claimants. Decree for libellant, and claimants appeal. Affirmed. For opinion below, see 196 Fed. 137.

Milton W. Smith, of Portland, Or., for appellants.

Wood, Montague & Hunt, of Portland, Or., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. On the 21st of January, 1905, the steamship *George W. Elder*, having her home port at Portland, Or., and while engaged in the coastwise trade between Portland and California points, struck a rock and sank in the Columbia river. After several unsuccessful attempts to raise her, the owners abandoned the vessel to the underwriters, who subsequently sold her to the claimant Peterson. On the 31st of December, 1905, her enrollment was surrendered. After Peterson's purchase, the claimant Doe acquired an interest with him in the ship. Further efforts to raise her were made, which proved successful on the 21st of May, 1906—about a year and four months after she had sunk. The vessel was then taken to the dry dock belonging to the libellant at St. John's, Or., and there docked May 29, 1906. From that time until the 18th of September, 1906, she remained on the dock undergoing repairs and alterations, which were intended to and did fit her to resume her business as a coastwise steamer plying the waters of the United States. When the vessel left the dry dock, and the libellant sought to collect its stated amount for dry dockage and incidental services, the claimants refused to pay a balance of \$4,788,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to enforce which demand the libel was brought, and sustained by the court below.

The claimants have brought the case here by appeal, contending, first, that the court below was without jurisdiction; second, that the libelant is without power to charge vessels for dry dockage; third, that the charges made by the libelant, if legally made, are unreasonable; and, fourth, that the service rendered did not give the libelant any lien.

[1] Portland being the home port of the vessel, it is conceded that no lien exists under the general maritime law for the service rendered by the libelant; but if by the statute of the state a lien was given, then it does not admit of question that it was a maritime lien, enforceable in admiralty in the courts of the United States. The *J. E. Rumbell*, 148 U. S. 1, 11, 13 Sup. Ct. 498, 37 L. Ed. 345; The *Glide*, 167 U. S. 606, 624, 17 Sup. Ct. 930, 42 L. Ed. 296; The *Robert W. Parsons*, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. Ed. 73. It is insisted, however, on behalf of the appellants, that at the time the repairs were made and the services rendered "the alleged ship was not engaged in commerce or navigation—it was dead," says appellants' proctor, and should be considered as one that never had been so engaged. We do not think so. The fact that the vessel while on one of her voyages was so badly damaged as to make it impossible to raise her for nearly a year and a half does not alter the fact that she was engaged in commerce and navigation when her injury occurred, and while the record shows that the damage was very serious, resulting in bending her keel and breaking it in three places, and in breaking and bending her keel plates, and in other serious damage, her character as a vessel was in no wise affected. The efforts to raise her were for the purpose of repair and her restoration to the service in which she was engaged when injured. She had lost neither her hull, machinery, nor equipment. Her hull, it is true, had a hole stove in it, and she was otherwise badly damaged; but no better evidence of the fact that she was capable of repair and of restoration to navigation and commercial service could be had than the fact shown by the evidence that she *was* raised, towed to the dry dock, placed thereon, repaired, and thereupon resumed her business of plying the waters of the United States in the coastwise trade. The circumstance that in the accomplishment of all this much time was consumed is unimportant. It in no way changed the identity of the vessel, which all the time remained the same. True, while lying in the dry dock she was idle; but she was being made ready to resume her voyages. Her position was wholly different from that of a vessel purposely withdrawn from navigation, or laid up because her field of operation is for some reason closed. *Hardy et al. v. Ruggles*, Fed. Cas. No. 6,062; The *Progresso* (D. C.) 46 Fed. 292; The *Marion S. Harris*, 85 Fed. 798, 29 C. C. A. 428; The *Cornelius Vanderbilt* (D. C.) 86 Fed. 789; 26 Cyc. 764, and cases there cited.

[2] By section 5706 of *Bellinger & Cotton's Annotated Codes and Statutes of Oregon* it is provided, among other things, that:

"Every boat or vessel used in navigating the waters of this state or constructed in this state shall be liable and subject to a lien—

"1. For wages due to persons employed, for work done or services rendered on board of such boat or vessel;

"2. For all debts due to persons by virtue of a contract, expressed or implied, with the owners of a boat or vessel, or with the agents, contractors, or subcontractors of such owner, or any of them, or with any person having them employed to construct, repair, or launch such boat or vessel, on account of labor done or materials furnished by mechanics, tradesmen, or others in the building, repairing, fitting, and furnishing, or equipping such boat or vessel, or on account of stores and supplies furnished for the use thereof, or on account of launch ways constructed for the launching of such boat or vessel;

"3. For all sums due for wharfage, anchorage, or towage of such boat or vessel within this state;

"4. * * *

In Benedict's Admiralty (3d Ed.) 283, it is said:

"The pecuniary charge in the nature of rent to which vessels are liable for the use of a dock or wharf is called wharfage or dockage, and is the subject of admiralty jurisdiction."

It is not disputed that the use of a dry dock was essential to the making of the repairs necessary for the vessel in question, nor that the libellant furnished the dock so used, and rendered the incidental services charged for. We agree with the court below that the terms of the state statute are broad enough to embrace the service so rendered. That the maritime character of the contract here involved is not affected by the fact that the repairs were made in a dry dock was distinctly held by Supreme Court in the case of *The Robert W. Parsons*, supra.

[3] The power of the port of Portland to construct and operate a dry dock is conferred by section 4639 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon, which reads as follows:

"The said the port of Portland shall have power to, in its discretion, acquire, own, and hold a site for, and to erect, hold, own, and operate a dry dock at and within the boundaries of the Portland [port] of Portland, on the Willamette river, on the terms and conditions following, that is to say:

"1. That the said dry dock shall be not less than of a sufficient size and capacity to accommodate vessels of four hundred feet in length;

"2. That the same shall be constructed of the style or pattern known as a floating dry dock; that is, so as to float, and rise and fall with the water in the river;

"3. That said dry dock shall be permanently located in or on a site to be secured therefor by purchase, lease, or gift, and which shall be so excavated as to allow of the dock floating therein, which site shall be on the boundaries of the port of Portland;

"4. That said dock shall be so located and constructed as that at extreme low water in the Willamette river the same shall admit vessels drawing twenty feet of water: Provided always, that nothing herein contained shall be so construed as to authorize the said the port of Portland to carry on the work of repairing, cleaning, or painting vessels, but that, under such rules, regulations, and charges as the said the port of Portland may make, and that said dock shall be at all times open to various mechanics of the city of Portland for the performing of such work."

The point of the appellant that the libellant was not authorized to charge for the service in question rests upon the contention that the meaning of the above-quoted section is that the dock is only for the use of mechanics having contracts to repair ships, and was not in-

tended for the use of any shipowner. We are of the opinion that the position is wholly untenable.

We further agree with the court below that upon the evidence in the case the libellant is not properly chargeable with the delay complained of by the claimants, or any part of it.

The judgment is affirmed.

BARRON v. ALEXANDER.

(Circuit Court of Appeals, Ninth Circuit. July 7, 1913.)

No. 2,171.

NAVIGABLE WATERS (§ 39*)—RIPARIAN RIGHTS—MAINTENANCE OF FISH TRAP IN ADJACENT WATERS.

The owner of a tract of land in Alaska fronting on Chatham Strait at a point where they are 12 miles wide *held* not entitled to an injunction to restrain another from constructing and maintaining a fish trap in the navigable waters in front of said land shown not to prevent or interfere with his access to the waters of the strait.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. § 39.*]

Appeal from the District Court of the United States for the First Division of the District of Alaska; Thomas R. Lyons, Judge.

Suit in equity by James T. Barron against Claire J. Alexander. Decree for defendant, and complainant appeals. Affirmed.

John R. Winn and N. L. Burton, both of Juneau, Alaska, for appellant.

Z. R. Cheney, of Juneau, Alaska, for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. This suit was brought by the appellant in the court below to obtain an injunction against the defendant thereto (appellee here) preventing the latter from completing a fish trap that he had commenced to erect in front of a 5.27-acre tract of land fronting on the south shore of the navigable waters of Chatham Strait, about five miles north of Hawk Inlet, in the district of Alaska, which upland the plaintiff alleged in his original complaint, and the trial court found, he owned. What the defendant did is thus alleged in that complaint, and substantially repeated in the amended and supplemental complaint afterwards referred to:

"On or about the 14th day of March, 1911, the above-named defendant, his agents, servants, and employes, entered upon the above-described survey No. 804 (covering the 5.27 acres), and upon the navigable waters directly in front of said described land, with a pile-driver and piles, and commenced to drive piles upon the tidelands and waters immediately in front of and abutting upon the piece or parcel of land above described and embraced within said survey No. 804; that ever since said time they have been and they are now driving piles upon said tidelands and water immediately in front of and abutting on said piece or parcel of land; that the driving of said piles in front

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of plaintiff's land as aforesaid interferes with and obstructs his free egress and ingress to the navigable waters of said Chatham Strait and his right of free access to the deep and navigable waters of said Chatham Strait."

In his answer to the original complaint the defendant denied that he or any of his agents or employes ever entered upon the tidelands in front of the plaintiff's said tract, but admitted that he had driven piles and constructed a fish trap in the navigable waters of Chatham Strait in front of the plaintiff's land, and denied that such acts of his interfered with or obstructed the plaintiff's free ingress to or egress from the said navigable waters. And as an affirmative defense the defendant set up, among other things, that Chatham Strait is a large arm of the Pacific Ocean, navigable for all sizes of vessels, and about 200 miles in length, and has an average width of about 15 miles; that at the place where the defendant constructed his fish trap the strait is about 12 miles in width, in all parts of which the ocean tides regularly ebb and flow; that the waters of said Chatham Strait abound in fish, salmon being especially abundant, and that the said waters constitute a fishery, free, public, and common to all persons; that on or about November 1, 1910, the defendant, and others interested with him in business, located a place in the said strait about two miles south of Funter Bay on the shores of Admiralty Island and in the open navigable waters of the strait for the purpose of constructing a fish trap for taking salmon; that the place so located by the defendant is a valuable fish trap site for the reason that large schools of salmon abound in the immediate waters, and was unoccupied and unappropriated by any one—

"engaged in the fish business or in any other kind of business except commerce and navigation; that it was open, navigable water; that after so locating said place as aforesaid, defendant and his associates made soundings and thereafter, to wit, on March 14, 1911, at great expense procured piles and a pile-driver and steamboat, all of which defendant used in the construction and erection of a fish trap upon the location above mentioned; that defendant drove said piles and constructed said trap entirely in the open, unoccupied, unappropriated, navigable waters of said Chatham Strait below lowtide lands of Admiralty Island; that the place where said trap was so constructed and driven by defendant is, as defendant is now informed, directly in front of land claimed by the plaintiff and called Nonmineral Survey No. 804."

The record shows that after a preliminary restraining order was issued the matter came on for hearing before the court, upon affidavits and oral testimony on the part of the respective parties, resulting in the dissolution of the restraining order, and that subsequently the plaintiff filed an amended and supplemental complaint in which he alleged, among other things, that he is the president of and largely interested in a certain named corporation owning and operating a large salmon cannery at Funter Bay, Alaska, about four miles from the site in question, and that it has at all times been the intention of the plaintiff to use the upland tract referred to "and the right of way out to deep water the entire width of said land as a fishing site and station, all of which is necessary to have and hold in order for plaintiff to successfully carry on the cannery business in which he is engaged"; that, as soon as the plaintiff became aware that the defendant was driv-

ing piles in the waters in question, the plaintiff forbade the same and commenced the suit and procured the restraining order referred to; and that upon the dissolution of that order the defendant completed his fish trap, which—

“was knowingly and maliciously and wrongfully done by said defendant with full knowledge of plaintiff's rights, and knowing full well that it would entirely and completely cut off and obstruct plaintiff's right of way from his upland out to deep water and navigable waters of said Chatham Strait, and the same has entirely obstructed, cut off, and rendered impossible plaintiff's ingress and egress to and from his land to deep and navigable waters of said Chatham Strait with gasoline boats, small steamers, and in fact any and all water crafts of any and all sizes except perhaps row boats, which has caused and is causing this plaintiff great irreparable damages.”

The defendant in his answer to the amended and supplemental complaint put in issue all of its averments except those relating to the navigability of the waters in question and in respect to the dissolution of the temporary restraining order, and as an affirmative defense set up substantially the same matters alleged in his answer to the original complaint, which affirmative allegations were put in issue by the reply of the plaintiff.

The trial of the issues between the parties resulted in findings of fact made by the court, to the effect that the plaintiff is the owner and entitled to the possession of the 5.27-acre tract of upland, and in these further findings:

“That said tract of land abuts on Chatham Strait, an arm of the North Pacific Ocean; that in the spring of 1911 the defendant commenced the construction of a fish trap in the waters of Chatham Strait opposite and in front of the tract of land hereinbefore described; that subsequently and before the trial of this action the defendant completed the construction of said fish trap; that said fish trap and the whole thereof, including the lead line, are situate in the waters of Chatham Strait and below low-water mark; that defendant's fish trap does not in any manner interfere with the free ingress and egress to and from the premises hereinbefore described to the deep water of Chatham Strait, nor from any part of said premises to said deep water of said Chatham Strait; that the operation of said fish trap will not obstruct or interfere with the free ingress to or egress from the land hereinbefore described; and that none of the acts of the defendant with reference to the construction, maintenance, or operation of said fish trap have or will obstruct or interfere with the plaintiff in the exercise of his right to free and unobstructed access to his land and every part thereof from the deep waters of Chatham Strait or from his land, as hereinbefore described, to the navigable waters of said Chatham Strait.”

The above findings of fact, being based upon very substantially conflicting evidence, are, under the well-established rule, conclusive here.

Moreover, the plaintiff's own testimony, as well as other evidence in the case, clearly shows that his object in bringing the suit was to enable him to construct a fish trap in the identical place occupied by the trap of the defendant, and not to a desire to wharf out from his upland or otherwise reach the navigable waters of the strait. It is not contended that the trap here in question falls within the prohibition of section 3 of the Act of Congress of June 26, 1906, c. 3547, 34 Stat. 479 (U. S. Comp. St. Supp. 1911, p. 1228), entitled “An act for

the protection and regulation of the fisheries of Alaska," which provides:

"That it shall be unlawful to erect any dam, barricade, fence, trap, fish wheel, or other fixed or stationary structure, except for purposes of fish culture, in any of the waters of Alaska, at any point where the distance from shore to shore is less than 500 feet, or within 500 yards of the mouth of any red salmon stream where the same is less than 500 feet in width, with the purpose or result of capturing salmon, or preventing or impeding their ascent to their spawning grounds, and the Secretary of Commerce and Labor is hereby authorized and directed to have any and all such unlawful structures removed or destroyed."

We see no merit in the appeal, and the judgment is, accordingly, affirmed.

EDENBORN v. SIM.

SAME v. ALDER.

(Circuit Court of Appeals, Second Circuit. June 27, 1913.)

Nos. 264, 265.

1. APPEAL AND ERROR (§ 1017*)—REVIEW—REFEREE'S FINDING.

A referee's finding, in an action to recover a contribution to a syndicate agreement for fraud, that there was no actual fraud, but that defendant was guilty of constructive fraud, in that as agent for the subscribers he failed to disclose that he was interested in one of the properties to be purchased by the corporation in process of promotion, was conclusive on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3911, 3961, 3996-4005; Dec. Dig. § 1017.*]

2. APPEAL AND ERROR (§ 842*)—SCOPE OF REVIEW—COMPLAINT—SUFFICIENCY.

Whether a complaint states a cause of action is a question of law arising on the face of the record, which is reviewable on a writ of error in connection with the question whether the facts found by the referee support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316-3330; Dec. Dig. § 842.*]

3. CORPORATIONS (§ 573*)—STOCK SUBSCRIPTIONS—CONSTRUCTIVE FRAUD.

A syndicate agreement provided for the purchase of stock of an existing corporation and certain coal lands, and for the sale of the property to the corporation as reorganized, the stock of which was to be issued to the syndicate subscribers. The property was purchased, the corporation reorganized, and the stock issued, when it was discovered that one of the syndicate managers had been personally interested in property sold to the reorganized corporation. *Held*, that any right of the subscribers to rescind for the manager's fraud must be worked out through the reorganized purchasing company, since there could be no rescission without restoring such manager to his former position, and, the contract having been fully executed, there remained no right in the individual subscribers to rescind.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2293-2296; Dec. Dig. § 573.*]

4. CORPORATIONS (§ 30*)—ORGANIZATION—SYNDICATE AGREEMENT—SECRET PROFITS.

Where one of the managers of a syndicate organized to reorganize a corporation made a secret profit by selling certain property in which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

he was personally interested to the corporation, such profit may be recovered by the company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 97-100; Dec. Dig. § 30.*]

In Error to the District Court of the United States for the Eastern District of New York.

Actions by James Sim and by Thomas P. Alder against William Edenborn. Judgment for plaintiff in each case, and defendant brings error. Reversed. Certiorari granted by the Supreme Court of the United States.

See, also, 198 Fed. 928.

M. W. Littleton, of New York City (Owen N. Brown and Arleigh Pelham, both of New York City, of counsel), for plaintiff in error.

Theron G. Strong, of New York City, for defendants in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. A syndicate agreement recited that the subscribers deemed it advisable to raise \$2,500,000 for the purchase of the ownership, control, and possession of the United States Iron Company and of a valuable coal property, and for the construction of certain furnaces and ovens, and for working capital, and it provided that the defendant, who was also a subscriber to the syndicate, with two other subscribers (who will not be mentioned again) should be managers; that the subscribers agreed severally with each other and with the managers that if a subscriber failed to carry out his agreement the managers might forfeit any moneys paid by him, and also hold him liable for any damages to the syndicate; that each subscriber made the managers his agents and attorneys; and that nothing in the agreement should make the subscribers partners.

It was originally intended to organize a new company, with a capital of \$2,500,000, the syndicate subscribers to receive stock at par for the amount of their subscriptions. Subsequently the managers, for the purposes of economy, decided to use the charter of the United States Iron Company, and to that end increased its authorized capital from \$1,000,000 to \$2,500,000 and changed its name to the Sheffield Coal & Iron Company. At the time the agreement was signed the defendant Edenborn, who subscribed the sum of \$500,000, owned 5,365 shares of the 9,250 shares of capital stock of the United States Iron Company outstanding; Ellwood, who subscribed \$300,000, owned 2,200 shares; and the estate of Williams, which subscribed \$51,800, owned 518 shares in the same company. All of these holdings were surrendered by the defendant Edenborn, as manager, to the reorganized company at 70 per cent. of their face value; the balance of the subscriptions of the defendant, Ellwood, and the Williams estate being paid in cash.

The plaintiffs, on learning that the defendant, when the syndicate agreement was executed, was personally interested in one of the properties to be purchased, and, while acting as agent for the syndicate, was selling his own property to it, rescinded their contracts as having been induced by fraud, and brought these actions against the defendant

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for the amount of the subscriptions that they had paid, tendering him the shares that they had received in the reorganized company.

[1] The referee held that he was bound by the decision of the District Judge, fortified by that of the Court of Appeals in *Heckscher v. Edenborn*, 203 N. Y. 210, 96 N. E. 441, holding that the complaint stated a good cause of action, and that the only question before him was whether fraud, actual or constructive, had been established by the evidence. Upon this point he found that there was no actual fraud, but that Edenborn, being the agent of each of the syndicate subscribers, was bound to disclose to each that he was interested in one of the properties to be purchased, and was as agent selling his own property to the syndicate in payment of a part of his subscription. His failure to do this was held to be a constructive fraud. He also found that the plaintiffs were not guilty of laches. Upon this writ of error these findings are binding upon us and they support the judgment. *David Lupton's Sons v. Auto Club*, 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177.

[2] But we are authorized to re-examine the question whether the complaint states a cause of action. This is a question of law arising upon the face of the record, and raises the question whether the facts found by the referee support the judgment he entered. *Andes v. Slau-son*, 130 U. S. 435, 9 Sup. Ct. 573, 32 L. Ed. 989.

[3] Consideration of the agreement satisfies us that the defendant, as manager, was made the agent of himself and of every other subscriber separately in order to repel any inference of partnership between the subscribers. It was, of course, necessary to have some one to represent them all in carrying out the scheme. The performance by the defendant of his duties as manager was for and on behalf of the whole syndicate, and not for and on behalf of any one subscriber. He received the subscription of each subscriber on behalf of all, and made the contemplated purchase and outlays on behalf of all. So when, in carrying out the scheme agreed upon, the defendant sold his stock in one of the properties to be purchased, viz., the original United States Iron Company, to the reorganized Sheffield Coal & Iron Company, he sold it to that company as successor to the rights of all the subscribers to the syndicate. Conceding that it was a constructive fraud on his part not to inform the subscribers of his personal interest, that fraud was upon the whole syndicate when the purchase was proposed, and upon the reorganized Sheffield Coal & Iron Company when the purchase was made. It is a condition of rescission that the status quo shall be restored. How could any individual subscriber, by tendering the defendant his stock in the reorganized company, representing a proportionate interest in other properties greatly exceeding in value the amount of the defendant's interest in the original capital of the United States Iron Company, and demanding back his whole subscription, restore the defendant to his original position? And how could the defendant be made a nonsubscriber as to such of the syndicate subscribers as did not know of his personal interest in the original company and a subscriber as to those who did? We think that, if the syndicate

subscribers have any right of rescission, that right must be worked out through the purchasing company.

[4] Moreover, we do not see how even it could upon rescission restore the defendant to his original position. It may well happen that because of the peculiar situation of any particular case, no right of rescission exists in favor of one who has been led by fraud into a complicated agreement which has been fully executed. We think this such a case. On the other hand, any profit made by the defendant, or any damage sustained by the purchasing company as a result of this particular fraud, may be recovered by it. The result of the decision in the Court of Appeals would make a manager in a case like this, who had sold his own property to a syndicate for \$1,000 without disclosing his personal interest, liable for the loss resulting from failure of the entire operation—perhaps \$2,500,000. This strikes us as a conclusion to be avoided, if possible. Where judges have differed as much as they have in this case, no conclusion can be reached with confidence; but we arrive at that of the Appellate Division in *Heckscher v. Edenborn*, 131 App. Div. 253, especially for the reasons expressed by Justice Miller at page 266, 115 N. Y. Supp. 673.

The judgment is reversed.

FERRELL v. PRAME et al.

(Circuit Court of Appeals, Sixth Circuit. June 13, 1913.)

No. 2,315.

1. APPEAL AND ERROR (§ 1009*)—REVIEW—REVERSAL—FURTHER PROCEEDINGS.

Where, in a suit to restrain a corporation from operating a business in competition with complainant, in alleged violation of a contract between complainant and P., who it was claimed had organized the corporation to evade the contract, it appeared that the corporation was promoted and organized by P.'s son-in-law, who lived and bore close and confidential relations with P., and after plaintiff had called various stockholders of defendant as witnesses, and claimed that their testimony taken together set forth his theory sufficiently to shift the burden of proof to defendants, they continued to rely on their denials of any fraud or subterfuge, and insisted that complainant's burden had not been satisfied, and introduced no proof in their own behalf, a decree dismissing the bill would be reversed and the cause remanded for further proceedings that additional proofs might be taken and the case determined on the facts, and not by an application of rules as to shifting burdens.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

2. WITNESSES (§ 276*)—ADVERSE PARTIES—CONCLUSIVENESS OF TESTIMONY—CROSS-EXAMINATION.

Where, in a suit to restrain a corporation alleged to have been fraudulently organized by P. to enable him to violate a contract with complainant not to engage in a competing business, complainant was compelled to call as his witnesses certain of the defendants interested in the corporation and adverse to complainant, he was not bound in any controlling way by their statements, and was entitled to cross-examine them as adverse witnesses.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 976-978; Dec. Dig. § 276.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Northern District of Ohio; William L. Day, Judge.

Suit by Albert T. Ferrell against Frank J. Prame and others. From a decree dismissing the bill, complainant appeals. Reversed and remanded for further proceedings.

Howell, Roberts & Duncan, of Cleveland, Ohio, for appellant.

G. C. Willet, of Cleveland, Ohio, and W. J. Geer, of Galion, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Ferrell and Prame were in partnership; Ferrell bought Prame's interest, and Prame agreed not to engage in a competing business. He violated this agreement, and Ferrell secured an injunction, the issue of which was affirmed by this court. *Prame v. Ferrell*, 166 Fed. 702, 92 C. C. A. 374, q. v., for fuller statement of facts. Thereupon friends of Prame organized the International Manufacturing Company, which bought his machinery and conducted a business like that in which he had been engaged. Ferrell filed a supplemental bill against this corporation and its stockholders and Prame, alleging violation and evasion of the decree; this bill was finally dismissed; and Ferrell now appeals.

In the view which we take of the case, it becomes immaterial now to determine whether such degree of succession by the new company to Prame's established business as appears by the record is sufficient of itself, and though in good faith, to entitle plaintiff to any relief, and also whether the dependency of the new business upon the patents, issued to Prame as described in the former opinion, makes it obnoxious to Ferrell's rights. Both these inquiries become unimportant if in fact the transfer from Prame to the new company was dominantly colorable; and so we come to consider, as the presently controlling question, whether the new business is what it purports to be, one wholly independent from Prame, or whether it is materially still Prame's business under false colors.

[1] It appears that the new corporation was promoted and organized by defendant Kaylor; that Kaylor is in the position of son-in-law to Prame, living in Prame's family and bearing to him very close and confidential relations; that Kaylor's own stock was paid by a book-keeping shift between himself and Prame incidental to another business in which they were interested; that subscriptions by some stockholders were made at Kaylor's request without investigation, were accompanied with a proxy to Kaylor, and that the business has never received any further attention from such subscribers; and that Kaylor has been, from the beginning, through apparently permanent proxies from ostensible subscribers, invested with the entire control of the business. The record was left in very unsatisfactory shape. Complainant called various defendants as witnesses, and claimed that their testimony, taken altogether, supported his theory sufficiently to shift to defendants the burden of explanation. Defendants relied upon the de-

nials, in their testimony, of any fraud or subterfuge, insisted that complainant's initial burden had not been satisfied, and took no proofs on their behalf. The details regarding the disposition of the money said to have been paid were left untouched—details like Prame's various bank accounts or other books, in which, naturally, there would be records of his receipt and use of the sums of money claimed to have been paid to him. Courts should not be called upon to dispose of such issues by applying technical rules as to shifting burdens. Proofs are for the purpose of developing the facts, and when each party deliberately fails to exhaust the subject, relying on the weakness of his adversary's case and not on the strength of his own, it may appear, as we think it here appeared, to be well within the discretion of the trial court to direct the taking of testimony to be further pursued, so that the proofs might perform their full function.

But the present case was left to depend upon whether the story of Prame's alleged transfer was, in any material part, too doubtful to be accepted, unless further corroborated. Without now passing upon other features (like the Dick brothers' subscription), which we assume will be persuasively either confirmed or disputed, we think there was one subject upon which, as the record stood, the burden was upon defendants to furnish corroboration. Defendant Monteith testifies that he purchased the two patents from Prame for \$6,000; that he subscribed for the same amount of stock in the new company; that he turned the patents over to the company in payment of his subscription; and that he paid Prame by giving his note for \$6,000. It also appears that Mr. Monteith is a banker and a man of business experience and pecuniarily responsible; that he did not pay the note, but gave a renewal, without interest; that he made no investigation regarding the validity or scope of the patents; that he had no particular knowledge of the business in which he was taking stock; that he had a long-standing acquaintance with Prame, who was also a banker in a nearby town; that, as stockholder, he executed to Kaylor a power of attorney; and that he has never paid any attention to the business. The sum of all these things is possibly reconcilable with a real and actual purchase by him of these patents from Prame and with a real and actual interest by Monteith in the new business to the extent of \$6,000; but they require further explanation and support before they can be accepted at their face value. The natural presumption from these things is that the transaction was a subterfuge and that the stock in fact belongs to Prame.

[2] We think the decree below should be reversed and the record remanded for further proceedings. Under circumstances like those here present, complainant should not be bound in any controlling way by the statements of the defendants in adverse interest whom he was compelled to call as his witnesses, nor prevented from a thorough examination and inquiry of the character of cross-examination. We are persuaded that such an exhaustive resort to all sources of information, either by the parties voluntarily or by direction of the court, will make a record from which the trial court can determine the issues with much better satisfaction than was possible upon the hearing so far had.

The appellant will recover the costs of this court against the company, Prame, Monteith, and Kaylor, the only appellees upon whose conduct the present reversal depends.

In re WESTON.

(Circuit Court of Appeals, Second Circuit. June 27, 1913.)

No. 171.

1. BANKRUPTCY (§ 413*)—DISCHARGE—SPECIFICATION OF OBJECTION—AMENDMENT.

A specification of objection against a bankrupt's discharge alleged that the application should not be granted because the bankrupt, while conducting a brokerage business in Buffalo, N. Y., during the years 1906, 1907, and 1908, failed and neglected to keep any books, with full and complete knowledge of the importance and necessity of books and records in the brokerage business, and with intent to defraud and deceive the undersigned objecting creditors and others. *Held*, that such specification, while inapt, was sufficient to sustain an amendment to conform it to the statute, reciting that the bankrupt, with intent to conceal his financial condition, failed to keep books of account or records from which such condition might be ascertained.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 712-718, 725, 727; Dec. Dig. § 413.*]

2. BANKRUPTCY (§ 409*)—DISCHARGE—OBJECTIONS—FAILURE TO KEEP BOOKS.

A bankrupt operated a brokerage business, telegraphing orders to a firm in Cincinnati, and receiving a commission of one-fourth of 1 per cent. The orders were given verbally, and a memorandum was made thereof on a piece of paper, which was put on a spindle and afterwards transferred to a sheet of the day's transactions. Such sheets were kept until all trades were closed out, and then consigned to the waste basket about once a month. He had a bank account and a bank book, but kept most of his money in a safe, disbursing it as cash. His customers deposited a small margin, and actual deliveries were not contemplated. He kept no other books. *Held*, that such facts indicated an intent on the bankrupt's part to conceal his financial condition by failing to keep books, and that he was therefore not entitled to a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752-757; Dec. Dig. § 409.*]

Appeal from the District Court of the United States for the Western District of New York.

In the matter of bankruptcy proceedings of William Weston. From an order denying the bankrupt's petition for discharge, he appeals. Affirmed.

A. W. Crosby, of Buffalo, N. Y., for appellant.

Grant & De Ceu, of Buffalo, N. Y. (J. J. Herman, of Buffalo, N. Y., of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is an appeal from an order of Judge Hazel in the District Court denying the bankrupt's petition for discharge. The specification of objection filed was:

"First. That such application should not be granted because of the following facts, which the undersigned charges to be true, namely: The said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

William Weston, while conducting a brokerage business in the city of Buffalo, N. Y., during the years 1906, 1907, and 1908, failed and neglected to keep any books, with full and complete knowledge of the importance and necessity of books and records in the brokerage business, and with intent to defraud and deceive the undersigned and others."

The petition was referred to the referee as special master, and the bankrupt at the first hearing moved to dismiss the specifications of objection on the ground that:

"They are insufficient, indefinite, and uncertain, and that the specifications do not specify facts which constitute legal ground for the court to deny a discharge to the bankrupt, and for the further reasons that they do not specify any legal objections to the bankrupt's discharge."

The special master permitted the specification to be amended so as to conform to the statute, viz., that the bankrupt "with intent to conceal his financial condition, failed to keep books of account or records from which such condition might be ascertained."

The bankrupt was a commission broker and had been in business since 1899. He had the usual blackboard telegraph operator and marker, but no other clerks. His customers gave verbal orders, which he transmitted by telegraph to a firm in Cincinnati to be executed, making a memorandum on a piece of paper which he put on a spindle and afterwards made up from the memorandums a list of the day's transactions on a sheet of paper. These sheets he kept "until all trades were closed out," and they were thrown into the waste paper basket about once a month. He had a bank account and bank book, but kept most of his money in his safe, disbursing it as cash. His customers deposited a small margin on their orders, and actual deliveries were not contemplated. His profits were in the shape of a commission of one-fourth of 1 per cent., paid him by the firm to which he transmitted his customers' orders. Transactions with this firm were settled every day; the daily sheet showing whether he owed it or it owed him, and how much.

The referee found that the bankrupt had failed to keep any books of accounts or records with intent to conceal his financial condition, which was the sole ground of objection before him, and recommended that his discharge be denied. The District Judge took the same view.

[1] We think the specification of objection filed, though very inapt, fairly indicated the statutory ground upon which it rested, and that the special master had power to allow the amendment making it conform to the words of the statute. In re Hanna, 168 Fed. 238, 93 C. C. A. 452.

[2] While the daily sheets, if kept, would have shown the state of accounts between the bankrupt and the brokers who executed his customers' orders, they would not have shown what commissions he actually collected, or what he did with them. No creditor could have told how much he owed, or how much he was owed. While the act does not expressly require books or records to be kept, it denies a discharge if the failure to keep them was with the intent to conceal the bankrupt's

financial condition. We agree with the special master and the District Judge that such intent is to be plainly inferred from the way in which the bankrupt transacted his business.

The order is affirmed.

SIEMUND v. ENDERLIN et al.

(District Court, E. D. New York. June 12, 1913.)

1. PATENTS (§ 328*)—INVENTION—INSTALLATION FOR ELECTRIC WELDING.

The Siemund patent, No. 967,578, for an installation for electric welding, claim 2, is void for lack of patentable invention.

2. PATENTS (§ 22*)—PROCESS.

The functions performed by certain apparatus, when arranged under certain conditions, cannot be patented as a new method of producing the result if the so-called method is merely a description in new terms of one of the forms of the old process, as carried out by the previously disclosed necessary elements of the device, and where the so-called new method is but the description of an equivalent experimentation with the old device under conditions recognized as possible, within the knowledge of any mechanic but not previously stated in language.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 24; Dec. Dig. § 22.*]

3. PATENTS (§ 328*)—VALIDITY—PROCESS OF ELECTRIC WELDING.

The Siemund patent, No. 967,579, for a method of electric welding, is void as not for a process in a patentable sense but as in fact descriptive of an expert mechanical application of an old method with a statement of the proper adjustment and manipulation of known devices to obtain the best results. Also *held* void for prior use of the so-called method by defendant.

In Equity. Suit by Heinrich L. J. Siemund against Joseph Enderlin, Sr., and Joseph Enderlin, Jr., doing business as Joseph Enderlin, Jr., & Co. On final hearing. Decree for defendants.

John C. Pennie, of New York City (William J. Wallace and William H. Davis, both of New York City, of counsel), for complainant.

Robert W. Hardie, of New York City, for defendants.

CHATFIELD, District Judge. The complainant is the owner of patents Nos. 967,578 and 967,579, both granted August 16, 1910. No. 967,578 was based upon an application filed June 3, 1909, by Siemund, who is shown to have been a German citizen, then residing in New York, and in the business of electrical welding and repairing of marine boilers and machinery for a number of the steamship and railroad companies around the harbor. This business of electrical welding had been developed by Siemund in Germany, and he was induced to come to the United States to establish the business here, by persons familiar with the German work. In the month of June, 1908, he did the first job of repair work at New York, upon the steamer Altai of the Hamburg American Line.

At that time the art of welding by electricity—that is, by the voltaic arc—had become, to a certain extent, well known, through the teach-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ings and practice of what is called the Benardos method, and certain improvements or developments thereof.

This Benardos method was described in the United States patent to Benardos & Olszewski, No. 363,320, granted May 17, 1887, on an application filed December 3, 1885. The letters patent recite a French patent, No. 171,596, October 10, 1885; a Belgian patent, No. 70,569, October 20, 1885; an English patent, No. 12,984, October 21, 1885; a German patent, No. 38,011, November 1, 1885; a Swedish patent, No. 726, November 6, 1885; a Russian patent, No. 11,982, December 31, 1886; and a Spanish patent, No. 10,267, January 5, 1887.

Benardos and Olszewski were Russians, and their patent is so simple and has been so generally recognized that one sentence from the specifications will describe all that need be quoted:

"Our invention contemplates the formation or production of the voltaic arc between the metal to be operated on and a conductor which is brought for said purpose into proper proximity to that point on the metal which is to be operated on, the conductor forming one pole, while the metal to be worked constitutes in itself the other pole."

This Benardos method or invention is recognized in text-books, a number of which have been introduced in evidence, and in technical articles and descriptions, explaining its practical application and resultant conditions, such as the necessity for using shields over the eyes, ways to economically and easily manipulate and operate the device, the current necessary therefor, and the phenomena caused by the process.

Benardos says that the conductor which is to form one pole, usually the positive pole, is to preferably consist of a rod of carbon, but may be of other material. In addition to the process of welding, Benardos claimed the separation or working of the metal, by continuing the process of melting under the voltaic arc, until the fluid metal could be removed by the perforation of the plate, or by allowing the fluid metal to flow away from any but a horizontal surface. He also provides for adding metal or minerals when needed, and suggested the use of carbon pieces to hold the molten material against a vertical surface, or a magnetic current to draw the melted portion, if paramagnetic, against the underside of an overhead plate. See description of Benardos experiments, at Tegel, near Berlin, page 427 of the English and American Mechanic, by Van Cleve & Edwards, 1890.

It will thus be seen that the Benardos process contemplated and described the broad and variable or comprehensive application of the voltaic arc with a movable conductor, to every operation dependent upon the melting of the metal at the point of formation of the arc, either for welding or working of the surface by the process of melting.

On September 18, 1888, C. L. Coffin, of Detroit, applied for a patent, issued on January 8, 1889, No. 395,878 which claimed an improved process of electric welding by subjecting a metal conductor to the effect of the voltaic arc, which at the other pole fuses the work; that is, the two ends of the joint or parts to be welded.

Thus the Benardos method of fusing the work at the joint and the material to be melted is accomplished by the fusion of the positive con-

ductor, which is to be of metal, and which is, when molten, to fall upon the weld and furnish additional material to form the same.

The idea of "dripping metal onto the work from a metallic pencil" connected with the positive main was used as if well understood in the Unwin & Howard patent, No. 480,794, of August 16, 1892. The Coffin patent, No. 405,345, of June 18, 1889, shows a modification or improved form of device by means of which extra material, to be united with the fluid metal produced by the Benardos method, can be supplied between the points forming the ends of the arc.

Another Coffin patent, No. 507,419, of October 24, 1893, seeks to improve upon the Benardos method by applying magnetic force at the extremities of the voltaic arc, and the Coleman patent, No. 650,124, May 22, 1900, presents again the Benardos idea of reversing the current, in order to assist the removal of the metal made fluid under the voltaic arc. This patent provides means for observing the work and for adding agents, such as oxygen or sulphur, to assist in the process of fusion, to make an easier flow, and to change the composition of the metal.

All of these patents are based upon the Benardos process, and the art of welding seems to have been practiced along these general lines until the needs of the art in welding thin surfaces and in working upon the vertical or overhead surfaces of marine boilers and such structures (where repairs had to be made without removing the article to be repaired to the repair shop, or where the working space was extremely circumscribed) were recognized and supplied.

In doing this kind of work, Siemund found that a metallic conductor of small diameter ($\frac{1}{8}$ to $\frac{3}{8}$ of an inch) with a current of from 50 to 70 volts and of about 200 amperes, could be brought to the point of fusion, and the voltaic arc (which in all the previous patents and processes had, when produced by a carbon-electrode, spanned a space of 2 to 4 inches) could be shortened to such an extent that the molten particles from the electrode could be deposited upon the superficially melted surface of the work, in a series of waves or layers, along the line of the movement of the arc, and that the resultant distortion, from cooling or change of substance, was so slight as to avoid injury to the structure, while leaving a stronger weld.

Siemund therefore filed an application in the Patent Office, upon the 3d day of June, 1909, in which he set forth the circumstances under which work could be performed to advantage by his application of voltaic arc welding. He stated the materials and instruments which he employed, giving the general relation of the varying elements, viz., the current, the size of the electrode, and the length of the arc. He included descriptions of the locations in which such work could be performed to advantage, and provided for the use of what he called means for maintaining a constant load upon the dynamo; that is, by arranging for an artificial or alternative resistance (to be brought in if the voltaic arc were terminated) such as a two-way switch. He described the use of certain fluxes, as previously disclosed by Coleman and Unwin & Howard, and stated that his method was of advantage whenever it was necessary to apply the welding metal "downward, up-

ward or laterally," by having the metal follow the arc, and being deposited at exactly the point of attachment desired. He states that the arc will "bring the free end of the welding wire to a condition sufficiently molten that it will progressively detach itself from the main body portion of the wire, yet will be only sufficient to raise to a like melting point that portion of the surface of the work." He states that the new metal and the old metal are "at the same degree of temperature and in the same molten condition at their points of contact." He says that in the preferred form, practice of his claimed invention will bring the welding metal under the influence of the magnetic steel, in such manner that as it melts it will follow the lines of magnetic force leading outwardly through the electric arc to the point of desired deposition.

To accomplish this last result Siemund provided for an armature wiring of the welding clamp, to furnish a magnetic current, which he stated would repel the molten particles of the electrode. Upon comment by the Patent Office to the effect that molten metal was nonmagnetic, and that the tendency of the magnetic current would be to attract rather than to repel, the language of the application was changed to provide as above for "bringing the metal under the influence of the magnetic field."

Siemund recited 10 claims for the method of welding, and 7 claims for an insulation or apparatus to accomplish that result. The Patent Office cited certain patents as preliminary matters to be considered, and pointed out the apparent joinder of methods relating to distinct and separate inventions (if patentable) and the inclusion also of claims for devices to carry on those methods.

To meet this objection, Siemund filed, on the 19th of January, 1910, a second application, with substantially the same description and specifications, but asking for a separate allowance of the method claims then withdrawn from the prior application. The Patent Office thereupon granted a patent upon each application, on August 10, 1910. The present action charges infringement of these two patents, and the complainant has specified claims 1, 2, and 5 of the method patent, and claim 2 of the apparatus patent, as infringed by the defendants. These claims are as follows: Claim 2, patent No. 967,578:

"2. An installation for electric welding or repairing, comprising a source of direct current supply, an arc welding circuit connected therewith and including a clamp adapted to hold a piece of the welding or repairing metal, and means for maintaining the tension of the current during temporary interruptions of the arc; substantially as described."

Claims 1, 2, and 5, patent No. 967,579:

"1. The method of electric welding or repairing, which consists in establishing an electric arc between the metallic object to be welded or repaired and the welding or repairing metal, the heat of the arc being such as to raise the temperature of those portions of the object to be welded or repaired and also the temperature of the welding or repairing metal to incipient fusion and also that the new metal as it melts will become detached and unite in small increments with the parts to be welded or repaired, the intense heating of the object to be welded or repaired being restricted to the place of

application of the new metal, thereby avoiding objectionable deformation and tension strains; substantially as described.

"2. The method of electric welding or repairing, which consists in establishing an electric welding arc between the metallic object to be welded or repaired, and the end of a rod of the welding or repairing metal, the heat of the arc being sufficient to raise the parts to be welded or repaired to incipient fusion and to cause the end portions of the rod to melt and unite with substantial homogeneity to the fused portions of the piece being welded or repaired; substantially as described."

"5. In the art of electric arc welding or repairing, so correlating the current employed for the production of the arc, to the welding or repairing metal and the metallic objects to be welded or repaired as to melt off in small increments the end portions of the welding or repairing metal and to likewise fuse the immediate parts to be welded or repaired but without causing objectionable deformation or tension strains in neighboring or distant parts of the piece to be welded or repaired; substantially as described."

The device upon which claim 2 of patent No. 967,578 is drawn was stated in the specifications and drawings to consist of what is known as a two-way switch or shunt system for the diversion of the current, if the arc used for the welding was disconnected or ceased to be formed. Under certain circumstances or installations, what is called by Siemund "a certain load for the dynamo when in operation" consists merely of a certain amount of resistance or opposition to the passage of the electric current by another path than through the welding arc, so that the changes of potential will not be so abrupt and the current would not fluctuate to such an extent as if no switch or no alternative resistance were provided.

This idea was stated by the experts for both parties, and is plainly shown by the patents introduced, to comprise a part of what is generally described as the generator or system of wiring for the supply of the current, and is not at all a part of the welding device. In other words, it makes for economy and preservation of condition, but does not enter into the apparatus or method of welding itself, and was old in the art, even when applied to electric welding.

The Unwin & Howard patent (*supra*), the Edison patent, No. 264,668, September 19, 1882, as well as the Burton & Angell patent, No. 488,468, December 20, 1892, and the Burton & Angell patent, No. 537,008, April 9, 1895, have to do with what are called in the testimony merely details in the formation of the generator or in the apparatus supplying the current, and in arranging the current for various methods of electric welding.

These patents had some bearing upon claim 2 of patent No. 967,578, and show the lack of invention in the device described in that claim, but this has no bearing upon the remaining claims of patent No. 967,579.

These patents just mentioned did, however, have to do with the various claims of the Siemund patents which were amended in the Patent Office as shown by the file wrapper, and correspond to certain of the devices explained by Siemund in his specifications. But after taking the testimony, it became apparent that no invention could be based upon the application of this particular method of operation to the use of the welding arc with the apparatus described by Siemund.

The testimony also showed that the defendants have never used the two-way switch, and get the desired result from a "compound wound" generator, a well-known device. Hence the charge of infringement of claim 2, and even the claim for this installation to supply current as described therein, was therefore abandoned.

[1] This takes the question of claim 2 of patent No. 967,578 out of the case, but would seem to give the defendants the right to have a determination that this claim is invalid, from the standpoint of patentable invention. This would make it unnecessary to consider further patent No. 967,578, were it not for the fact that both this patent and patent No. 967,579 described, as has been said above, the same conditions in the welding art, the same improvements as claimed by Siemund, and exactly the same specifications and details of application or illustration as in patent No. 967,579.

Another patent, No. 948,764, issued to Kjellberg, on February 8, 1910, upon an application filed August 13, 1907, presents several questions which must be considered separately. The date of this patent makes it too late to be treated as an anticipation of Siemund. *Westinghouse Mach. Co. et al. v. General Electric Co. et al.* (D. C.) 199 Fed. 907; *Union Typewriter Co. v. L. C. Smith & Bros.* (C. C.) 173 Fed. 288; *General Electric Co. v. Allis-Chalmers Co.* (C. C.) 190 Fed. 165. But it was so treated in the Patent Office, for the date of granting preceded the consideration of the Siemund application. No interference was declared and no issue as to date of invention was there determined, for the Kjellberg patent was treated as if inoperative, or at least as not showing the Siemund method. But the Kjellberg application was earlier than any use by Siemund in this country, and we must consider whether Kjellberg was the real inventor if any patentable novelty was disclosed by him which would have infringed Siemund (if later) or would have been an anticipation if the date of issue had preceded the Siemund application. *Sundh Electric Co. v. Interborough Rapid Transit Co.*, 198 Fed. 94, 117 C. C. A. 280.

Kjellberg described a method and device for using electric welding in limited spaces, as on ship boilers and for overhead work, by the use of a metal electrode held "at a sharp angle to the line of movement." He deposits the metal in successive layers by the movement or manipulation of the arc. His metallic electrode is held in a handle which is the equivalent of the holder or clamp of Siemund, and his arc is plainly shorter than in the Benardos method as practiced or as used by Coffin and the others above named. He heats the work only at the point of welding and says that the metal of the electrode is "pulled or sucked by the electric current from the positive electrode to the negative." In other words, he manipulates the voltaic arc in such a way as to allow the deposit and adhesion of the molten metal.

But Kjellberg also claims an electrode with a cover of noncombustible, normally nonconducting material, which will form compounds or alloys with the molten metal, and which, he explains, will have the effect of causing the end of the metal electrode to melt, in the shape of a cup, thus holding the molten material in place while being distributed in the line of the weld and also attached upward, if the welding be done upon the under surface of the work.

A great deal of contention has arisen in the testimony of the various witnesses about the operation of this Kjellberg patent. The complainant's witnesses charge that the Kjellberg patent is inoperative and point out their statements to the Patent Office when Kjellberg was cited as a basis for criticism of the Siemund application. The complainant's expert also testifies that the Kjellberg device, when used as described in the patent, will not produce a welding or brazing, but will merely cause a melting of the electrode when applied to an overhead weld, and that the melted portion will drop to the floor, instead of becoming affixed to the point of the material or overhead surface to be welded, where the voltaic arc is formed.

The testimony shows experiments by experienced welders, who were instructed, and who, on the face of the experiments, endeavored to produce the results stated by Kjellberg. The good faith and sufficiency of these experiments is attacked by the defendant Enderlin, who testifies that any competent and experienced welder can cause the molten metal from the electrode to drop to the floor, and not to be deposited upward against the surface to be welded, in such a way that a spectator, looking on at a distance of from three to four feet, with the usual glass shield which is necessary when the voltaic arc is employed, could not detect that the operator was not actually carrying out his instructions to make a weld.

On the other hand, Mr. Kenyon, the defendants' expert, testifies that the Kjellberg patent is inoperative, and even goes so far as to say that the Siemund and Enderlin methods of welding are inoperative, when they seek to apply the molten or partially melted extremity or particles from the electrode upward against the under surface of the material to be welded, in the location of the voltaic arc. Mr. Kenyon testifies that no such effect could be produced unless there is a coating (even though this be extremely thin) upon the outer surface of the wire electrode, which coating will diminish the fluidity of the melted portion of the electrode, and produce what Mr. Kenyon calls a "pinching" effect toward the center where the fluidity is greater. He thinks that the flux used in certain instances by Siemund and by the defendants, and in a way furnished by an electrode cover of chalk, magnesia, and potassium, as described by Kjellberg, is sufficient to produce this pinching effect in any instance where welding is actually accomplished.

It is made apparent by the testimony of the complainant's witnesses and of the defendant Enderlin himself that the overhead process of welding can be accomplished with or without the flux coating, and with or without a cover of substances which will form alloys or furnish an electrode of secondary conductivity to the metal wire; and one witness testifies that potassium or magnesia would have no effect at all in forming such an alloy.

But the necessary conclusion from this conflict seems to be that the Kjellberg patent is inoperative only when the electrode is held in such a position and so applied that the fluid metal is not in fact caused to be deposited at the other pole of the voltaic arc and to adhere thereto. If the Kjellberg electrode be of the proper proportions and handled in the proper way, the question would be, not whether Kjellberg was op-

erative, but whether the device used was really that disclosed by the Kjellberg patent, and was actually the device used by the complainant and by the defendants.

The Patent Office allowed the Siemund patents over the objection based upon Kjellberg. An examination of the Kjellberg patent shows plainly an electrode of such diameter that the operation would be that of the Benardos method, and which would be effective only for welding materials in such position that the brazing or soldering metal could fall upon the joint (unless by the experience of the operator, that is by experiment, the metal electrode should be made of such slight diameter that the phenomenon described by Mr. Kenyon as "pinching," and by the complainant and defendants in this case as the actual projection of the small particles from the electrode by means of the voltaic arc, could take place). Kjellberg states that his electrode is to be made of solder, and that the electrode metal is to be pulled or sucked from the positive electrode to the negative electrode. He indicates that the path in which the electrode is to be moved is about the distance of the diameter of the electrode from the work, and he seems to have had in mind, and when operating (provided the operator has solved the mechanical principles of successful manipulation) to be following, the same method which the complainant has attempted to patent and which the derendants use.

But the Kjellberg patent, in claims 2 and 3, states that the invention lies in the use of the cover or outside material forming the cup in which the molten part of the electrode shall be held. If the idea of such a device was invention, it has nothing to do at least with the patent in suit, and whether or not it was operative for overhead work does not affect the present question. Claim 1 of the Kjellberg patent is as follows:

"The herein described method of welding, brazing or soldering with an electrode containing soldering material consisting in passing a current to form an arc between the electrode and the parts to be welded and then moving the electrode in a line parallel to the part where the solder is to be applied while held at a sharp angle to the line of movement, so that the soldering material will pass from the electrode in a continuous stream and be applied in rows and layers to the parts to be welded."

In this he would seem to be describing the result which he obtained when welding as is done by the complainant and the defendants in this action. But in this claim 1, Kjellberg does not describe nor state a method of performing a welding operation on an overhead surface, as distinguished from the Benardos method. He describes rather the way in which he manipulates the appliances which will accomplish overhead welding, if the method of constructing and arranging these has previously been understood.

One of the witnesses in the present case is said to operate under Kjellberg's patent and to perform successful welding on overhead work. But this witness in fact uses the Siemund methods rather than those claimed by Kjellberg. This again contradicts the contention of the experts that none of the methods described will do what they are supposed to accomplish, and indicates further that the welding operation itself is not the result of any method claimed by Coffin, Kjellberg,

or Siemund, and that these patents are all attempts, by certain successful operators, to explain what they have succeeded in accomplishing by manipulating a metallic electrode, of small diameter, when actuated by an electric current, sufficient only in voltage and amperage to produce a voltaic arc of extremely short length, and causing a melting or incipient fusion at the immediate point to which the arc is sprung upon the work.

The defendants' witnesses further show that the angle at which the electrode is held, with reference to the surface of the work, depends upon the manipulation of the individual workman, and that the result is not because of any particular angle which may be formed, but rather that the angle is but a measurement of the location of the parts when the workman is successfully carrying on the process.

The conclusion, therefore, seems necessarily to be that Coffin, Kjellberg, Siemund, the defendants, and the workmen operating under the Kjellberg patent, have all, through these various times, been applying the teachings of the Benardos method, as improved upon by Coffin and Kjellberg through the use of a metal electrode, which can be made to supply additional material by melting at the positive pole of the arc. They have all found by experience that, under certain relative conditions of size of parts and strength and quantity of current, an experienced workman can weld upon an overhead surface. They have all realized that the use of a flux may assist the process of melting, and that in some instances the presence of the flux or coating material may have the "pinching" effect, or may cause the voltaic arc to operate more directly upon the fluid metal in the center than at the surface of the electrode. They have also learned that, in the absence of such coating or fluxing material, the proper proportion and relation of the parts will allow the operation of overhead welding to be accomplished. But Siemund was the first man who described to the Patent Office, or who expressed in writing, a definite description of the proportion and arrangement of the entire apparatus and the method of manipulation of the parts thereof, when making a successful overhead weld.

[3] It would not seem that such a description of particular arrangement or adaptation to a particular purpose was the invention of a method; nor can it be held that an arrangement of the parts of a device (described in prior patents and used for a purpose and in a way shown in those patents, but, coupled with the skill of the operator, made to be effective only under certain conditions, which will produce results desirable under certain circumstances) can be patentable as a new invention, when the earlier patents show both an understanding of the possibility of these results, the existence of such an arrangement of parts and of the conditions produced, together with an understanding of what is necessary for a skilled operator to get these results, even though the reason assigned, or the explanation of the cause of the results themselves, be mistakenly stated and attributed to incorrect factors or parts in doing the work.

[2] The functions performed by certain apparatus, when arranged under certain conditions, cannot be patented as a new method of producing the result, if the so-called "method" is merely a description in

new terms of one of the forms of the old process, as carried out by the previously disclosed necessary elements of the device, and where the so-called new method is but a description of an equivalent experimentation with the old device, under conditions recognized as possible, within the knowledge of any mechanic but not previously stated in language. *Berardini v. Tocci* (C. C.) 190 Fed. 329.

Nor is mere adjustment patentable. The testimony in the case and the patents cited show that, throughout the entire development of the art of electric welding, the necessity of avoiding undue heating, immediately adjacent to the point of fusion, and to a disturbance or change in the chemical and physical structure of the material around the place where the actual welding is taking place, necessitated a careful use of the voltaic arc, and a localization or an attempt at confining the influence of the heat and the process of melting to as little of the substance or surface as would be sufficient to make a homogeneous weld.

In this way, by experiment, Siemund has stated in his application for patent the general limits as to amperage and voltage within which he can supply a current through a metallic pencil, which will produce a voltaic arc of extremely short length and sufficient only to melt the extreme end of the pencil and the immediate points where the voltaic arc is attached to the work. The length of this arc is to be kept within such limits that the flow of the detached fluid particles, under the influence of the current passing through the arc, will cause them to pass to the other extremity of the arc; that is, to come in contact with the fluid or incipiently melted surface of the work. A careful manipulation so as to shorten the arc to the requisite length, and then to remove the electrode so as to produce a fresh melted portion without having the electrode itself unite with the work upon cessation of the arc, or without destroying the arc by removing the electrode too far from the work, is recognized and stated by Siemund as the real explanation of how he was able to successfully weld an overhead surface. But this is not in his claims of invention. He cannot patent the function which the elements perform, nor can he claim every sort of device which produces the result because he has described the forces and the correlation of the parts in producing the result. *Manhattan General Const. Co. v. Helios-Upton Co.* (C. C.) 135 Fed. 785; *National Hollow Brake-Beam Co. et al. v. Interchangeable Brake-Beam Co.*, 106 Fed. 693, 45 C. C. A. 544; *Fuller v. Yentzer*, 94 U. S. 288, 24 L. Ed. 103; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136; *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. 778, 31 L. Ed. 863.

The Benardos device showed the qualities of the voltaic arc and the effect of bringing into conjunction metal rendered fluid by that arc; the Coffin patent and Coffin experiments showed the understanding of how to produce the same result through the use of the metallic electrode, and an understanding of proportioning the current, the material, and the size of the arc, to the necessities of the work, that is, so as to accomplish a weld; while Kjellberg described the application of these methods to overhead welding, explained the use of fluxes and of the

necessary manipulation of the device, so as to cause a deposit of the metal through the effect of the arc, and indicated an arrangement (which he did not fully understand and appreciate but which he did describe) where the proper relation of the parts and adjustment of the electric current is so apparent that any workman, skilled in the application of electricity, would consider it as governed by the relative size and requirements of the work, even though that statement is not expressed.

When we come to the Siemund patents, we have the first definite expression of the general limits necessary in practical work. We have a definite statement of just how the workman would operate in successfully welding by the electric current, to an overhead surface. We have the statement that this is actually accomplished, most successfully, by the use of an additional coil of wire or system of winding around the handle of the electrode, through which a magnetic current can be applied, during the process of welding, and we have a statement as to the joint use of the coating or flux, for the double purpose of improving the material after welding, and of making the melting process easier at the exact point of the springing of the arc. But, strange as it may seem, Siemund stated that he preferred to make his invention depend upon the use of this magnetic current, and in his application to the Patent Office, as shown by the file wrapper introduced in evidence, not only stated that successful welding to an overhead surface could not be accomplished unless the magnetic current was added around the electrode, but he also stated that without the use of such magnetic current and fluxes or coating, the melted material would fall to the ground and could not be made to attach to the overhead surface.

It will be noticed that Benardos used the electrode for either the positive or negative pole, and in some of the other patents, such as Coleman, the electrode is made the negative pole; the reason there being, as was recognized in the Benardos patent, that for the purpose of cutting metal or withdrawing the molten metal, a reversal of the electric current would have a tendency to cause the fluid material to move away from the point of fusion.

With this in view, and recognizing the proposition that a magnetic current will not affect molten iron positively, the Patent Office took exception to Siemund's claim that his invention consisted either in the employment of the magnetic current or in the possibility of using it to dispel the molten material, and suggested that the current was more likely to attract the same, or to cause the arc to revolve.

Siemund thereupon confined his claim for the device and method with the magnetic winding to but one claim of the patent, and stated that the voltaic arc and the electrode were merely subject to the magnetic influence, without saying that it attracted or repelled, and, in fact, without saying whether it was influenced at all by the magnetic current, but still retaining the claim of invention for a magnetized apparatus. The other claims, covering a structure without this magnetic winding, were subsequently added and were the result of the effect of the Kjellberg and Coffin patents, or of further experimenta-

tion, in which Siemund apparently realized that his original conclusions were not correct, and that welding could be done without the use of the magnetic coil. He also relinquished some of his claims as to adjustment of the current, and upon this trial the balance of these claims have been withdrawn, and, as has already been stated, claim 2 of patent No. 967,578 is apparently invalid.

For all of these reasons it seems to the court to follow that Siemund was making an expert mechanical application of the Benardos method, as modified by the Coffin and Kjellberg devices and methods, in such a way as to successfully apportion and manipulate the structure for the purpose of welding to an overhead surface. He attempted to describe these mechanical adjustments, in connection with what he thought was an invention, through the use of a magnetic coil, and what is left, after the withdrawal of the claims about the means of regulating the current and of attempting to magnetize the arc, does not show patentable invention.

The defendants have raised the objection that the language of the claims is so broad that they cannot stand independent of the statement contained in the specifications. That is, that they are not patentable except as limited by the specifications, and that they do not describe in terms the matters which the specifications show Siemund intended to be claimed as his real invention. Siemund's claims contain nothing new except as contained in the words "substantially as described," and this reference to the specifications is only available to show invention where the application of old methods is thus made to apply to a new use which of itself constitutes invention. *Hohmann & Maurer Mfg. Co. et al. v. Charles J. Tagliabue* (C. C.) 175 Fed. 87 at page 91.

This contention need not be considered in detail, for the preceding discussion answers the proposition. If the invention is patentable, the claims as limited to the nature of the invention disclosed by the patent as a whole would not be objectionable. On the other hand, if there be no invention, then the claims are merely a statement of the teaching of the prior art, and are not valid, but are no more invalid because general in form.

The conclusion that the patent is invalid is rendered much less debatable by the general evidence as to prior use. It appears from the testimony that the defendants, in attempting to practice the Benardos method but with a metallic holder, accidentally found that the formation of the voltaic arc between the holder and the work produced a welding of the holder to the work, and by further experimentation reached the use of a device, substantially equivalent to the Siemund apparatus as described in the patent, and operated under the exact method set forth in Siemund's method claims. The testimony does not show when the defendants first used the apparatus for overhead welding. But Siemund claims a method and device for welding in all positions, and does not claim invention because the device can be used for overhead welding also. His specification shows this merely as an illustration of scope and practical utility, and this was taught by the earlier patents and also invented by others in so far as it involves patentability.

The defendants use a barrel of water as an artificial quieting resistance. They have never attempted the magnetic winding around the electrode holder, and have never attempted the elaboration of alternative methods for supplying the current so as to maintain a more or less constant tension, whether the voltaic arc be in use or temporarily broken during the progress of the work, except as furnished by the use of a compound generator.

But these differences have nothing to do with any of the claims under discussion, nor with the method and devices of the Siemund patent proper, and the defendants are therefore, as was said at the outset, using substantially the identical method of the Siemund patent, and have been for such a period as the testimony shows the same devices to have been employed by them in New York harbor. The testimony shows that Siemund was brought over from Germany by inducements made to him around the years 1906-07, and because of news of his success in repairing boilers upon the German steamships. The various government authorities and large steamship companies around the harbor of New York gradually learned of the Siemund methods, as well as of those of Enderlin, and, shortly before the issuance of the patent to him, his employment of these methods was well known to the steamship trade. The persons who employed Siemund seem to have had no knowledge of the work done by Enderlin. But, on the other hand, a number of other individuals either employed or knew of the work done by the defendants, and the evidence shows conclusively that, for seven or eight years prior to the Siemund experiments, Enderlin was welding on a small scale, but still publicly, and in such a way that it is strange the matter did not become better known, by the method of electric current, of substantially the proportions needed for the Siemund method and by the use of a metallic electrode of such small size as to produce a voltaic arc, manipulated in almost the identical way which Siemund later patented.

Such use makes it apparent that Siemund was not at the time of obtaining the patent the inventor in the sense which the statute requires; and even if the particular improvements upon the Benardos method were patentable, or if the particular device showed patentable novelty, the American patent must be held invalid when tested from the standpoint of the defendants' prior use.

The defendants may have a decree.

MARCONI WIRELESS TELEGRAPH CO. OF AMERICA v. NATIONAL ELECTRIC SIGNALING CO. et al.

(District Court, Eastern District of New York. April 22, 1913.)

1. COURTS (§ 347*)—PLEADING—SET-OFF AND COUNTERCLAIM—CONSTRUCTION OF NEW RULES.

In applying the second paragraph of rule 30 of the new equity rules (198 Fed. xxvii, 115 C. C. A. xxvii), which provides that the answer "must" state any counterclaim arising out of the transaction which is the subject-matter of the suit, and that it "may" set out any set-off or coun-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

terclaim against the plaintiff which might be the subject of an independent suit in equity against him, the distinction between the mandatory and permissive provisions is not to be observed by defeating an alleged counterclaim or construing it so strictly as to make it fall in the other class from that in which it has been cast, but it should be allowed and considered if the allegations are sufficient to show that it may fall within either, and that, if within the second, it is within the jurisdiction of the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

2. COURTS (§ 347*)—PLEADING—SET-OFF AND COUNTERCLAIM—CONSTRUCTION OF NEW RULES.

The second part of such provision does not enlarge the jurisdiction of the court, and a set-off or counterclaim pleaded thereunder must be one "which might be the subject of an independent suit in equity" against the plaintiff in the court in which the suit is brought.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

3. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—SET-OFF AND COUNTERCLAIM.

In a suit for infringement of a patent the defendant may, under rule 30 of the new equity rules (198 Fed. xxvii, 115 C. C. A. xxvii), and within the reasonable limits of convenience, plead in the answer by way of set-off or counterclaim causes of action for infringement by the plaintiff of other patents relating to the same subject-matter as the one in suit, if independent suits in equity might be maintained thereon.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. § 310.*]

4. SET-OFF AND COUNTERCLAIM (§ 1*)—"SET-OFF"—"COUNTERCLAIM."

A "set-off" is generally considered to be a matter which will be capable of use as an offset to any recovery by the plaintiff. A "counterclaim" is a matter which is capable of use as a basis for a judgment for relief against the plaintiff, and, of course, may be used as a set-off as well.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1645-1650; vol. 7, pp. 6439-6444; vol. 8, pp. 7620, 7621, 7798, 7799.]

In Equity. Suit by the Marconi Wireless Telegraph Company of America against the National Electric Signaling Company and Samuel M. Kintner and Halsey M. Barrett, receivers. On motion by complainant to strike out counterclaim. Overruled.

Sheffield, Bentley & Betts, of New York City (James R. Sheffield and L. F. H. Betts, both of New York City, of counsel), for complainant.

Herbert G. Ogden, of New York City (F. W. H. Clay, of Pittsburgh, Pa., of counsel), for defendants.

CHATFIELD, District Judge. This action is based upon a charge by the complainant of infringement of United States letters patent No. 837,616, issued to Henry H. C. Dunwoody December 4, 1906, on an application filed March 23, 1906. The answer seeks to interpose a counterclaim in addition to the other defenses by which the defendants charge infringement on the part of the complainant of letters patent No. 706,744, August 12, 1902, No. 727,331, May 5, 1903 (reissued May

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

26, 1903 under No. 12,115), and No. 731,029, of June 16, 1903. These three patents set forth in the counterclaim are alleged to be the property of the defendants and, it will be noticed, are anterior in date to the patent upon which the complainant has brought suit. The Dunwoody patent has to do with an improved wave responsive or detecting device for wireless telegraph systems, composed of a mass or body of nonmetallic crystalline material. The three other (Fessenden) patents relate to receivers for currents produced by electromagnetic waves—(1) a device or receiver; (2) an improved current actuated wave responsive device by which the conductivity of the receiving circuit shall be changed; (3) a method for utilizing the energy of waves derived from signal waves by means of a body of coherent material. (The above statement of the subject-matter of each patent is intended merely to be a sufficient description for the purposes of this motion, and is not intended as a full reference to the various patents.) Upon this counterclaim the defendants ask an injunction with an accounting, and it necessarily follows that, if successful upon the counterclaim, the amount recovered upon the accounting would be available in diminution or extinction of the amount which the complainant might recover if it were successful, or might result in a judgment in the defendants' favor, over and above the complainant's recovery.

The pleadings in this action have been interposed since the equity rules (adopted by the Supreme Court of the United States in 1912) have been in force, and under rule 33 (198 Fed. xxvii, 115 C. C. A. xxvii) the complainant has made a motion to "strike out" the counterclaim, alleging that the paragraphs of the counterclaim fail to set forth facts sufficient to enable them to maintain the same, and that the allegations are insufficient in law to entitle them to the relief asked. The defendants have stated their alleged counterclaim in the following words:

"As a matter of set-off or counterclaim, arising out of the transaction which is the subject-matter of the complainant's complaint. * * *

An objection which was raised on this wording (to the effect that the suggested counterclaim on the face of the answer showed that it did not arise from that transaction) having been disposed of upon the argument of the motion, and the defendants having asked leave to modify this language so as to charge the affirmative defense, "either as a counterclaim arising out of the transaction which is the subject-matter of the suit, or as a set-off or counterclaim against the complainant, and which might be the subject of an independent suit in equity against him," it is only necessary to state the grounds upon which the amendment was asked and allowed.

Rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi) requires the defendant to set out his defense to each claim of the bill, and allows as many defenses as may be deemed essential. The second paragraph of this rule then says:

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and

such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims."

It will be noted that a counterclaim "arising out of the transaction which is the subject-matter of the suit" *must* be included in the answer. Consideration of the rule and of the subject-matter of the present action indicates that in a suit for infringement of patent the transaction which is the subject-matter of the suit does not mean, on the one hand, the patent rights alone, nor, on the other hand, the particular act of infringement alleged. Either of these might be the transaction in question, but the word "transaction" is broader in scope, yet narrower when applied to the particular set of circumstances from which the relations and rights of the parties have resulted. The same patent might have to do with entirely separate transactions, or the same infringement might result in establishing various rights, contract or otherwise. But the test of determining the transaction from which the suit arose would require a determination of the precise right (and its breach) about which the parties were litigating, and the attendant circumstances which were involved therein.

Rule 30 plainly requires that as between the parties to an equity action involving the steps to such a transaction, and the determination of rights between the parties growing out of the transaction, all claims shall be litigated in one suit, and that thus the matter shall be rendered *res adjudicata* and future litigation avoided. For this purpose the rule says that such counterclaims must be made a part of the answer in the first suit which calls into question this transaction. On the other hand, the ordinary relations of persons in business and society, whether with respect to a contract, a tort, or, for illustration, a patent, may give a defendant in his opinion a cause of action against the same party who is bringing a bill in equity against this defendant upon some transaction with which the defendant's claim has no point of contact beyond the identity of the parties to the suit.

The words of rule 30 provide that every and any such cause of action may be set off or counterclaimed by the defendant; that is, used by him, if successful, as a subtraction of diminution against the plaintiff's claim if the plaintiff be successful therein, and also available to the defendant for his own relief in case the plaintiff be unsuccessful. The inclusion of such a set-off or counterclaim without the use of a cross-bill is said to have the same effect as a cross-suit, and is made discretionary, or even optional, under the rule. The purpose of uniting independent suits is plainly to facilitate adjustments and to diminish litigation. But the doctrine of *res adjudicata* should not be invoked against a man, nor should he be charged with laches, for failing to insist upon prosecuting an independent action against some one who might happen to be suing him, if nothing were to be gained, and not even the convenience of witnesses were furthered by so doing.

[1] The distinction, therefore, between the two parts of the second paragraph of rule 30 is not to be observed by defeating an alleged counterclaim, or construing it so strictly as to make it fall in the other class from that in which it has been cast. Technical errors are to be

disregarded. Rule 19 (198 Fed. xxiii, 115 C. C. A. xxiii). The terms "set-off" and "counterclaim" as used in the statute are comprehensive, and do not seem to be intended to be mutually exclusive; that is, to be taken as requiring a matter urged in defense to fall strictly into the one class or the other.

[4] A "set-off" is generally considered to be a matter which will be capable of use as an offset to any recovery by the plaintiff. A "counterclaim" is a matter which is capable of use as the basis for a judgment for relief against the plaintiff, and, of course, may be used as a set-off as well. A counterclaim under the New York Code may arise from the "transaction," or may be "any other cause of action on contract," etc. But all matters of set-off, such as payment or claims for depreciation in value or a release, are considered as other "defenses." Sections 500 and 501, Code of Civil Procedure. But a counterclaim arising from an entirely different contract, and requiring substantially a separate verdict by jury at the trial of the plaintiff's case, goes further than to allow a cross-action upon a patent as a part of the trial of another patent case. A counterclaim falling in either class should therefore be allowed and considered (if the allegations are sufficient to show that it either arises out of the transaction or can be "the subject of an independent suit in equity against" the plaintiff) subject to exceptions which will be considered later. The mandatory requirement, therefore, is but a defense, if a future action should be brought upon a counterclaim which should have been disposed of in the prior litigation. The permissive portion of the rule, however, affords no ground of defense to future litigation, unless the cause of action has been included, and has been determined between the parties.

For this reason, therefore, as has been stated, upon the present motion the defendants have amended their answer, and we have to consider the general objections presented to the combination of four or more patent suits between the same individuals, and in this particular instance related to the same general subject-matter of wireless telegraphy, or some of the devices used in that art, but not upon their face seeming to arise from the same transaction. It may be that the alleged act of infringement by the defendants will prove upon the hearing to have to do necessarily with the very transactions by which the plaintiff is setting up its own rights, and possibly thereby infringing the patent rights of the defendant. But upon the language of the pleadings it would not seem that the motion can be disposed of upon this ground.

The plaintiff points out that between large manufacturers hundreds of infringement actions might be pending upon different patents in widely divergent fields and impossible of classification so as to base thereon any suggestion that the causes of action arose from the same transaction, or even that they had any similarity to one another, beyond being patent cases and being litigation between the same parties. But, under the language of the section, any of these subjects of litigation, if the suit could be brought in equity and could have the same effect as a cross-suit, may be united in one set of pleadings and disposed of at one trial, resulting in but one judgment in favor of the party who

might recover enough to exceed that of his opponent, and involving in this trial a number of decrees or injunctions, in the case of patents, against either or both parties, as the right to the injunction might be shown.

At this point we should consider the language of rule 26 (198 Fed. xxv, 115 C. C. A. xxv), which provides that the plaintiff may join in one bill as many causes of action cognizable in equity as he may have against the defendant. This language is also broad enough to unite a bill to set aside a transfer of real estate as fraudulent, with an action for injunction to prevent the breach of some theatrical contract, and also with an action upon a patent right for damages and an injunction as well. If under rule 26 three such causes of action or 300 if they existed could legally and properly be united, it is difficult to see why, under the provisions of rule 30, any of these 3 or 300 actions could not be united in a bill. Any such cross-suits or counterclaims could be disposed of in the same litigation, inasmuch as the parties were the same, and as to a certain extent the witnesses might have their convenience furthered, even if the convenience of the court be exceedingly strained.

We must therefore go a step further before determining what limitation there is upon either rule 26 or rule 30. It is provided in rule 26 that:

"If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials."

Under rule 30 no such provision for the convenience of the court is inserted. But it may be assumed that entirely distinct or separable controversies, even if contained in one set of pleadings, could be separated upon the trial, and would result in a succession of trials, and, if necessary, in a succession of judgments or decrees, which could be set off or counterclaimed against one another in the issuance of execution or the satisfaction of the judgment.

There is nothing inherently impossible, therefore, and nothing forbidden by the language of the rule; but, on the contrary, the rule would seem to require and direct the union of various litigations existing in equity up to the time of pleading, or, by amendment, up to the time of trial, between the parties to the litigation, and we have to consider what limitations must be observed in this particular application.

[2] It is evident that the Supreme Court cannot by rule confer jurisdiction, and that they have not intended so to do. It is evident that when they say "causes of action in equity," they mean only such causes of action as the court could entertain. We shall not attempt to classify or define the various causes of action of which the United States courts are given jurisdiction by statute, but for the purposes of this motion, and for the interpretation of the section, we shall confine consideration to causes of action which could be heard by the same court as the one acting in a suit brought by a plaintiff for infringement of patent, occurring within this district. Surely a cause of action in equity between the plaintiff and defendant, if both reside in this district, could not be brought in the United States court, unless it arises under the patent laws or some other statute of the United

States giving this court jurisdiction. Manifestly, therefore, only such causes of action could be cognizable in equity under rule 26 in this court, and only such causes of action could be interposed by a defendant as counterclaims and set-offs to an action on a patent.

It has been uniformly held in this circuit and in many other courts of the United States, that an action brought under the patent laws cannot be made to carry with it violations of other rights, of which the court does not have jurisdiction through diversity of citizenship, or under some other statute of the United States. *National Casket Co. v. New York & Brooklyn Casket Co.* (C. C.) 185 Fed. 533. The new equity rules do not enlarge this limit. Rule 26, except as modified by the necessities of convenience, allows the joinder of as many causes of action as can be properly disposed of and covered by "a final judgment." But these are only such actions as could be brought separately, and rule 26 does not compel the union of dissimilar actions, nor the inclusion in one decree of a number of various kinds of equitable relief, with various sets of accountings.

[3] By analogy, rule 30 seems to be intended to prevent useless litigation and to serve the convenience of parties by providing for the inclusion of as many causes of action (which the court of equity can entertain within its statutory jurisdiction) as could properly be disposed of in one litigation, by cross-suits, and which could be included in the necessary injunction orders and by a complete accounting in one decree. Within reasonable limits of convenience, a charge of infringement of one patent right, with counterclaims alleging infringement of three other patent rights related to the same subject-matter, and involving complications only to the extent of considering a larger number of claims, followed by a decree directing specific orders of injunction, as the case may be, and with a complete accounting as to the causes of action, seems to the court to be, when properly used, within the intent and letter of rule 30. Such a suit could be tested only by the doctrine of convenience and possibility of handling suggested by the provision in rule 26.

This seems to be in accord with the present English practice as shown in the stated case of the *Chameleon Patents Manufacturing Co., Ltd., v. Marshalls, Ltd.*, Reports of Patent, Design, Vol. XVII, No. 19, decided June 13, 1900, in the High Court of Justice, Chancery Division, in which an action for infringement and a counterclaim based upon copyright were disposed of in one trial. A case decided by Judge Dodge, in the District of Massachusetts, March 15, 1913 (*Terry Steam Turbine Co. v. B. F. Sturtevant Co.*, 204 Fed. 103), has to do with an application, under rule 34 (198 Fed. xxviii, 115 C. C. A. xxviii), to set up in a supplemental answer, a counterclaim which the defendant had not included in his original answer. The counterclaim there offered was a so-called equitable tort, and the application might have been denied in the court's own discretion, or on jurisdictional grounds, even though we do not go so far as to repeat the statement that the second part of the language of rule 30, viz., the defendant "may, without cross-bill, set out any set-off or counterclaim," applies only to such counterclaim as is described in the mandatory portion of

the rule; that is, a counterclaim arising out of the subject-matter of the transaction which is the subject-matter of the suit.

Under the former practice, a cross-bill was for discovery or to give "full and complete relief to all parties as to the matters charged in the original bill." *Stonemetz Printers' Machinery Co. v. Brown Folding-Mach. Co.* (C. C.) 46 Fed. 851, citing Story's Eq. Pl. § 389, and numerous cases. This ruling was followed in *Stuart v. Hayden*, 72 Fed. 402, 18 C. C. A. 618 (affirmed 169 U. S. 14, 18 Sup. Ct. 274, 42 L. Ed. 639), and in *Jackson v. Simmons*, 98 Fed. 768, at page 774, 39 C. C. A. 514, and is correct in stating the scope of a "cross-bill" under the old rules. The new rule 30 not only thus does away with a cross-bill, but says that "without cross-bill" any claim which could be the subject of an independent equity suit shall be set out in the answer with the same effect as a "cross-suit," so as to allow a "final judgment" on the "original" and "cross-claims." Here we have a deliberate use of new terms covering any "independent suit in equity," to have the result of a "cross-suit," and yet to be pleaded "without cross-bill" (which is seemingly recognized as the old way of pleading). In the case of the *Terry Steam Turbine Co.*, supra, the court seems to hold that the permissive way of pleading is no broader than the mandatory. If so, it is impossible to give any purposeful meaning to the greater part of the paragraph. However, to go to the other extreme, and hold that all causes of action in equity between the parties and within the court's jurisdiction can be brought in and tried, is evidently not practicable, although the rule seems to be broad enough for this construction. Some restriction should be adopted (under rule 79, 198 Fed. xli, 115 C. C. A. xli) for general limitation, and in each case the court must ultimately determine what issues can be properly disposed of in "a final judgment" in the suit, and order severance accordingly.

In the present case, while difficulty is suggested by the nature of the subject-matter and the number of claims, it does not seem that for a trial without a jury greater difficulty would be found than in disposing of four suits in what might be termed a series, and there seems to be no reason, beyond the court's natural desire to simplify its work, for striking out the counterclaim in the present action. If it should appear that some connection of events brings this counterclaim or the cause of action upon the defendant's patents into the category of matters arising "from the same transaction" as the plaintiff's own cause of action, then assuredly the court should not force the parties into the possible position of having their rights in the future shut off by the mandatory language of the first part of the section.

For all these reasons, therefore, the motion will be denied.

ADAMS & WESTLAKE CO. v. PETER GRAY & SONS, Inc.

(District Court, D. Massachusetts. July 2, 1913.)

No. 237 (C. C. 824).

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SIGNAL LAMP.

The Hamm patent, No. 651,782, for a signal lamp, covers specific improvements of construction, rather than any new principle of construction or operation, the efficiency of the lamp in respect to prevention of blowing out and prevention of sweating being due to its special form, and not to any conception of a new principle or of any generic feature of novelty; and while as a specific structure it discloses patentable novelty and invention, its claims must be limited to such structure. As so construed, *held* not infringed.

2. PATENTS (§ 170*)—CONSTRUCTION OF CLAIMS—IMPROVEMENT PATENTS.

When the improved result accomplished by a patented device is due to a more exact or refined application of old principles, care must be taken to limit the claims to those new features which give the better result.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 245; Dec. Dig. § 170.*]

In Equity. Suit by the Adams & Westlake Company against Peter Gray & Sons, Incorporated. On final hearing. Decree for defendant.

Gillson & Gillson, of Chicago, Ill., and Charles Allen Taber, of Boston, Mass., for complainant.

Richard P. Elliott, of Boston, Mass., for defendant.

BROWN, District Judge. The bill charges infringement of letters patent No. 651,782, June 12, 1900, to William S. Hamm, for improvement in signal lamps. Claims 1, 2, 5, and 6 are in suit.

"1. The combination, with a lantern, of an annular air-chamber depending thereinto remotely situated with reference to the burner and communicating with the combustion-chamber thereof, the said annular chamber comprising an inner imperforate and an outer perforated air-distributing wall, and being closed at its lower end and provided with air-inlet openings communicating with the external air, and the central passage of the annular air-chamber constituting an escape-flue for the products of combustion, substantially as set forth.

"2. The combination, in a lamp or lantern, of a casing or body having a series of openings for the admission of air, a perforated cylinder within the casing or body and secured thereto below the openings, and a cone attached to the perforated cylinder and passing through it and the top of the casing or body, substantially as set forth."

"5. The combination, in a lamp or lantern, of a casing or body, a plate in the upper part of said casing or body, an internal cone extending above and below the said plate, a perforated cylinder connected to the base of the said internal cone, an outer cone above said plate, surrounding the internal cone, and extending above the same, said outer cone being open at the top, and a cap above said outer cone, the casing or body being provided, immediately below said plate, with openings, substantially as set forth.

"6. The combination, in a lamp or lantern, of a casing or body, and an air-chamber in its upper part consisting of the plate 3, cylinder 8 and cone 10, said chamber extending into the casing or body and having a series of openings for the admission of air from without, and perforations for the exit of air into the casing or body, said air-chamber constituting means for deflect-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing and quieting the currents of air before they pass into the lantern, substantially as set forth."

The specification states that the invention relates particularly to signal lamps such as are employed in connection with railway switches, although applicable to other lamps used in railway practice and for a variety of purposes. The lamp is intended for use in the open air, and for exposure to various temperatures.

[1] One of the objects of the invention is to prevent "sweating," and thus preserve an unobstructed and brilliant light. A further object is to prevent the downward rush of air either under the top cap or through the openings provided to admit fresh air for combustion, tending to extinguish the flame. A further object is to prevent the choking up of the hot-air outlet by the heavier cold air or otherwise, which also has a tendency to extinguish or smother the flame or render it less brilliant.

The patentee states that the lamp body is preferably made of Bessemer steel, of the general character set forth in his patent No. 549,314, November 5, 1895. This shows a cone (marked "10") arranged within the upper portion or section 2 of the lantern casing. In the present invention a similar cone is employed, but the upper portion of the outer casing is differently shaped and the openings therein are differently placed. The base of the cone is also carried down into the body of the lantern. The patentee says:

"The sweating of the lenses is prevented by the increased volume of cold air which enters the lantern through the perforations in the cylinder 8, thus insuring (as nearly as possible) an even temperature on the inner and outer surfaces of the lamp body and in the lenses, which can only be secured by keeping a sufficient volume of cold air the temperature of which is substantially that of the outer air between the inner surface of the lamp-body and the central current of hot air from the burner."

"To obtain the necessary quantity of cold air within the lantern, it has been found necessary to carry the base of the cone 10 into the lantern. This, however, is not objectionable, as it is apparent that within certain limits the nearer the base of the cone 10 is to the flame the more quickly will the hot air pass through the cone and out of the lamp under the cap 1. This rapid movement of the hot air will carry the whole of it out of the lamp, leaving none to mingle with the incoming cold air, and at the same time it will effectually prevent the cold air from passing down through the cone into the lamp, which would extinguish the flame or cause it to flicker and reduce the power of the light."

In the prior patented art is also the patent to Hamm, No. 592,705, October 26, 1897, in which reference is made to "sweating"; the patentee saying:

"I have overcome this defect by constructing a lantern having a top-air admission, the air descending within the globe and to a certain extent in contact therewith to the bottom of the globe and thence to the flame. Thus a current of air of the same temperature as that of the globe (which is that of the exterior air) is always in contact therewith, any deposition of moisture thereon being prevented," etc.

The prior patent to Bourne, No. 569,572, October 13, 1896, shows a top-air admission, and it is said:

"Such air descends within the globe close to the inner wall thereof, and being cool and descending rapidly protects the globe from the condensation of such vapors as are not carried off completely through the ventilator," etc.

Bourne also says:

"One cause of the low efficiency of a lamp or gas flame as compared with the theoretical results which should be obtained from the use of a given quantity of an illuminant of standard quality is the failure to remove immediately and completely the products of combustion, which, especially in lanterns, are returned sometimes and to some extent to the point of combustion, thereby interfering with the proper supply of oxygen and occasioning imperfect combustion. Another cause, not only of low efficiency, but also of the frequent extinguishment of the flame altogether in any structure, whether it be a lamp or a lantern or a room in which there is a ventilating-opening above the flame, is the back draft which is sometimes established, especially in the case of lanterns which are exposed to currents of air. It is the object of my invention, primarily, to remove both of these causes of trouble by effecting the immediate removal of the products of combustion and by preventing the possibility of back drafts. Incidentally to the attainment of these main objects I promote the supply of oxygen to the flame, so that the combustion shall be of the proper character and a maximum of light obtained, prevent the accumulation of the products of combustion in the globe of a lantern or lamp, and consequently the deposit of watery and other vapors on the inside of the globe, which has hitherto been a serious difficulty, especially in the use of railroad, marine, and other signal lamps or lanterns in cold weather."

A similar direction of the air current is described in the patent to Miller, No. 439,672, November 4, 1890:

"The cool incoming air is drawn close to the glass, so that the temperature of the globe is kept down," etc.

It does not appear, however, that Miller was specially concerned with the problem of preventing sweating, but rather with preventing disturbance of the flame by violent blasts or strong currents of air, and with regulating the draft of incoming air and directing the current of air to the sides of the globe, in order to keep the temperature of the glass low.

The patent to Richardson, No. 72,542, December 24, 1867, and to Thomas, No. 402,204, April 30, 1889, have also been brought to the attention of the court.

It is apparent that at the date of the invention of the Hamm patent in suit there was no novelty in the expedient for guarding against sweating, which consists in introducing air at the top of the lantern into an annular air-chamber surrounding a central draft-tube through which the products of combustion escape, and delivering the air from the said annular air-chamber adjacent to the upper part of the inner surface of the wall or body of the lantern, so that the freshly admitted air may flow down the inner surface of the lantern body. The statement of defendant's expert to that effect seems fully justified.

Furthermore, the necessity of removing the products of combustion was obvious and had been expressly referred to in the Bourne patent, in language which has been above quoted.

It is conceded by the complainant that the patent does not state a correct scientific theory of the cause of sweating in lamps. The complainant's brief states:

"While it is true that Hamm did not have a scientifically correct theory as to the cause of the sweating in lamps, supposing it to be caused by the condensation of moisture carried in by the air, when in fact it arises from

the condensation of water vapor generated directly by the combustion, nevertheless he did provide an adequate remedy. That there was moisture within the lamp body, which became condensed upon its walls when the ascending vapors mixed with the incoming air, he knew, and his invention in part consisted in means for successfully preventing this admixture."

Also:

"It matters not that he thought it necessary to keep the walls cool, while in fact the thing to be accomplished was to prevent the vapors" (i. e., from combustion) "from being cooled by contact with the walls."

Complainant's expert Crew says on rebuttal:

"In order to separate these two bodies, the ascending column of water vapor and the glass wall, we might use a glass chimney, and this has sometimes been done; but the simpler and superior method is to introduce the air which is needed for combustion in such a way that it will flow in a steady, uniform, continuous, well-distributed stream of 'dry' air between the wall of the combustion-chamber and the column of ascending products."

Apparently, then, the devices of the prior art involved the same principle of separating the glass and products of combustion by means of a sheet of air enveloping the globe. It is urged, however, that in the lamp of the Hamm patent there is also a region of dead air, between the descending curtain of air and the ascending products of combustion, a region of air whose motion is insignificant compared with the steady flow of dry air over the lens or the ascending flow of combustion products, and that this is secured by a depending cylinder, extending some distance below the point at which fresh air is admitted to the combustion-chamber, combined with a horizontal velocity of the air as it is being admitted to the combustion-chamber.

It is said to be characteristic of complainant's device that the air which issues from the air-chamber is quite widely separated from the nearest of the escaping products of combustion, and that the function of the lower portion of the conical structure is to make such separation. The specification states:

"The lower end of the cylinder 8 being imperforate, the entering air current pours directly into the lamp when deflected downward by the plate 3."

After considering the complainant's contention, I am of the opinion that the features of directing the incoming air to the sides of the glass, thus separating by a curtain of air the glass and the ascending products of combustion, and also the separating of the incoming current of air from the ascending products of combustion by a depending cylinder, were features of the prior art.

It was, of course, fundamental to guard against gusts that might enter the globe or combustion-chamber, either from the air-inlets or from the chimney or outlet for products of combustion, and extinguish the flame. So far as this feature is concerned, it may be said that the testimony that the complainant's lamp does not blow out shows merely that the entrance and exit are better guarded than other devices, and upon this question the devices of the complainant and defendant are to be compared with reference to the special structures, rather than to any novelty in principle. Upon this question, also, the patent to Thomas, No. 402,204, April 30, 1889, and the patent to Miller, No.

439,672, seem to have special relevancy, though apparently these patents are not concerned directly with the problem of sweating.

Giving due weight to the evidence as to the efficiency of the complainant's device, in respect to the prevention of blowing out the flame and the prevention of sweating, this appears to be due to its special form, rather than to any conception of a new principle, or of any generic feature of novelty.

The unpatented art, which includes the Watts tail marker lamp, the Bessemer steel switch lamp, the Bessemer steel switch lamp with flat open cap, and the masthead lamp, as well as the patented art, shows that the success of the lamp of the patent in suit is due to specific improvements of construction, rather than to any new principle of operation or construction. The differences are in degree rather than in kind.

The fact that the defendant has succeeded in attaining results similar to those attained by the patentee in a case of this kind is a very slight indication of infringement.

[2] When the improved result is due to a more exact or refined application of old principles, care must be taken to limit the claims to those new features which give the better result; otherwise one who has made what is perhaps the best application of old principles may lay too broad a claim to the use of that which other improvers are also at liberty to apply.

Much stress is laid by complainant upon the argument that the patentee produced a new result. This is somewhat misleading. It is not broadly new, as we have seen, to control the force of the wind by air-chambers which quiet the gusts, to direct the air-current to the wall of the lamp, and to so separate the entrance and exit that the vapors shall not mingle. Better results of this kind are not such results as lead to the inference of any new mode of operation. To do the old thing better does not necessarily involve patentable novelty.

The complainant's supplemental brief cites many authorities upon the question of invention. It may be conceded, however, that the lamp of the patent in suit as a specific structure involves patentable novelty. The difficulty in the present case is in finding any new principle of operation, or a result new in kind, as distinguished from an improved result, due to a better and more careful application of old principles.

The complainant's contention, that if a device gives a new result it is immaterial that the inventor may have had an erroneous theory of operation, is fully recognized in *Combustion Utilities Corp. v. Worcester Gaslight Co.* (C. C.) 190 Fed. 155, 159, which presents questions somewhat analogous to those in this case.

The expression "new result" is not exact. The kind or degree of improvement may be so great as to justify the expression, or of such character that we may call it a mere improvement in result—not new, but better. The case cited seems to me to illustrate a case on one side of the line, and the present case to fall on the other side of the line. The difficulty of drawing such a line, and making a judgment upon a question of this character, is fully recognized. I am of the opinion,

however, that in the present case the burden rests upon the complainant to show that there is involved in the device of the patent in suit some new mode of operation or some novelty in principle or in application of principle, in order to invoke the doctrine of equivalents to such an extent as to bring the defendant's device within the claims.

From the testimony of the complainant's witnesses as to a "balanced draft," it seems quite probable that the efficiency of complainant's lamp depends largely upon proportions and adjustments not referred to in the patent, and not claimed. In view of the prior patents to Hamm, and of the prior patented and unpatented art, I am of the opinion that the claims of the present Hamm patent in suit must be regarded as for specific structures operating upon general principles which are open to other inventors to apply; that the claims in suit are each and all limited to specific constructions substantially like those shown; and that, so limited, they are not infringed.

In reaching this conclusion I by no means desire to depreciate the value of the improvements made by Mr. Hamm in the practical art. It must be remembered, however, that what he had disclosed, both of structure and of principle, in his prior patents, cannot be protected under the present patent, and that so far as this patent is concerned others are entitled equally with himself to profit by his experiments and to improve upon his disclosures, which form part of the prior art.

The defendant's air-chamber has features which resemble the air-chamber of Watts more closely than Hamm's. Watts has a single row of perforations disposed horizontally, the defendant a double row disposed horizontally, the air-discharge being downward in both, while Hamm, in his patent No. 592,705, had a single row of vertically disposed perforations, and in the patent in suit a vertical perforated screen. Defendant has a depending part, but this does not have the function of discharging the air laterally against the wall of the globe. It also serves to better perform a function not referred to in the patent in suit, but to some extent involved in Hamm's structure—the separation of the inlet and the outlet.

These differences are not merely colorable evasions, but considered as structures defendant's lamps may be regarded as new combinations, borrowing both from Hamm's prior patents and from other inventors of the prior art.

I am of the opinion that the claims in suit are valid, but in view of the prior art are so limited that they are not infringed.

The bill will be dismissed.

In re AMERICAN FIBRE REED CO.

In re NEW ENGLAND CHAIR CO.

(District Court, E. D. Kentucky. June 19, 1913.)

Nos. 831, 832.

BANKRUPTCY (§ 178*)—TRANSFER OF ACCOUNTS—SALE OR PLEDGE—USURY.

Bankrupts, being from time to time in need of money, made out lists of accounts owing to them by customers and presented the same to intervener, which, if the accounts were acceptable, advanced to the bankrupts 75 per cent. of the face value thereof, and the accounts on the books of the company were stamped as sold to intervener. Under the contract and in practice the accounts were collected in the name of the bankrupts in the regular course of business, and the proceeds turned over to an employé, who was attorney in fact for both parties, and who at once transmitted the same to intervener. If the account was promptly paid, intervener at once took from the sum remitted the 75 per cent. of the face of the account, also 5 per cent. discount therefrom if the account was to run 120 days, or a less amount according as the time for maturity was shorter, and remitted the balance to the bankrupts; intervener being entitled, however, to withhold such remainder to make good accounts in default or where the debtor had become insolvent, in which event, or in the event of nonpayment of any account at maturity, the bankrupts obligated themselves to repurchase the account within five days after receipt of notice. *Held*, that such transaction was not a sale of the accounts, but a pledge thereof as security for money advanced.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264-274, 283, 284; Dec. Dig. § 178.*]

In Bankruptcy. In the matter of consolidated bankruptcy causes of the American Fibre Reed Company and the New England Chair Company, bankrupts. On exceptions to the master's report on the intervening petition of the Home Bond Company. Report confirmed.

The following is the report of Special Master D. W. Lindsey:

The Home Bond Company, by its intervening petition filed in the above-styled proceedings in bankruptcy pending in this court, asserts claim, as the owner, of certain sums of money alleged to be in the hands of H. V. McChesney, the trustee of said bankrupt estates, which claim is contested by the trustee. The contention of the intervening petitioner is that under the terms and provisions of two certain contracts with the said bankrupt corporations, respectively, the one with the New England Chair Company, dated March 6, 1911, and the other with the American Fibre Reed Company, dated November 9, 1911, it bought from each of said corporations certain accounts owing to the corporation, and that, these bankrupt proceedings having been instituted by the petitions filed February 2, 1912, and said H. V. McChesney having been by order of this court appointed custodian and afterwards the trustee of the said bankrupts' estates, he proceeded to and did collect certain of the accounts as alleged to have been purchased by the petitioner from the bankrupt corporations respectively, and now has the money so collected by him in his possession as trustee as aforesaid; that the purchases of such accounts by the petitioner from the New England Chair Company were between the dates of April 26, 1911, and November 16, 1911, inclusive, and from the American Fibre Reed Company between November 18, 1911, and January 24, 1912, inclusive; and that the amounts of such accounts so collected by the custodian and trustee from the New England Chair Company ac-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

counts was \$2,571.37 and from the American Fibre Reed Company accounts was \$2,358.32.

The defense interposed by the trustee rests primarily upon the contention that the transactions between the petitioner and the bankrupt corporations, respectively, were not the buying by the former from the latter of the accounts, but were in substance and effect and in fact nothing more or less than the pledging of the accounts by the latter to the former for a loan, in each instance, of a certain per cent. of the face value of the accounts and at the usurious rate of not less than 24 per cent. per annum interest, with the right and duty retained and devolved upon the bankrupt corporations in their own names and at their expense to collect the accounts, the proceeds in each instance to be applied first to the payment of the amount advanced and loaned by the petitioner to the bankrupt and the stipulated interest thereon, and the "remainder" of the amounts collected being the property of and to go to the bankrupt corporation or for its benefit; that the petitioner has since these proceedings in bankruptcy were instituted itself collected a number of said accounts, and now has in its hands the money arising from such collections, amounting to \$——, and also has a large number of the accounts uncollected, amounting to \$——; and that if a settlement of the transactions is made between the petitioner and the bankrupt corporations, or the trustee, under the said contracts, upon a legal and equitable basis and purged of usury, but a very small sum, if anything, will be coming to the petitioner upon the surrender to the trustee of all uncollected accounts.

The two contracts, copies of which are exhibited, are upon printed forms, are identical in every respect, except as to their dates, and that the one is with the New England Chair Company and the other with the American Fibre Reed Company, and it was admitted by counsel for both parties in the argument, and is practically stated in the agreed facts, that in each instance of the alleged purchase of accounts by the intervening petitioner from the bankrupt corporations the transactions were had and made under the terms and conditions of said contracts respectively. The case is submitted to the special master upon the pleadings and exhibits and the agreed statement of facts filed, with the agreement in writing filed that the affirmative matter contained in the trustee's response to the intervening petition and amended petition is controverted of record, and after argument by counsel.

The question first to be considered is whether the transactions had between the intervening petitioner and the bankrupt corporations, under the contracts exhibited, were sales by the bankrupts to the petitioner of the accounts involved, or in the nature of pledges of such accounts as security for moneys advanced or loaned thereon to the bankrupts. The following cases cited in the brief of counsel for the trustee, to wit: *Bright v. Wagle*, 3 Dana (Ky.) 252; *Boli v. Irwin & Son*, 51 S. W. 444, 21 Ky. Law Rep. 367; *McKibben v. Diltz*, 138 Ky. 684, 128 S. W. 1083, 1085, 1086, 137 Am. St. Rep. 408—are in point as illustrative of the extent to which the courts have gone in holding that an instrument, purporting on its face to be a deed or bill of sale, is in effect in the nature of a mortgage or as security, and not a sale. And that the courts will penetrate devices used to cover up or conceal usury is well illustrated by the case of *Missouri Valley Life Ins. Co. v. Kittle* (C. C.) 2 Fed. 113, where, quoting from the syllabus, it is said: "Any agreement, device, or shift to reserve or take more than the law permits for use of money loaned is usury, and whether by such means more than the legal rate of interest has been contracted for is a question of fact, to be collected from the whole of the transaction as it passed between the parties."

As was said by the Kentucky Court of Appeals in *Edrington v. Harper*, 3 J. J. Marsh. 354, 20 Am. Dec. 145: "It is often very difficult to discriminate between mortgages and conditional sales. Every case must be determined by a consideration of its own peculiar circumstances, and it is proper that no specific rules should be defined for distinguishing mortgages from conditional sales: otherwise, the usurer, with the rules before him, would be able to evade the laws against usury, and oppress the necessitous with

impunity." And again on page 355 of 3 J. J. Marsh. (20 Am. Dec. 145): "The intention of the parties is the only true and infallible test. That is to be collected from the condition or conduct of the parties, as well as from the face of the written contract." And again: "The fact that the real transaction between the parties was a borrowing and lending will, whenever or however it shall appear, show that a deed, absolute on its face, was intended as a security for money; and whenever it can be ascertained to be a security for money it is only a mortgage, however artfully it may be disguised." To the same effect in substance is the ruling of the court in *Baldwin v. Crow*, 86 Ky. 679, 7 S. W. 146. And that such rules apply for the construction of the contracts in question cannot well be doubted.

To distinguish a sale from other transfers of property, it is said in Cyc. vol. 35, page 27: "The essence of a sale is the transfer of the property in the thing from seller to buyer. The elements which distinguish a sale from other transfers are: (1) That the transfer is of the property; that is, of the general or absolute property, as distinguished from a special property; and (2) that it is for a price." And again, in the same volume, pages 39 and 40: "If, however, there is a right reserved by the buyer to demand and enforce repayment, the transaction is not a sale, but in the nature of a mortgage." And the author cites in the note the case of *Robinson v. Farrelly*, 16 Ala. 472, as holding: "When the vendee retains the right to demand repayment of the vendor, notwithstanding the purchase, it is conclusive to show that the transaction was intended as a security and not a sale."

In the light of the authorities cited, the intention of the parties is to govern, and that intention is to be ascertained from the contract and the conduct of the parties in the transactions thereunder. In the agreed statement of facts, and in the argument of counsel, it was agreed that all of the accounts involved in these transactions between the petitioner and the bankrupt corporations were accounts that were due in 120 days, and that the amount retained or collected thereon as interest (called in some places service charge) was at least at the rate of 24 per cent. per annum. In arriving at the proper construction of the contracts, the accounts will be considered of the 120-day class as set out in the first paragraph of the contracts, and the discounts or interest charges accordingly. Under the provisions of the contracts, and as the business was conducted by the parties up to February 2, 1912, when bankruptcy proceedings were commenced, the transactions were as follows:

The Chair Company, or the Reed Company, as it happened to be, styled in the contract the first party, being from time to time in need of money, on such occasions made out a list or inventory of accounts owing to it by its customers for goods sold and presented the same to the Home Bond Company, styled in the contract the second party. If the second party found the accounts acceptable to it, it then advanced or paid to the first party 75 per cent. of the face value of the accounts, and the accounts on the books of the latter were stamped as sold to the second party. The accounts were, under the terms of the contract and in *practice* by the parties, collected in the name of and by the first party in the regular course of its business, and the proceeds were by the first party turned over to its paid employé, who was mutually acceptable to the parties, and was the attorney in fact for both parties, and who at once transmitted the proceeds of the collection of the account to the second party. If the account was promptly paid in the 120 days, or when due, the second party at once took from the sum so remitted to it the 75 per cent. of the face of the account, which had been paid, or loaned, by it to the second party, and also the 5 per cent. discount from the face of the account, and the remainder of the proceeds of the collection it at once remitted back to the first party. However, the second party had the right to withhold such "remainder" to make good some other account in default or where a debtor for an account had become insolvent. But if the account was not promptly paid and accounted for as above stated, when due, then an additional discount or interest charge on the face value of the account for such overtime, according to the schedule of rates prescribed in the contract, was made by the second party and also deducted from "the remain-

der" belonging to the first party. And where the debtor of an account had become insolvent, or in the event of the nonpayment of any account at maturity, by the contract, the first party covenanted and obligated itself "to repurchase said account within five days after receipt of written notice thereof."

In all this we find wanting what have been defined to be the essential elements of a sale: (1) There was no transfer of the absolute property in the accounts. The accounts were to be, and were, so far as the transactions were carried out, collected by the first party, the alleged seller, and at its costs and expense. The absolute property in the accounts was not transferred, because the second party only acquired the right to have or take from the proceeds of the account the amount it had advanced thereon and its stipulated usurious interest, and the remainder of the proceeds represented an interest in the account which by the contract the first party had at all times retained, and was to go to it or for its benefit. The fact that the entire proceeds of the collection was to be and was remitted to the second party, and the remainder then remitted back to the first party, can in no sense alter or refute or disguise the fact that the latter at all times had to that extent a property right in the account. (2) No definite price was fixed as the purchase price, and again there was reserved by the alleged buyer the right to demand and enforce payment, not of the face of the account, but only repayment if the 75 per cent. advanced and the stipulated usurious interest, which from the authorities, *supra*, "is conclusive to show" that the transfer of the accounts was not a sale, but in the nature of a mortgage. On the other hand, we have as indicative of a loan a definite amount to be advanced on each account according to the time at which it became due, with the obligation for the repayment of that sum with interest at a rate four times the legal rate, and that regardless of whether the account is paid or not.

It is plain to be seen that the only money furnished, or which the second party was in any sense called upon or obligated to furnish, whether called a payment or a loan, on the accounts, was the 75 per cent., or \$75 on the \$100, of the face of the accounts, and that all the second party was entitled to receive back, whether from the collection of the account, or from its repurchase by the first party, was the \$75 on the \$100 of the face of the account, the only amount it had furnished, plus the discount or interest charge, which was at the rate of 20 per cent. per annum, or $3\frac{1}{4}$ times the legal rate on the money so furnished, if the account was paid at maturity, and, according to the statement of agreed facts, amounting, in the actual transactions as had, to not less than 24 per cent. per annum, or four times the legal rate on said amount. There are very many terms and conditions in the contract to which no reference has been made, because their purpose seems only to be to provide guaranty and security to the second party of the performance by the first party of the contract, and serve in some degree only to disguise the real transaction.

In the light of the authorities above quoted, it is the opinion of the special master, quite evident, from the provisions of the contract and the conduct of the parties thereunder, and it is so by him held, that the contracts were not sales of the accounts involved by the respective bankrupt corporations to the petitioner, but transfers of the accounts as security. According to the agreed statement of facts, the Indiana statute, like the Kentucky statute, fixes 6 per cent. per annum as the legal rate of interest; and while the Indiana statute permits interest up to 8 per cent. to be contracted for in writing, it provides that, if over 8 per cent. be contracted for or collected, all over 6 per cent. is forfeited. And in both states such excess of interest may be relieved against, and, if paid, recouped. It is immaterial, therefore, whether the contracts in question were made in Indiana or Kentucky. Therefore, in the settlement of these transactions between the petitioner and the trustee of the bankrupt estates, the same should be purged of all usury; and the petitioner, the Home Bond Company, be treated in this proceeding as a creditor of the bankrupt corporations with security for its debt.

A claim is asserted by the petitioner for the sum of \$140.34, being the ag-

gregate of certain items of court costs, expenses, attorney's fees, etc., expended by it to enforce the payment of some of the accounts collected by it. That such costs and expenditures were incurred and paid by the petitioner does not seem to be questioned in the response of the trustee; but for that officer it is simply contended that the costs were incurred and expenditures made by the petitioner after the appointment and qualification of the custodian on April 9, 1912, and that by reason of the filing of the petitions in bankruptcy, and the appointment and qualification of the custodian of the bankrupt estates, the right to collect said accounts passed to the custodian, and that thereafter the right of petitioner to make such expenditures ceased. Although the contract is silent as to when or under what circumstances the petitioner was authorized to incur such costs or liability, or in fact to make collection of any of the accounts, yet under the terms of the eighth clause in the contracts it seems to be conceded that petitioner could employ counsel or cause legal action to be instituted to enforce the payment of any of said accounts, or any part thereof, either in its own name, or in the name of the first party; and the clause certainly does provide that "in either case" immediate payment shall be made by the first party to the second party of "all court costs, expenses, and attorney's and stenographer's fees" which may be by the latter expended in such proceedings. It is not averred in the pleadings, nor is it made to appear in the agreed statement of facts, when petitioner incurred the costs, fees, and expenses for which this claim is made; but it seems that these liabilities were incurred by the petitioner in the effort to reduce to money the accounts, which, in the view taken by the special master, constituted a security to it for its claim against the bankrupt, and the special master is of opinion that under all the circumstances of this case this claim should be allowed to the petitioner.

The petitioner also sets up claim against the trustee for the sum of \$800, being \$100 per month from March 16 to October 12, 1912, inclusive, paid by it to E. Manning, who in the sixth clause of the contract was by the bankrupt appointed attorney in fact to receive remittances in payment of the accounts embraced in these transactions and transmit the same to the petitioner. The averment in the petition is that \$100 per month was a reasonable charge, that under the provisions of said sixth clause of the contract the bankrupt was to pay him, but, failing to do so, the petitioner was compelled to make such payment. From the trustee's response and the agreed statement of facts it appears in substance that during the continuance of the contracts here involved between the petitioner and the New England Chair Company and the American Fibre Reed Company, respectively, said Manning was the treasurer of the New England Chair Company and its bookkeeper, and assistant secretary of the American Fibre Reed Company and its bookkeeper, and was in each of said contracts appointed by the company by whom he was employed the attorney in fact as stated; that for all his services while so employed by these companies, including such as he rendered as such attorney in fact, he was to receive a regular salary, and the same was paid to him by the Chair Company, until the business was taken over by the Reed Company, and then by it up to April 9, 1912, when the custodian took charge of the bankrupts' estates, with the exception of the two weeks just prior to April 9, 1912, and that two weeks' salary is owing him from the Reed Company; that from April 9, 1912, to September, 1912, said Manning was in the employ of the custodian as clerk, and likewise from September, 1912, until January, 1913, he was in the employ of the trustee as clerk, and his salary in such employments has been paid him out of the bankrupts' estates.

There is no averment in the petitioner's petition of what, if any, services as such an attorney in fact was rendered by said Manning, during the time from March 16, 1912, to November 12, 1912, or any part of it, nor can it well be seen how he could have rendered any service in that capacity, inasmuch as the record in this case shows that after his appointment the custodian and then the trustee has been receiving all collections of the accounts made, except such as have been collected by the petitioner, and it was impossible for said Manning to have received any such collections as such attorney in fact or made transmittance thereof to petitioner. In the opinion of the special

master, this claim of the petitioner should be and the same is disallowed, as is also the application of the petitioner for allowance of his attorney's fee in this proceeding.

The United States Supreme Court, in the case of *Sexton v. Dryfus*, 219 U. S. 343-345, 31 Sup. Ct. 256, 55 L. Ed. 244, announced the rule that the date of the filing of the petition is the date, in all cases, at which the affairs of the bankrupt are supposed to be wound up, and that the rule applies in the case of secured as well as unsecured creditors. Subsection "h" of section 57 of the Bankrupt Act provides: "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance." Act July 1, 1898, c. 541, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443).

The antagonistic attitude of the parties as to their respective rights under the contracts involved has brought the subject into court, and the effort must be to adjust matters between them as near as may be to these requirements. Instead of stating the account between the parties as of February 2, 1912, the date of the filing of the petition in bankruptcy, the parties seem from the agreed statement of facts to have contemplated the date of the filing of such agreed statement, and to have included interest on some of the items to that time. No injustice can be seen in this, provided interest is computed on both sides of the account. Upon that idea the special master states this account between the Home Bond Company and the trustee, based upon the agreed statement of facts as follows:

According to the agreed statement of the facts the total amount of discount or interest charge retained by the Home Bond Company, on accounts of the New England Chair Company, collected through the attorney in fact, E. Manning, being at the rate of at least 24 per cent. per annum upon the 75 per cent. of the face of such accounts, advanced or paid on such accounts from the time of such advance or payment to the time of the collection of the account and remittance to the Home Bond Company:

Amount to.....	\$4,128 96
Only one fourth of such sum would be the legal interest.....	1,032 24
Leaves as due trustee for usury in sum retained.....	\$3,096 72
Interest at 6 per cent. for one year on this sum.....	158 80
Agreed amount of the "reserve" from such accounts due the Chair Company and now in hands of Bond Company.....	978 64
Interest at 6 per cent. for one year on this sum.....	58 71
Total due by Bond Company on accounts of Chair Company.....	\$4,292 87
By 75 per cent. of \$2,845.88, Chair Company accounts collected by the trustee.....	\$2,134 41
By 6 per cent. interest thereon for one year.....	128 06
By 75 per cent. of \$2,364.35, Chair Company accounts uncollected	1,773 26
By 6 per cent. interest thereon for one year.....	106 39
	<hr/> 4,142 12
Balance due by Bond Company to trustee on Chair Company account.....	\$ 150 75

The amount of the discount or interest charge retained by the Home Bond Company on accounts of the American Fibre Reed Company, collected through the attorney in fact, E. Manning, being at the rate of at least 24 per cent. per annum upon the 75 per cent. of the face of such accounts advanced or paid on such accounts, from the time of such advance or payment to the time of the collection of the account and its remittance to the Bond Company:

Amounts to.....	\$ 679 35
Only one fourth thereof would be legal interest..	169 83
Leaves due trustee for usury in sum retained.....	\$ 509 52
6 per cent. interest on same for seven months.....	17 85
Agreed amount of "reserve" due from accounts of Reed Company collected by Bond Company and now in its hands.	1,265 38
6 per cent. interest on same for seven months	44 31
	<hr/>
	\$1,837 06
By 75 per cent. of \$2,409.25, Reed Company accounts collected by trustee.....	\$1,806 93
By 6 per cent. interest on same seven months.....	38 05
By 75 per cent. of \$616.56, Reed Company accounts uncollected	462 42
By 6 per cent. interest on same seven months.....	16 17
	<hr/>
	2,323 57
Balance due from trustee to Bond Company, account Reed Company accounts.....	\$ 486 51
Deduct amount due trustee from Bond Company on Chair Company accounts.....	150 75
	<hr/>
Leaves due Bond Company from trustee on both accounts.....	\$ 335 76
To which add amount allowed Bond Company for court costs, attorney's fees, etc.....	140 34
	<hr/>
	\$ 576 10

Duffin, Sapinsky & Duffin, of Louisville, Ky., for Home Bond Co.
Brown & Nuckols, of Frankfort, Ky., for the trustee.

COCHRAN, District Judge. These causes are before me on exceptions filed by the Home Bond Company to the report of Referee Lindsey, as special master herein. The matter with which the report has to do is the relation of that company to certain accounts in favor of the bankrupts, some of which have been collected by the trustee herein, and some by the company. The latter claims to have been the owner of the accounts when collected under written contracts of purchase. This claim the trustee contests. Its position is that the company merely had a lien thereon for certain loans made by it to the bankrupts and legal interest thereon from the dates of the respective loans. The special master has upheld this position, and stated the accounts between the bankrupts and the company on this basis. It is of this action that the company complains by its exceptions.

The contract between the bankrupt, the New England Chair Company, and the company, is in words and figures as follows:

"This agreement, made this 6th day of March, 1911, at Indianapolis, Indiana, by and between New England Chair Company, hereinafter called first party, and the Home Bond Company, hereinafter called second party, witnesseth: That for one dollar (\$1.00) and other good and valuable considerations, each to the other paid, receipt whereof is hereby acknowledged, the parties hereto have agreed and do hereby agree as follows:

"First. That said second party shall buy from said first party all acceptable accounts tendered to it by said first party and pay therefor the face value thereof less the following discounts: One per cent. on accounts that are paid within fifteen days. Two per cent. on accounts that are paid within thirty days. Three per cent. on accounts that are paid within sixty days. Four

per cent. on accounts that are paid within ninety days. Five per cent. on accounts that are paid within one hundred and twenty days. Six per cent. on accounts that are paid within one hundred and fifty days. Seven per cent. on accounts that are paid within one hundred and eighty days—subject, however, to the terms of this and any subsequent written agreement executed by the parties hereto.

"Second. That the said party shall pay: Seventy-eight per cent. on thirty day accounts. Seventy-seven per cent. on sixty day accounts. Seventy-six per cent. on ninety day accounts. Seventy-five per cent. on one hundred and twenty day accounts. Seventy-four per cent. on one hundred and fifty day accounts. Seventy-three per cent. on one hundred and eighty day accounts—upon delivery to and acceptance of such accounts duly assigned to the party of the second part, and the remainder, less discount and deductions taken by the debtor, shall be paid immediately after the collection of the account by the second party: Provided, however, no payment of the remainder shall be made while any of said accounts are in default.

"Third. The first party shall properly assign and deliver to said second party all accounts purchased, including the right of stoppage in transitu, either in the name of the party of the first part or in the name of the party of the second part (provided, however, the party of the second part shall not be charged with negligence in not making stoppage in transitu in any event unless thereunto requested by the party of the first part). If the merchandise named in the accounts should be refused or returned, for any cause, the title to such merchandise shall be and remain in said second party until such accounts are paid.

"Fourth. Said first party hereby guarantees the payment to the second party or its assigns of all accounts purchased hereunder according to the terms thereof. In the event of nonpayment at maturity to said second party of any accounts as purchased as aforesaid, or should the debtor become insolvent, said first party hereby covenants and agrees to repurchase said accounts within five days after receipt of written notice thereof and to pay therefor the same amount paid to the first party by said second party, plus the discount provided for in the first paragraph of this contract. Said second party is hereby given the right without notice to said first party to credit any moneys coming into its possession, belonging to said first party, on its accounts.

"Fifth. Immediately after the purchase of every account hereunder, said first party shall make upon its book an entry showing the absolute sale of said accounts to said second party, and said second party is hereby given the right and privilege of auditing the books, accounts, and records of said first party, relating to said accounts, at any time that it may see fit to do so.

"Sixth. Where as, it is for the mutual benefit of the parties hereto that the collection of said accounts shall in the first instance be remitted to the parties of the first part and in its name, the party of the first part shall at all times appoint some person or persons, mutually acceptable to both of the parties hereto, their attorney in fact to receive all such remittances in whatever form they may be made, and to transfer, assign, and transmit all such proceeds to said party of the second part. And said party of the first part shall, immediately upon receipt of such remittances, in whatever form the same shall be made, deliver the same to such attorney for transmittal to the party of the second part; and said attorney shall at all times have access to all mail received by said party of the first part, and all books and records of the party of the first part, to discover what payments and remittances are made upon such accounts. And in consideration of the execution of this agreement by the party of the second part, said party of the first part undertakes to guarantee the faithful conduct of said attorney in fact in the receipt, assignment, and transmittal of all such payments or remittances. And upon the like consideration said party of the first part shall pay unto said attorney in fact compensation for all such services so rendered in that behalf; and we will furnish and provide for said attorney in fact all necessary clerical or stenographic assistance for making reports and remittances.

Said attorney in fact shall also have the right and power, and it shall be his duty to endorse the name of the party of the first part on any freight or express bill or bill of lading relating to said accounts, and ratifying and confirming all its said attorney may do in the premises. And said attorney in fact as to all such matters shall receive such moneys or other remittances solely for the party of the second part and shall at all times be subject to its exclusive orders with relation thereto; and it is now mutually agreed between the parties hereto that E. Manning shall be and continue such attorney in fact to perform such duties, until by mutual agreement of the parties hereto another person shall be appointed in his stead.

"Seventh. That said second party in making purchase of accounts hereunder relies upon the guaranties and covenants of said first party herein contained and upon the written representations made to it by said first party as to the financial responsibility of said first party; that said written representations heretofore made and that may hereafter be made are for the purpose of establishing the credit of said first party so that sale of accounts may be made hereunder.

"Eighth. That said first party shall execute and deliver to said second party or its assigns any document necessary or proper to carry into effect this contract, and should second party employ counsel or cause legal action to be instituted to enforce payment of any of said contracts, or any part thereof, either in its own name or the name of the party of the first part, then and in either case said first party shall immediately pay to said second party or its assigns, all court costs, expenses, and attorney's and stenographer's fees which may be by it expended in such proceedings.

"In witness whereof, the said first party has hereunto set its hand and seal, and said second party has caused these presents to be executed by its president and secretary, and its corporate seal to be hereto attached.

"The New England Chair Company [Seal.]

"By A. D. Martin, President.

"Attest: Chas. Irion, Secretary.

"Home Bond Company.

"By P. J. Hauss, Vice President.

"Attest: F. H. Rupert, Secretary.

"For and in consideration of the execution of the foregoing agreement by the Home Bond Company, the undersigned hereby guarantees to said Home Bond Company the full prompt and faithful payment and discharge by New England Chair Company of all and singular the agreements and provisions therein contained to be by said New England Chair Company kept, observed, and performed, and hereby waives notice of acceptance of this guarantee by the Home Bond Company.

"In witness whereof, we and each of us have hereunto set our hands and seals this 6th day of March, 1911.

A. D. Martin. [Seal.]

"Graham Vreeland. [Seal.]

"Chas. Irion. [Seal.]

"Witness: Chas. Irion."

The contract between the other bankrupt and the company is of similar character and dated November 9, 1911. I approve of the conclusion reached by the special master and the reasoning on which it is based. The considerations which support this conclusion are that the bankrupts were to and did collect the accounts and bear all expense in connection with their collection; what is claimed to have been the purchase price for the accounts, to wit, the difference between the face of the accounts and the discount, was not known until payment of the account and receipt thereof by the company, and then depended on the time that had elapsed since the date of the advance of the 75 per cent.; what is claimed to have been deferred payment of the purchase price was simply a return to the bankrupt of the excess of the collection over

and above the advance and discount; and the provision that, in the event of nonpayment of any of the accounts at maturity or the debtor becoming insolvent, the bankrupt should repurchase the accounts and pay therefor the advance made thereon plus the discount.

The argument on behalf of the Bond Company assumes that the conclusion of the special master is based on the consideration that the bankrupt guaranteed the payment of the accounts, and is directed largely to combating the idea that this consideration rendered the transaction a loan and not a purchase. Numerous cases are cited where purchases of notes and accounts, accompanied by a guaranty of payment, have been held to be purchases, and not loans at usurious rates of interest. But I do not understand that the special master's conclusion is based on this consideration; nor is it needed to uphold it. Possibly, however, the fact that the contracts were accompanied by a personal guaranty that the bankrupts would make full, prompt, and faithful payment and discharge of all the agreements and provisions therein contained to be kept, observed, and performed by it is not without some significance in upholding that conclusion.

The decision of the Circuit Court of Appeals of the Second Circuit in the case of *In re Canfield*, 193 Fed. 934, 113 C. C. A. 562, and of the Supreme Court of the United States in the same case under the style of *Houghton, Receiver, v. Burden*, 228 U. S. 161, 33 Sup. Ct. 491, 57 L. Ed. —, rendered April 7, 1913, is relied on by the company as conclusive on the question herein involved. But I fail to see its relevancy to this case. In that case there was no such question in issue as that in issue here. Burden did not claim to have purchased the accounts there involved. He simply claimed a lien thereon to secure a loan, and the sole question was whether the contract between him and the bankrupt was usurious, and therefore, under the law of New York, void. The ground upon which it was claimed to be usurious was the provision that, in addition to receiving 6 per cent. on his money, Burden was to receive a certain compensation for certain services to be rendered by him for the bankrupt. The question as to whether this provision rendered the contract usurious hung on whether it was a sham and device to cover usury, or really intended to provide compensation for the services called for in the contract.

Here, if the contracts are treated as evidencing loans, there can be no question that the discount provided for is usurious. It is for greatly more than the legal rate of interest. The discount provided for is not for services to be rendered by the company to the bankrupts. It was to render them no services. All that it did, or had a right to do, was on its own account. Hence the only way of saving the contracts here is to make good the contention that they evidence purchases, and not loans. That the company has failed to do. Rather, it has been shown that it is not good.

In so far as the contracts in question here use words fit for a contract of purchase, they are mere shams and devices to cover loans of money at usurious rates of interest. That the company was not averse to the use of shams is otherwise apparent from the use by it of the word "service," in its dealings with the bankrupts under the contracts,

to characterize the discounts. In any view of the contracts, those discounts were not charges for services rendered the bankrupts. Loans are never regarded as services.

The report of the special master is approved and confirmed.

In re DR. RIEGEL SANITARIUM CO.
(District Court, E. D. Pennsylvania. July 10, 1913.)
No. 4,626.

BANKRUPTCY (§ 140*)—OWNERSHIP—FURNITURE OF SANITARIUM—FIXTURES—SEPARATE OWNERSHIP OF REALTY AND CHATTELS.

A bankrupt corporation was engaged in conducting a sanitarium. Title to the building and the furniture therein had previously been vested in the same person, who conveyed the personal property to the bankrupt and the real estate later to another corporation, organized at the time for the purpose of holding the same, and such corporation executed a mortgage thereon. Neither the deed nor the mortgage contained any reference to the personal property, nor to the purpose for which the realty was used. *Held*, that neither conveyed the furniture as fixtures, the title thereto having been previously vested in the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

In the matter of the Dr. Riegel Sanitarium Company, bankrupt. On exceptions to report of referee. Exceptions overruled.

Joseph A. McKeon, of Philadelphia, Pa., for trustee.

J. Edgar Butler, of Philadelphia, Pa., and Isabel Darlington, of West Chester, Pa., for Realty Co. and mortgagee.

J. B. McPHERSON, Circuit Judge. The subject in dispute may be explained in a few words:

The bankrupt was engaged in carrying on a sanitarium. In December, 1912, a creditors' petition was filed and a receiver was appointed. In a few days he presented a petition, averring that he had found a quantity of furniture and furnishings on the premises 1927 Girard avenue, Philadelphia, and asking for an order to sell. He obtained the order, appraised the goods, and was about to sell, when another corporation, named the Dr. Riegel Sanitarium Realty Company (hereinafter called the Realty Company), applied to the court, asserting "absolute ownership" of certain personal property described in Exhibits A and B attached to its petition, and averring (1) that this property was among the articles about to be sold by the receiver; (2) that the Realty Company was also the owner in fee simple of the premises where these articles were; and (3) that the articles described in Exhibit B were so attached to the realty that removal would irreparably injure the owner of the fee. The District Court was therefore asked to restrain the sale, and to direct the receiver to deliver to the Realty Company all the articles described in both exhibits. Such an order was made on January 10, and of course the sale did not take place. On January 13 the receiver petitioned the court to vacate the order of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

January 10 and to direct him to proceed with the sale. Thereupon the whole subject was sent to the referee with instructions "to ascertain and report the facts, together with the testimony, his findings, and recommendations thereon." After hearing a good deal of evidence the referee was ready to report on March 10, with a recommendation that the order be vacated, except as to "such items that are so affixed to the premises that they cannot be removed without injury to the structure of the building." Exceptions to the report were presented, however, and these having been overruled, the subject now comes up for review.

The articles described in Exhibit A are no longer in dispute, so that the controversy is confined to Exhibit B. Another claimant also has intervened—P. M. Sharpless, who is a mortgagee of the real estate—and accordingly it becomes necessary at this point in the discussion to explain the relation of the Realty Company and of the mortgagee to the bankrupt. Early in 1911 the buildings on Girard avenue were owned, occupied, furnished, and equipped by the Pennsylvania Benevolent Association—a society or corporation not connected with any of the parties to this dispute—but the business (a hospital or sanitarium) had not been successful, and indeed, as I understand, was about to be given up. A mortgage of \$35,000 incumbered the property, and proceedings to collect the debt were threatened. About the same time several persons, who desired to promote certain medical remedies and methods of treatment, obtained an option of \$35,000 upon the real estate with its contents, and in April the bankrupt corporation was organized under the laws of Delaware. But when settlement was about to be made in August, four months later, the title could not be insured because the trust company refused to issue a policy, taking the ground that a foreign corporation could not legally own real estate in Pennsylvania. The promoters thereupon decided to organize a holding company under the laws of Pennsylvania for the purpose of taking the title to the real estate on Girard avenue, and accordingly the Realty Company was chartered on September 20. Meanwhile, and before this was done, the buildings and also the furniture and furnishings had been sold to the mortgage creditor of the Benevolent Association under executions issued not only upon the mortgage, but also upon the bond accompanying that security. The real estate was sold under the mortgage, and the personal property was sold upon the execution issued on the bond. Both the real and the personal property were bought in by the attorney for the mortgage debt, and in due course his title was transferred as follows: On August 17 he executed a bill of sale directly to the bankrupt for all the personal property then upon the premises, and (at a later date after the Realty Company had been organized) his formal title to the real estate was conveyed to that company, not directly, but after some intermediate steps that are not important and need not be detailed. The money necessary to carry out this transaction—\$35,000—was furnished by Mr. Sharpless, and in order to secure him the Realty Company mortgaged the premises for the amount thus advanced. Neither the deed to the Realty Company, nor the mortgage to Sharpless, refers in any way to personal property, or to the contents of the building, or to any business that had been,

or might be, carried on therein; but both instruments are confined to the conveyance of the real estate. Both use the conventional language of Pennsylvania deeds, and (as already stated) neither makes any reference to a sanitarium or to furniture or furnishings or fixtures.

It will be noticed, therefore, that the title to the real estate, and the title to the chattels contained therein, had been separated, if, indeed, they had ever been united by the Benevolent Association—and of such union there is no evidence. The furniture and furnishings had been conveyed to the bankrupt and not to the Realty Company, and the title to the real estate had been conveyed to the Realty Company and not to the bankrupt. Although neither the deed nor the mortgage nor any other writing professes to unite these two titles, the Realty Company is claiming to be the owner of the personal property, and Sharpless asserts that the lien of his mortgage covers it. I must admit that I do not clearly understand on what ground these claims are rested; I mean, on what clearly defined legal ground, for I am aware of a somewhat indefinite proposition—rather assumed in the argument than expressly formulated—that the bankrupt and the Realty Company were practically identical, and that what belonged to one should therefore be regarded as belonging in substance to the other. The contention is not without some support; for the two corporations were officered and controlled by the same persons, both were promoting the same enterprise, and they did not attempt to treat themselves as distinct. Nevertheless they could not help being distinct, and continuing to be distinct, in several particulars. They had been chartered for different purposes, the stockholders were not identical, and the corporate powers were not the same. The very object of creating the Realty Company was to form a separate corporation to hold the real estate in Philadelphia, and it is unavailing to insist now that the details of the transaction were so interrelated that the rights of one of these corporations were substantially the rights of the other. If I am correct in this position, the discussion would seem to be at an end, for it is certain that the Realty Company never acquired any right to this personal property by a bill of sale or by other transfer from any owner of the title; and it is equally certain that Sharpless has acquired no greater right than was possessed by the Realty Company itself. The mortgagee's counsel argue that their client's security is broad enough to cover this personal property as well as the real estate, and they appeal to the modern rules that govern the law of fixtures. The argument is that the personal property in question is necessary for the purposes of a sanitarium, and therefore should be treated as attached to the realty; that, as loose rolls and other machinery lying on the floor of a mill may pass as fixtures, so furniture and furnishings specially appropriate for use in a sanitarium may pass as fixtures, even if they be not attached to the soil or to the building. I do not think it worth while to spend time in discussing this proposed expansion of the law of fixtures. I think there are sufficient reasons why it could not in any event prevail in the present case:

1. This personal property belonged to the bankrupt before the Realty Company came into existence at all, and the company never acquired

the title thereto, and could not sell or mortgage it while it belonged to another person.

2. As the bankrupt did not attempt to convey or mortgage this property, either by description as personal property or by referring to it as fixtures, the title to it did not automatically leave the bankrupt.

3. Neither the deed nor the mortgage attempts to convey or incumber this real estate as a "sanitarium." I may assume (but without deciding) that a building devoted to such purposes, and so described, might conceivably need a certain kind of equipment, as a rolling mill *ex vi termini* needs machinery to be complete. But there is no such description here; both instruments merely convey houses and land, and contain no reference to any actual or intended use of the property; and there is no evidence that any agreement of any kind, written or parol, was made, merging the personal property in the real estate (so to speak) as machinery might by agreement be merged in a mill. Such a union can only be inferred or implied from the loose and confused conduct of the parties, and I do not think the court would be justified in drawing the inference.

But the Realty Company and the mortgagee *do* have a possible interest that should be protected. The referee recognized it when he recommended that the order of January 10 should be vacated, except as to "such items that are so affixed to the premises that they cannot be removed without injury to the structure of the building." But he stopped there without going on to the next and obvious step—he did not specify what these excepted articles are. It is clear that without a detailed finding on this subject no definite order can be made, and the report must therefore be sent back with instructions to report on or before August 1 what specific articles can, and what articles cannot, be removed without injury to the structure of the building. It is probable that the contestants may now be able to agree about most of the items in Exhibit B, and in that event the entry of the final order may of course be hastened.

The report is therefore sent back to the referee for the purpose just indicated.

UNITED STATES v. CURREY.

(District Court, D. Oregon. July 28, 1913.)

No. 5,907.

1. POST OFFICE (§ 48*)—MISUSE OF MAIL—INDICTMENT—PROHIBITED INFORMATION.

An indictment, charging that defendant received through the post office department a certain letter, a copy of which was set out, and that thereafter defendant in response thereto did knowingly, etc., deposit and cause to be deposited for mailing and delivery a certain envelope containing a letter giving information as he, the defendant well knew, as to how, when, where, of whom, and by what means certain articles, etc., intended to prevent conception, might be obtained, was not demurrable for failure to allege that defendant knew or believed the articles mentioned in the letter were designed or intended to prevent conception; it being sufficient

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to show that the indictment alleged, as it did, that defendant knew that the envelope contained a letter giving the prohibited information.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. § 48.*]

2. POST OFFICE (§ 48*)—MISUSE OF MAILS—UNMAILABLE ARTICLES—SPECIFICATION.

Where an indictment for misuse of the mails alleged the mailing and delivery of an envelope containing a letter giving information where certain articles intended to prevent conception could be obtained, the government was not required to specify or elect as to which of several articles it relied on for a conviction; it being sufficient that the letter gave information where the unmailable articles might be had.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. § 48.*]

3. POST OFFICE (§ 48*)—MISUSE OF MAILS—ILLEGAL LETTER—ELEMENTS OF OFFENSE.

In a prosecution for misuse of the mails in depositing in the post office for delivery an envelope containing a letter giving illegal information, an indictment, alleging that defendant deposited and caused the letter to be deposited in the mails for transmission and delivery, sufficiently connected him with the letter, without alleging that he wrote it or caused it to be written.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. § 48.*]

4. POST OFFICE (§ 31*)—MISUSE OF MAILS—NONMAILABLE MATTER—USE OF ARTICLES ADVERTISED—KNOWLEDGE.

In a prosecution for misuse of the mails in depositing for mailing a letter giving information as to where certain articles intended to prevent conception might be obtained, it was sufficient that the articles specified were designed, adapted, and intended for that purpose, whereupon defendant would be presumed to know that the articles were nonmailable.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 50, 52; Dec. Dig. § 31.*]

5. POST OFFICE (§ 31*)—MISUSE OF MAILS—STATUTES.

The statute regulating the use of mails provides that every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use to prevent conception is declared nonmailable. *Held*, that such section relates to the article, drug, medicine, or thing advertised or described, and not to a letter describing it or the advertisement thereof through the mails, and hence an indictment charging that defendant deposited in the mails a letter which advertised and described certain articles in a manner calculated to lead another to use and apply them to prevent conception was insufficient.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 50, 52; Dec. Dig. § 31.*]

6. POST OFFICE (§ 48*)—MISUSE OF MAILS—SCIENTER.

Where an indictment for misuse of the mails charged that defendant did knowingly deposit for mailing a certain envelope, which, as defendant then and there well knew, contained a letter described, which letter advertised and described certain articles, implements, etc., intended, designed, and adapted to prevent conception and gave information as to where and from whom the same could be obtained, it sufficiently alleged that defendant knew that the letter advertised or represented that the articles spoken of therein could or might be used for that purpose.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. § 48.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

H. E. Currey was indicted for misuse of the mails and moves to quash the indictment. Motion granted in part.

Charles C. Hindman, Asst. U. S. Atty., of Portland, Or.

William Smith, of Baker City, Or., and J. N. Hart, of Portland, Or., for defendant.

WOLVERTON, District Judge. The defendant is indicted by 13 counts, for making use of the mails for unmailable matter. By the first count it is charged that the defendant received through the post office establishment a certain letter (setting the same out by copy), and that thereafter the defendant, in response to such letter, "did knowingly, unlawfully, and feloniously deposit and cause to be deposited for mailing and delivery * * * a certain envelope * * * addressed to ———, which said envelope contained therein a certain letter giving information directly and indirectly, as he the said defendant well knew, as to how, when, where, of whom, and by what means certain articles, instruments, substances, drugs, medicines, and things designed and intended for preventing conception might be obtained." This letter is also set out by copy, and is signed "Live and Let Live Drug Store, by Mrs. B. Grove."

The second count charges that defendant "did knowingly, unlawfully, and feloniously deposit * * * a certain envelope, * * * which said envelope, as the defendant then and there well knew, contained therein the letter dated October 21, 1912, to ——— and signed by the Live and Let Live Drug Store, by Mrs. B. Grove, a copy of which said letter is set out in count 1 of this indictment, which said letter advertised and described certain articles * * * in a manner calculated to lead another to use and apply said articles * * * for preventing conception."

Count 3 charges that the defendant did knowingly, etc., deposit, etc., a certain envelope, etc., which said envelope, as the defendant then and there well knew, contained the letter (describing it as in count 2), which letter advertised and described certain articles, etc., in a manner calculated to lead another to apply said articles, etc., for preventing conception.

Count 4 charges the posting of a letter, in language as in count 3, which said letter, however, it is alleged advertised and represented that certain articles, etc., may and can be used and applied for preventing conception.

Counts 5 to 8 and 9 to 12, inclusive, are in substance the same as the four preceding counts, except that they are founded upon other correspondence, between the same parties, relative to the same subject-matter.

The thirteenth count is based upon the mailing of a package containing articles and things (describing them) designed, adapted, and intended for preventing conception.

To each of these counts a motion to quash has been interposed.

To count 1 it is objected that: (1) It does not allege that defendant knew or believed the articles mentioned in the letter were designed or intended for preventing conception. (2) It does not point out

which article or articles are relied upon as an article or thing so designed or intended. (3) It fails to connect defendant with the Live and Let Live Drug Store, or with Mrs. B. Grove, ostensibly the writer of the letter. (4) It does not allege that the articles mentioned in the letter were unmailable. (5) The letter shows that another wrote it, and not the defendant, which fact is not negated by the indictment.

[1] Answering these in their order: It is sufficient that it is alleged, as the indictment does in effect, that the defendant well knew that the envelope contained a letter giving the inhibited information. The articles and things are specified in the letter, and the letter very clearly discloses the use for which they are designed and calculated.

[2] It is enough that the letter gives information where unmailable articles may be had. This renders the letter unmailable, and the pleader is not required to specify or elect as to which of several articles that might be mentioned he relies upon for conviction.

[3] It is the mailing of such a letter that is denounced, not the writing of it or causing it to be written, and hence it is unnecessary to further connect the defendant with the letter.

[4] Nor is it essential to allege that defendant knew the articles or things to be unmailable. When it is shown that they are designed and adapted and intended for preventing conception, the defendant is presumed to know that they are unmailable. The law imposes that knowledge upon him, and he cannot escape from it by a show of ignorance.

And as to the fifth objection, it makes no difference as to who wrote the letter. It is sufficient that defendant posted it, or had it posted, knowing its contents.

[5] Count 2 is outside of the statute, as counsel for defendant claims. By the statute "every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception" is declared nonmailable. This has relation to the article, drug, medicine, or thing advertised or described, and not to a letter describing it, or the advertisement of it through the mails.

Counts 6 and 10 are subject to the same objection.

[6] Objection is made to counts 3, 7, and 11 on the ground that it is not alleged that the defendant knew that the said letter advertised or represented that the articles or things spoken of in the letter, or any of them, could or might be used for an illegal purpose. The same objection, in effect, is made to counts 4, 8, and 12, namely, that there is no scienter touching the contents of the letter.

In so far as pertinent in view of the objection, it is charged that the defendant did knowingly deposit for mailing a certain envelope, which said envelope, as defendant then and there well knew, contained therein the letter (describing it), which said letter advertised and described certain articles, instruments, etc. It has been held, although there seems to be authority to the contrary, that the words "did knowingly deposit," used in an indictment, having reference to a letter for mailing, in their ordinary acceptation qualify not only the act of de-

positing, but extend also to the imputation of knowledge of the nature of the letter deposited. *United States v. Clark* (C. C.) 37 Fed. 106, 107; *United States v. Fulkerson* (D. C.) 74 Fed. 619, 626; *United States v. Purvis* (D. C.) 195 Fed. 618.

But in the present case it is further alleged that defendant well knew that the envelope deposited contained a certain letter of a date specified, addressed to a named person and signed by a party designated, and further identified as the one which is set out in count 1. By all reasonable intendment, such indictment avers knowledge on the part of the defendant of the purpose of the letter contained in the envelope; that is to say, that it advertised and represented the articles and things in a way denounced by the statute. The objection, therefore, on the ground assigned, is not well taken.

The same objection is also taken to counts 5 and 9, and the same result must follow. The same result applies as well to count 13, which pertains to the deposit for mailing of a certain package containing certain articles which are described.

The motion to quash will therefore be allowed as to counts 2, 6, and 10, and denied as to the others.

UNITED STATES, to Use of HOLLINGER (VERMONT MARBLE
CO., Intervener), v. STANNARD et al.

(District Court, M. D. Pennsylvania. July 31, 1913.)

No. 476.

1. PLEADING (§ 151*)—PENNSYLVANIA PRACTICE—AFFIDAVIT OF DEFENSE—
DEMURRER.

In a suit on a federal contractor's bond, an objection that plaintiff's suit was not brought within the time specified by statute could be properly raised under the Pennsylvania practice by affidavit of defense, and it was not material that it was not set up by demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 302; Dec. Dig. § 151.*]

2. UNITED STATES (§ 67*)—FEDERAL CONTRACTOR'S BOND—ACTION BY MATERIALMAN—TIME—STATUTES—CONSTRUCTION.

Act Cong. Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948), provides for suit by a materialman on a federal contractor's bond in case suit is not brought by the United States within six months after final settlement of the contract, provided that the materialman's suit must be commenced within one year after final settlement, and provided that personal notice of the pendency thereof shall be given to all known creditors, and notice shall be published for at least three successive weeks, the last publication to be at least three months before the time limited for suit. *Held*, that the provision for notice is not directory only, but mandatory, creating a condition precedent to the materialman's right to recover on the bond, and that the last publication must be completed three months before the expiration of the year from final settlement, or the creditor's right is barred.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

Suit by the United States, to the use of J. A. Hollinger, against Ambrose B. Stannard and others, in which the Vermont Marble Company intervened. On rule for judgment for want of a sufficient affidavit of defense. Denied.

A. V. Bower and R. W. Archbald, both of Scranton, Pa., Wolfe & Bailey, of Harrisburg, Pa., and J. A. Strite, of Chambersburg, Pa., for plaintiff.

A. C. Stamm, M. E. Olmsted, and W. S. Snyder, all of Harrisburg, Pa., for defendants.

WITMER, District Judge. Suit is here brought under the provisions of Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948), which extend to parties who have furnished material used in the construction of a government building the protection afforded by the bond given to the government by the contractor at the inception of the contract.

The contract was entered into under date of November 28, 1910, between the United States of America and Ambrose B. Stannard for the construction of a United States post office building in the borough of Chambersburg, Pennsylvania, which the Illinois Surety Company and the National Surety Company, jointly as sureties, assured the United States in the penal sum of \$30,000. The building was completed and accepted, and a final settlement made June 24, 1912, by the contractor with the government. No suit having been brought on the bond by the government, a certified copy of the contract and bond was obtained, and J. A. Hollinger, February 24, 1913, brought suit on the bond in the name of the United States of America to recover for certain material and labor furnished in the construction of the building for which he was not paid by the contractor. Notice to creditors was published by order of court for three weeks in the Franklin Repository, a newspaper published at Chamberburg, in said district, the last publication appearing on April 9, 1913.

The Vermont Marble Company, May 22, 1913, on application, was given leave to intervene and be made a party, and thereafter filed a statement of claim aggregating \$1,900, with interest, for marble furnished to and used by the contractor in the construction of the building.

[1] The surety companies each filed an affidavit of defense to the claim of the Vermont Company, which in turn June 10, 1913, filed exceptions to the sufficiency of the affidavits. A rule was afterwards, on June 24, 1913, obtained to show cause why judgment should not be entered for want of a sufficient affidavit of defense. Whether the affidavit presents sufficient defense to prevent summary judgment is now for consideration. While the defendants call upon the plaintiff to make proof of his claim, their chief defense is purely legal, going to the right of the plaintiff to recover any amount whatever. That such defense was not set up by demurrer is of no consequence under the Pennsylvania practice. If for any reason, upon examination of the affidavit, the court is satisfied that the defense should be sustained in whole

or in part, judgment must be refused. *United States v. Schofield* (C. C.) 182 Fed. 240.

It is contended by defendants in their several affidavits that the suit instituted by Hollinger was not brought in the time required by the act of Congress giving him the right of action. "Final settlement having been made for the post office * * * on June 14, 1912," it is said in the affidavit, "a period of a full year from the final settlement for the said post office will have elapsed on June 14, 1913; but as the act requires publication of the pendency of such suit for three weeks, and the completion of the publication three months before the expiration of a year from the final settlement for the said post office, it is expressly required by the statute that the original use plaintiff, J. A. Hollinger, should have completed his publication of notice of the pendency of his suit three months before June 14, 1913, or upon March 14, 1913. As the act further requires that the publication of the notice of the pendency of the suit must run for three weeks, then the publication of the pendency of the suit * * * should have started not later than February 21, 1913."

[2] The act provides that there shall be but one suit on the bond, giving the United States priority by six months in the right of action, and allowing parties, who have furnished materials and labor the opportunity to intervene and be made parties to such action, with a view of making equal distribution among claimants of the fund realized, after the United States is fully paid. It further provides that:

"If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, * * * be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor, and his sureties, and to prosecute the same to final judgment and execution: Provided, that where suit is instituted by any of such creditors on the bond of the contractor it shall * * * be commenced within one year after the performance and final settlement of said contract, and not later; and provided further, that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. * * * Provided further, that in all suits instituted under the provisions of this act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

It is contended for the plaintiff that the limitations imposed by the statute, requiring that suit shall be brought within a year after acceptance and final settlement of his contract by the contractor, that the United States shall have six months in which to sue before the right passes to creditors generally, and that all creditors who expect to take anything by the suit shall intervene within the year (*Baker Contract*

Co. v. United States [C. C. A.] 204 Fed. 390, and authorities cited), are the only conditions imposed limiting a recovery, and that the provision respecting notice, personal or by publication, by the creditor who brings suit, to other creditors of their right to intervene, is directory merely, and not mandatory, and that the failure to comply with it does not affect the liability of the sureties or the right to recover on the bond. I am unable to reach this conclusion. The conditions precedent to recovery are attached to the grant by the latter words in the act, in the form of provisos, permitting creditors to sue upon the bond (*Title Guaranty & Trust Co. v. Crane Co.*, 219 U. S. 34, 31 Sup. Ct. 140, 55 L. Ed. 72), and they are equally effective, whether applying to the time during which action shall be instituted or to the manner in which equal division of the amount recovered on the bond is intended to be effected. "Where the liability and the remedy are created by the same statute, the limitation of the remedy is created as a limitation of the right." *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358. "The rights of the parties are defined by the statute which exacted the bond, and by that statute suppliers of labor and material used in the prosecution of the contract work for the government, claiming the right to have recourse upon it, must proceed in the prescribed manner.

As was said by Mr. Justice Van Devanter, construing the act of February 24, 1905, in *United States v. Congress Construction Co.*, 222 U. S. 199, 32 Sup. Ct. 44, 56 L. Ed. 163:

The act "also provides that only one such action shall be brought and that it shall be so instituted and conducted, in point of notice and otherwise, that all demands of that class may be adjudicated therein and included in a single recovery."

The purpose of the act is to protect materialmen and laborers contributing to the construction of federal buildings, and to give all an equal opportunity to secure themselves through the action on the bond as provided by the act. To accomplish this a notice is provided, which is imposed by the act upon the one who takes the initiative. By the notice required all creditors will have at least three months after the last publication to file their claims, and this, in fact, limits the time during which a creditor may bring suit to a little over two months. While this imposes diligence, and the necessity of watching the office of the clerk of the District Court, and if suit is not brought by some other, the bringing of suit during this interim and the publication of notice, it nevertheless affords a remedy for fair and equal treatment of creditors which did not heretofore exist. That the last proviso of the act as to notice, grafted upon the right to sue and recover judgment, is as much a condition imposed and to be observed as the limitations embraced in the two preceding provisos is not doubted.

There may be other reasons why the motion should be denied, which it will not be necessary to consider in view of the conclusion reached. The rule to show cause is dismissed, and the motion to enter judgment refused.

Ex parte LA MANTIA.

(District Court, S. D. New York. June 10, 1913.)

No. 60.

1. EXTRADITION (§ 14*)—PROCEEDINGS FOR EXTRADITION TO FOREIGN COUNTRY—EVIDENCE.

For the purposes of extradition under the treaty with Italy of March 23, 1868 (15 Stat. 629), a conviction of the alleged fugitive in contumaciam, in his absence, is to be treated only as a charge of crime.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 15, 16; Dec. Dig. § 14.*]

2. EXTRADITION (§ 14*)—PROCEEDINGS FOR EXTRADITION TO FOREIGN COUNTRY—EVIDENCE.

Under Act Aug. 3, 1882, c. 378, § 5, 22 Stat. 216 (U. S. Comp. St. 1901, p. 3595), which makes documents authenticated as required by law evidence in extradition proceedings, depositions need not be sworn to.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 15, 16; Dec. Dig. § 14.*]

3. CRIMINAL LAW (§ 662*)—INDICTMENT AND INFORMATION (§ 2*)—FOREIGN EXTRADITION—APPLICABILITY OF CONSTITUTIONAL PROVISIONS.

The provisions of the fifth and sixth constitutional amendments, that no person shall be held to answer for a capital or otherwise infamous crime unless on the presentment or indictment of a grand jury, and that the accused in criminal prosecutions must be confronted with the witnesses against him, have no application in proceedings for extradition to foreign countries, whose laws may be different.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3, 1538-1548; Dec. Dig. § 662;* Indictment and Information, Cent. Dig. §§ 4-8; Dec. Dig. § 2.*]

4. EXTRADITION (§ 14*)—FOREIGN EXTRADITION—PROOF OF IDENTITY.

Evidence produced in extradition proceedings for the return of an alleged fugitive from justice to a foreign country considered, and the competent evidence held insufficient to identify the prisoner as the person charged.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 15, 16; Dec. Dig. § 14.*]

Application of Giovanni La Mantia for writ of habeas corpus. Prisoner discharged.

Daly, Hoyt & Mason, of New York City, for Italian government.
William Michael Byrne, of New York City, for alien.

Kenneth M. Spence, Asst. Dist. Atty., of New York City, for the United States.

WARD, Circuit Judge. The Italian ambassador asked for the extradition under the treaty of 1868 between the United States and Italy of one Giovanni Di Lorenzo, charged with having committed an extraditable offense, viz., murder, October 30, 1908, at San Lorenzo, Italy. He presented to the commissioner documents certified by the American ambassador at Rome under section 5 of the act of 1882, which show clearly that the murder specified was committed; that Giovanni Di Lorenzo was charged with committing it after a preliminary judicial inquiry in substance like the indictment of a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

grand jury, which resulted in the issuance of a warrant for his arrest and detention for trial on the charge, in the court of assize at Palermo.

The certificate of the American ambassador is not in the language of the statute, as would seem to be the proper course. It states that the documents are authenticated "so as to entitle them to be received in evidence for similar purposes by the tribunals of the courts of the United States of America, as required by the act of Congress of August 3, 1882." It should have stated that the documents were entitled to be so received by the courts of the kingdom of Italy. No objection, however, was made on this ground, and I mention it only to call attention to the importance of obtaining proper certificates in these cases. The expression "for similar purposes" means as evidence of criminality. In *re Luis Oteiza y Cortes*, 136 U. S. 330, 337, 10 Sup. Ct. 1031, 34 L. Ed. 464. I am of opinion that upon such evidence as these papers disclose a magistrate here would be justified in committing Giovanni Di Lorenzo if charged with having committed the offense in this country, which is the degree of proof required by article 1 of the treaty.

[1] The complaint states, and counsel for the prisoner contends, that he was tried and convicted in *contumaciam*. There is no evidence of conviction in the documents certified from Italy. What they show is that September 3, 1910, the criminal court of Palermo held a preliminary inquiry into the charge, which resulted in a finding, called sentence, that Giovanni Di Lorenzo should be tried for it in the court of assize of Palermo, and a warrant of arrest issued on September 10th in pursuance of that sentence. It would, however, make no difference whether there had been subsequently a conviction in *contumaciam*, because for the purposes of this proceeding it would be treated only as a charge of crime. *Ex parte Fudera* (C. C.) 162 Fed. 591.

Counsel for the prisoner insists upon various constitutional privileges, which I think apply only to prisoners held for trial here. The act of 1882 defines the papers which may be received in evidence as to the commission of a crime in a foreign country, if authenticated in the manner prescribed. However, the prisoner has had in substance everything that the constitutional privileges involve. The fourth amendment to the Constitution of the United States provides that no person shall be seized except upon a warrant issued "upon probable cause supplied by oath or affirmation." The documents forwarded from Italy conform to this requirement. They establish abundant probable cause. There are statements from a number of persons to the effect that a quarrel took place between Di Lorenzo, his son Salvatore, and his brother-in-law La Fata, on the one side, and two of Di Lorenzo's creditors and their attendants, on the other, as to the possession of certain empty wine casks; that in this quarrel two of the latter faction were shot to death; that Di Lorenzo, his son, and La Fata immediately fled. Scalici, a customs guard, states that he saw Di Lorenzo fire the shot that killed one of the murdered men.

[2] Although these statements were not sworn to, each is stated to

have been read, subscribed, and confirmed by the person making it, which is an affirmation. Moreover, in these international extradition cases the statute makes documents authenticated as required by law evidence. Depositions need not be sworn to. *Elias v. Ramirez*, 215 U. S. 398, 30 Sup. Ct. 131, 54 L. Ed. 253; *Ex parte Glaser*, 176 Fed. 702, 100 C. C. A. 254.

[3] The provision of the fifth amendment, "that no person shall be held to answer for a capital or otherwise infamous crime unless on the presentment or indictment of a grand jury," applies to persons held for trial in the courts of the United States. If construed to apply to prisoners to be held in extradition proceedings to answer for such crimes in foreign countries, there could be no extradition between the United States and countries where the common law does not prevail. However, in this case there was a judicial inquiry and finding in Italy preliminary to the issuance of the warrant of arrest, substantially like the finding of our grand jury.

So the provision of the sixth amendment, requiring the accused in criminal prosecutions "to be confronted with the witnesses against him," obviously applies to criminal prosecutions tried here, and not to persons extradicted for trial under treaties with foreign countries whose laws may be entirely different.

Finally, the case of *Ex parte Fudera* (C. C.) 162 Fed. 591, does not apply. There was in it nothing to connect the prisoner with the crime charged but pure hearsay statements of police officers, on which no magistrate in this country could commit any one for a crime charged to have been committed here.

[4] This leaves as the only question whether there is any competent legal evidence to support the commissioner's finding that the prisoner is Giovanni Di Lorenzo, as the demanding government asserts, and not Giovanni La Mantia, as he claims. I lay out of the case the copy of the examination of the prisoner and his son Salvatore at St. Louis, January 10, 1913, by the immigration authorities, certified under section 882, Rev. Stat. U. S. (U. S. Comp. St. 1901, p. 669), because that section only makes it equal to the original, which itself would not have been competent if produced; also the examination at Ellis Island by the immigration authorities February 7, 1913, of Maria Di Lorenzo, Vito Di Lorenzo, and Providenzia La Fata, which is not certified, nor the testimony of the witnesses proved, by the interpreter and stenographer, and which, if certified and so proved, would not have been competent against the prisoner, having been taken in a nonjudicial proceeding to which he was not a party. No question of disputed identity could be established upon such evidence.

I do not consider the testimony of Hayes, an immigration official, nor of Andreacci, the interpreter, at Ellis Island, as to declarations by the son Salvatore, because they are not competent evidence against the prisoner. It is sought to justify them as relating to pedigree; but the issue is strictly not as to pedigree, but as to identity, and, as far as pedigree is concerned, I have assumed that Salvatore is the son of the prisoner. I also lay out of the case the examination of the prisoner himself before the commissioner, on the ground that, the proceeding

being a criminal one, he could not, under the sixth amendment, be made a witness against himself.

The result is that no legal proof, however much moral proof there may be, is left that the prisoner, who has been for some years known in this country as Giovanni La Mantia, is, in point of fact, Giovanni Di Lorenzo. No one may properly complain that proceedings which involve personal liberty are carefully scrutinized. They should be taken with caution and in full compliance with the requirements of law.

The prisoner is discharged, but, in order that the demanding government may have an opportunity to appeal from this decision within say 20 days from the entry of an order hereunder, only upon giving recognizance with sufficient surety in the sum of \$2,000 for appearance to answer the judgment of the appellate court.

ABRAST REALTY CO. v. MAXWELL.

(District Court, E. D. New York. July 26, 1913.)

1. INTERNAL REVENUE (§ 9*)—CORPORATION TAXES—"DOING BUSINESS."

Certain individuals owning the business of a department store also owned the real estate rented by the firm operating the department store, and, in order to control the real estate, lease, rents, etc., more conveniently, organized plaintiff corporation, of which they owned the stock, under the New York Business Corporations Law (Consol. Laws 1909, c. 4). The corporation was first authorized to buy, sell, rent, and exchange real property, build, construct, and alter houses thereon, manage and develop property, deal in goods, wares, and merchandise, and carry on any business connected therewith, etc. It in fact did no business, except own and operate the real property in question, and on December 26, 1911, amended its certificate of incorporation, so as to limit its powers to the mere ownership and rental of such property, with a distribution of the proceeds. *Held* that plaintiff had no property right in the form of a business privilege, and was not doing business, so as to be taxable under Corporation Tax Act Cong. Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946).

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

2. INTERNAL REVENUE (§ 38*)—CORPORATION TAXES—PAYMENT UNDER PROTEST—RECOVERY.

Plaintiff corporation having been assessed for corporation taxes in January, 1912, under Corporation Tax Act Cong. Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946), and the same not having been paid, a writ of distraint was issued by the collector, and, the corporation having been notified that the tax would be collected by levy, the deputy collector took from a representative of the corporation the amount of the tax, against the verbal protest of the corporate officer at the time, and a written notice of protest then served, in which the corporation denied that it was liable to the tax. *Held*, that the protest was sufficient to entitle the corporation to recover the amount from the collector, on its being determined that the corporation was not within the law.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. § 38.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At Law. Action by the Abrast Realty Company against William J. Maxwell to recover a corporation tax paid to a deputy collector under protest. Judgment for plaintiff.

Edward N. Grout and Paul Grout, both of New York City (Edward M. Grout and F. Sidney Williams, both of New York City, of counsel), for plaintiff.

William J. Youngs, U. S. Atty., of New York City (Louis R. Bick, Asst. U. S. Atty., of Brooklyn, N. Y., of counsel), for defendant.

CHATFIELD, District Judge. Trial has been had, and a verdict in favor of the plaintiff rendered by the jury, by direction of the court. The present motion is to set aside this verdict, and, by stipulation of both parties, to direct, if that motion be granted, the entry of judgment for the defendant.

[1] The plaintiff corporation was organized under the Business Corporations Law of the state of New York, with power to—

"buy, sell, rent and exchange real property, improved and unimproved, to build, construct and alter houses thereon, and to manage and develop real property, generally, to purchase, manufacture, acquire, hold, own, mortgage, pledge, lease, sell, assign and transfer, to invest, trade, deal in and deal with goods, wares and merchandise, and property of every kind and description, and to carry on any of the above business or any other business connected therewith wherever the same may be permitted by law, either manufacture or otherwise, to the same extent as the laws of this state will permit, and as fully and with all the powers that the laws of this state confer upon corporations and organizations under this act and to do any and all of the business above mentioned and set forth in the same extent as natural persons might and could do."

All of the stock was issued to certain members of the firm of Abraham & Straus, who individually owned the real estate rented by that firm for its business. By the terms of the lease all repairs, taxes, expenses, and matters connected with the use of the property are performed and taken care of by Abraham & Straus, the lessees.

The corporation has done nothing except turn over to its stockholders the proceeds of the rent in the form of dividends. Up to December 26, 1911, the corporation exerted none of its corporate powers except as above stated, and upon that date amended its certificate of incorporation so as to limit its corporate powers to the mere ownership and rental of this property, with distribution of the proceeds.

In January, 1912, a corporation tax was assessed, under the provisions of section 38, Act of August 5, 1909, and, not being paid, a writ of distraint was issued by the collector. Notification having been given the corporation that the tax would be collected by levy, sufficient funds were in the hands of a representative of the corporation, so that the deputy collector was able to count out and take the amount necessary to cover the tax, viz., \$2,166.76. Thus the writ did not have to be exhibited by the deputy.

Verbal protest had been made to the collector prior to this time, and a written notice of protest was given him at the time of levy, in which notice the corporation stated that the tax was paid under protest and that the corporation claimed that it was not liable to the

tax. Suit was thereupon brought against the collector to recover the amount, and the action has resulted as stated.

It would appear that the plaintiff corporation is organized under a statute making it *prima facie* liable to the tax. It had the power to engage in activities which, if exercised, would plainly make it "doing business" during the year 1911. *Flint v. Stone Tracy Co.*, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312.

After the 26th of December, 1911, the form of its certificate and the powers exercised by it are entirely similar to those in the case of *Zonne v. Minneapolis Syndicate*, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428, and the existence of trustees in the *Minneapolis Case* would not seem to narrow the liability in that case so as to form a distinction from the present situation.

Prior to the 26th of December, 1911, the government claims that the situation is like the exception noted in the case of *McCoach v. Minehill & Schuylkill Haven Railroad Co.*, 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. —, in which it is said, with reference to *Cedar Street Co. v. Park Realty Co.*, 220 U. S. 170, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312:

"We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law."

But an examination of this record makes it appear that the Abrast Company did nothing before the 26th of December, 1911, in a different way than it did after that time, and that by the change in the certificate of incorporation it relinquished merely powers which it did not exercise and for which, therefore, it could not be taxed. *McCoach v. Minehill & Schuylkill Haven R. R. Co.*, *supra*.

The general situation is entirely similar to that of the individuals who owned the real estate in question, and who leased it to the Abraham & Straus firm prior to the formation of the corporation. If these individuals had maintained an office for the renting of real estate, and had, in connection with that office, managed the real estate and performed all the duties connected therewith, those individuals would be held to have been in the real estate business. But if, on the other hand, they merely had title to the property, executed a lease, and had the rent paid either to a trustee for division among the owners, or directly to themselves, it would not seem that these individuals could be said to have been in business, nor to have conducted a real estate business, and the only tax upon the right to do business, or upon the business itself, would have to be levied directly upon the property involved.

So the plaintiff corporation has no property right in the form of business privilege, beyond the ownership of the real estate which is liable to a direct real estate tax, and which is not taxable under the United States statute in question.

[2] This conclusion seems to be the same as that of the Supreme Court in the cases cited, and the only remaining question is whether

the collector made a levy under sections 3107 and 3205, R. S. (U. S. Comp. St. 1901, pp. 2029, 2080), in such a way that it was equivalent to a payment without protest. In the cases of *City of Philadelphia v. Collector*, 72 U. S. (5 Wall.) 720, 18 L. Ed. 614, *Ersine v. Van Arsdale*, 82 U. S. (15 Wall.) 75, 21 L. Ed. 63, and *Johnson & Johnson v. Herold, Collector* (C. C.) 161 Fed. 593, it is shown that where the tax is paid under such circumstances that the terms of protest are understood and sufficiently expressed to be brought to the notice of the government, and where the levy is used merely to protect the government officer in acting under the statute, an action may be maintained to recover the tax.

For these reasons, the motion to set aside the verdict will be denied.

BRADY v. SOUTH SHORE TRACTION CO.

In re BRADY et al.

(District Court, E. D. New York. April 15, 1913.)

COURTS (§ 278*)—JURISDICTION—RECEIVERSHIP—INJUNCTION FOR PROTECTION OF RECEIVERS—EFFECT OF SALE OF PROPERTY.

A court granted an application by receivers appointed by it for a street railroad company for an injunction restraining another company from threatened action interfering with their operation of the property. At the time the property was sold by the receivers, no formal order had been entered on such application; a temporary restraining order previously made having remained in force. *Held*, that by the sale the court lost jurisdiction to make any order restraining future acts for the protection of the purchaser, but that it retained jurisdiction to make and enforce a decree embodying its previous decision.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 819; Dec. Dig. § 278.*]

In Equity. Suit by Paul T. Brady against the South Shore Traction Company. In the matter of the application of Paul T. Brady and Willard V. King, as receivers, for an injunction. On motion to vacate temporary stay and to deny the application for injunction. Sustained in part.

See, also, 197 Fed. 669.

Gifford, Hobbs & Beard, of New York City (Arthur C. Hume, of New York City, of counsel), for petitioners.

Evarts, Choate & Beaman (Herbert J. Bickford and Henry A. Robinson, both of New York City, of counsel), for Third Avenue Bridge Co.

Frueauff & Robinson, of New York City (Robert S. Sloan, of New York City, of counsel), for Manhattan & Queens Traction Corporation.

CHATFIELD, District Judge. During the administration of certain property by receivers of this court appointed in this action, an application was made on petition for an injunction against the Third Avenue Bridge Company, an intended competitor, which was alleged

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to have no right to undertake the intended acts, and hence would be illegally injuring the property which the receivers were legally in possession of and legally enjoying, viz., a franchise over the Fifty-Ninth Street Bridge and extending into this district.

It was not denied by the petitioners that, if the competitor had complied or should comply with the laws by which his competition could be legalized by the proper authorities, then no wrong would be inflicted upon the property rights in the possession of the receivers. But they also contended, and the court held on objections based upon the question of jurisdiction, that irreparable injury to the property within the possession of the court's receivers and under its protection could be prevented by injunction, when about to be inflicted by any one who did not have a right to compel the receivers to allow the competing act. The decision upon the original motion was filed on July 1, 1912, and has been reported in 197 Fed. 669. No restraining order or injunction *pendente lite* has ever been signed, but the temporary stay has continued by order of the court and with the acquiescence of the Third Avenue Bridge Company. Some discussion has been had as to the settlement of such an order, and during all the period in question since the making of the original motion the temporary restraining order has been in force. After the decision of the motion and some months ago, much of the property held by the receivers, including the franchise over this bridge, was sold by order of the court and with the approval of the necessary municipal and state authorities to purchasers whose rights have become vested in the hands of the Manhattan & Queens Traction Company, who are parties to this motion.

The present application was originally made upon notice to the receivers alone for an order vacating the temporary stay and denying the application for an injunction. It was urged that this court had lost entire jurisdiction over the proceeding by reason of the fact that the only ground of jurisdiction upon which the original ruling was made was the possession and administration by this court, through its receivers, of the property affected. The court directed that the purchasers of this property be brought in as parties to this motion. They have appeared and answered, and it is now contended by the receivers and by these purchasers, the Manhattan & Queens Traction Company, that they are entitled to an injunction order and a decree of this court determining the nature of their title to the property rights in question, deciding that the Third Avenue Bridge Company has not complied with the statutes, and has not obtained an enforceable franchise for the service planned. They ask that it be now enjoined from exercising against the successors in interest to the receivers the intended injury, unless the Third Avenue Bridge Company shall first apply to the proper authorities to perfect its franchise rights and obtain the right to so do.

The situation is unusual, and the principal difficulty arises from the fact that the court must make and enforce a decree embodying its former decision, if title to the property transferred by the receivers is to be definitely adjudicated on the facts which existed prior to the

sale, and which were set forth on the hearing. On the other hand, possession of the property having been given up by the receivers, no jurisdiction exists at present in this court over new parties threatening future injury to that property, and the court has no jurisdiction to protect the purchasers from further injury by competition of the old parties. But if the motion should now be reconsidered, and an injunction denied solely upon the ground of present lack of jurisdiction for further maintenance of the injunction, then the parties in possession would have no determination, which would have the effect of an order or decree, showing the decision of the court, and which would settle the rights determined therein, unless reversed upon appeal. This court cannot decide as to the possibility of resistance on the part of the purchasers from the receivers against a collateral attack upon the conclusions of this court in its previous decision. Nor should this court, if it has lost jurisdiction to enter any order embodying its decision, attempt any further proceedings in the matter. Further, this court would not have the right to decide between parties not within its jurisdiction such questions of title as may be based upon the former decision.

For these reasons, the present motion, in so far as it asks the court to deny, for lack of jurisdiction, the issuance of any injunction as to future acts of the Third Avenue Bridge Company, with respect to the property now in the hands of the Manhattan & Queens Traction Company, will be granted.

The motion, in so far as it seeks to reopen or reverse the previous decision and to set aside from the outset the injunction or temporary stay which has been in effect and has been enforced by the court to protect the property while in the hands of its receivers, will be denied.

Certain questions were left open for hearing upon testimony before final decision, but the jurisdictional points were decided upon the conceded facts, and as to those the conclusion of the court was in effect final. A decree may be entered as to these questions, in the form of an order adjudicating, as between the Third Avenue Bridge Company and the receivers of this court, the right of the receivers to enjoy (without interference until further order of this court, or so long as the court had jurisdiction to protect the property) undisturbed exercise of the franchise rights and property which were threatened with interference on the part of the Third Avenue Bridge Company, up to the time of the sale of such rights to the Manhattan & Queens Traction Company, and which were conveyed by such sale.

It is considered by the court that its former jurisdiction over the subject-matter and over the parties has now been lost, to the extent of making further orders respecting the subject-matter, since that is no longer in the possession of the court. But, jurisdiction over the parties having been gained through possession of the subject-matter, it still remains to the extent of establishing, by decision and order of the court, the conditions and rights which existed at the time property was transferred by order of the court, and that order must be tested by appeal, if incorrectly established.

STEAMSHIP OVERDALE CO., Limited, v. TURNER.

(District Court, E. D. Pennsylvania. July 2, 1913.)

No. 30 of 1913.

ADMIRALTY (§ 14*)—JURISDICTION—MARITIME CONTRACTS.

A contract by which a dealer in coal agreed to furnish to the owner of a line of steamships at certain prices all the normal necessary bunker coals that might be required by the buyer for the use of all of its vessels is not a maritime contract with respect to any part of it which remains executory, and a court of admiralty is without jurisdiction of an action against the seller for its breach by failing to supply coal demanded by one of the buyer's vessels.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 177-180; Dec. Dig. § 14.*]

In Admiralty. Suit by the Steamship Overdale Company, Limited, against Alfred Turner, doing business under the name of Colin & Turner. On exception to libel. Exception sustained.

Edward F. Pugh, of Philadelphia, Pa., and Convers & Kirlin, of New York City, for libelant.

Howard M. Long and Abraham Israel, both of Philadelphia, Pa., for respondent.

THOMPSON, District Judge. This is an action in personam to recover damages for the alleged breach of a contract whereby the respondent agreed to furnish to the libelant company "all the normal, necessary bunker coals that may be required by the buyers for the use of all the steamers of which they are the registered managing owners except when otherwise bound by charter." The libelant claims damages arising from the failure of the respondent to supply the steamship Overdale at Norfolk, Va., with 900 tons of bunker coal at that port, and avers that by reason of the default of the respondent the master loaded the Overdale at the best terms which he was able to obtain at Norfolk, whereby the libelant was compelled to pay \$1,476.50 more than the price named in its contract with the respondent, which amount is claimed as damages, together with damages for nine hours' delay to the vessel in loading the coal, amounting to \$159.44. The respondent excepts to the libel upon the ground:

"That the damages claimed by the libelant arose from the breach of the contract set forth in said libel, which is not an admiralty or maritime contract, nor an admiralty or maritime cause of action, and the cause of action so set forth is not within the jurisdiction of this honorable court."

The contract in this case is similar to that under consideration in the case of *Diefenthal v. Hamburg American Line* (D. C.) 46 Fed. 397, where to quote the language of Judge Billings:

"The respondents were owners of a number of steamers running between New Orleans and various European ports. They made a contract, whereby it was agreed that the libelants would, for the period of one year, furnish and deliver to the respondents on board of their several vessels all the meat, eggs, and vegetables required as supplies for the passengers and crews of said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

boats at fixed prices. The libel further propounds that the number of respondents' boats departing within the year from New Orleans was 43; that the execution of the contract was entered upon, and 2 boats had been furnished with supplies, which, at the agreed prices at that season of the year, caused a loss to the libelants; and that the respondents, refusing to carry out thereafter the said contract, have caused a loss to the libelants of the full sum of \$10,000. The contract, therefore, was a contract whereby the libelants agreed to sell and deliver, and the respondents, who were owners of vessels engaged in foreign commerce, agreed to purchase and receive, at enumerated prices, the supplies which such vessels might require at the port of New Orleans for the period of one year."

After a discussion of the leading authorities upon the question as to what are and what are not maritime contracts, Judge Billings proceeds in his opinion at page 399:

"This is a contract relating to the furnishing of supplies. But it is, after all, not a contract where, until the supplies are actually furnished, the contractors relied upon any ship, but upon the other contracting party. 'The proximate and not the remote cause is looked to as the source of jurisdiction in admiralty.' *Dunl. Adm. Pr. marg. p. 44.* It was not a contract for supplies for a ship, except that the wants of the 43 ships were to furnish the measure of the extent of what was to be furnished—i. e., the contract related to navigation only so far as concerned amounts. For all other purposes it was a general contract for the sale and delivery of provisions, and, according to the distinction which has been made in the cases above referred to both in England and in this country, though having ulterior reference to navigation, is still one for the refusal to carry out which, by the defendants, the plaintiffs must have their remedy in the common-law courts, and not in the court of admiralty. It need not be held that there could not be an admiralty suit in some cases where there is no maritime lien. But where the contract is for supplies, to bring it within the admiralty jurisdiction it must come within the reason that brings materialmen within the dominion of admiralty courts—i. e., it must appear that the necessities or conveniences of ships in ports remote from home ports require that a credit should be given and a debt created which, though arising on land, are distinctively maritime, because necessary to maritime commerce as conducted by ships. It must begin and end in the necessities of a particular vessel for her own voyage. Where owners group together a large number of vessels, and make annual contracts for their supplies, the admiralty jurisdiction does not include them, because the reason for it does not. The objection to the jurisdiction, which it seems to me must prevail, is that this contract, though relating remotely to navigation and maritime commerce, is separated so far from them that it did not spring from the necessities of navigation, and is not within the considerations which make it essentially and distinctively maritime, and, though in part executed, is not, with reference to damages for its further nonexecution, within the jurisdiction of the courts of admiralty. The exception to the jurisdiction must be maintained."

I think the reasoning of Judge Billings applies to the present case and should be followed. The decision was approved in the case of *Marquardt v. French* (D. C.) 53 Fed 603; in *The Harvey and Henry*, 86 Fed. 656, 30 C. C. A. 330, which cases were cited and followed by Judge McPherson in this district in *Reliance Lumber Co. v. Rothchild* (D. C.) 127 Fed. at pages 748 and 749; in *The City of Clarks-ville* (D. C.) 94 Fed. 201; and in *The Mary F. Chisholm* (D. C.) 129 Fed. 814.

If the respondent had offered to deliver coal to the Overdale, and the master of the vessel had refused to accept delivery, the respondent

would have had no right of action in admiralty, either in rem or in personam.

"The admiralty jurisdiction in cases of contract depends, primarily, upon the nature of the contract, and is limited to contracts, claims, and services purely maritime, and touching rights and duties appertaining to commerce and navigation. 1 Conk. Adm. 19; *People's Ferry Co. v. Beers*, 20 How. 393 [15 L. Ed. 961]."

See, also, the note to *The Richard Winslow*, 18 C. C. A. 347, where a careful collation is made of the cases bearing upon the question of admiralty jurisdiction as to matters of contract.

In the present case the contract was between the owner of a line of steamships and a firm engaged in the sale of coal for a general supply of coal at certain prices, the quantity to be measured by the requirements of the libelant for use of all its vessels. Until the contract was executed, no particular vessel or no particular voyage was in contemplation of either of the parties. It had no reference to any particular maritime service or maritime transaction, nor to the navigation, business, or commerce of the sea. If coal had been supplied to the Overdale, the contract would apply as to the coal delivered to the navigation or commerce of the particular vessel, and admiralty would have jurisdiction (*Berwind v. Schultz* [C. C.] 28 Fed. 110; *Rudolph v. Bryan* [D. C.] 161 Fed. 233); or if the contract, being purely executory, had been for performance of some maritime service, admiralty would have had jurisdiction as in the case of *Boutin v. Rudd*, 82 Fed. 685, 27 C. C. A. 526, where admiralty jurisdiction was sustained in a suit for breach of contract of towing; or in *Baltimore Steam Packet Company v. Patterson*, 106 Fed. 736, 45 C. C. A. 575, 66 L. R. A. 193, where jurisdiction was sustained for breach of contract to furnish a cargo to a vessel; or in *Graham v. Oregon Railroad & Navigation Co.* (D. C.) 135 Fed. 608, where jurisdiction was sustained on the same ground; or in *Mauzy v. Culliford* (C. C.) 10 Fed. 388, where the suit arose by reason of the vessel owner's failure to furnish a vessel under a charter party; or in *The Strathnairn* (D. C.) 190 Fed. 673, where admiralty jurisdiction was held to attach for a breach of contract to load a cargo on a vessel.

But in the present case the contract was not such as to give reciprocal rights to the parties to sue in admiralty for nonperformance, and the remedy of the libelant is therefore in the courts of law for breach of a contract not maritime in its nature.

The exception must therefore be sustained.

UNITED STATES v. BUNTING et ux.

(District Court, D. Oregon. July 28, 1913.)

No. 3,840.

WATERS AND WATER COURSES (§ 252*)—IRRIGATION—LATERAL DITCHES—RIGHT TO CUT—ESTOPPEL.

Where defendants over whose land certain irrigation ditches belonging to a government irrigation project was located became a member of a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

water users' association which owned the project prior to its incorporation in the government work, and one of the by-laws of the association provided that such rules and regulations as the Secretary of the Interior might promulgate relating to the administration and use of the water should be binding on the stockholders of the association, and the secretary put into effect certain rules prohibiting water users from cutting the banks of any canals or laterals and from taking water therefrom except at places designated by the government, defendants were estopped to claim the right to break down the banks of a lateral ditch and take water therefrom at a point not so designated, on the ground that, because they owned the fee in the soil of the ditch, they were entitled to take water at whatever point they desired.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 252.*]

Suit by the United States of America against C. A. Bunting and wife. Decree for the United States.

Clarence L. Reames, U. S. Atty., of Portland, Or.
C. C. Brower, of Klamath Falls, Or., for defendants.

WOLVERTON, District Judge. The government now is, and since 1905 has been, engaged in the construction and completion and in the operation of an irrigation project designated as the "Klamath project," situated in the Klamath Basin in Oregon and California. In the course of the work, the government acquired, by purchase from the Little Klamath Water Ditch Company, a canal known as the Main Adams Canal, extending northeasterly and southwesterly across section 35, township 40 south, range 10 east, together with certain laterals, among which are those known as the Stukel and Parrish laterals.

The defendants, C. A. Bunting and his wife, M. Veneta Bunting, are, and have been since 1902, the owners and in the occupancy of certain lands situated in said section 35, through which the Main Adams Canal and Stukel and Parrish laterals extend, and to the south boundary of which the Offield lateral has been constructed. They acquired these lands of Samuel C. Trayner, and at the time they so acquired them the Stukel lateral was serving not only the lands of the defendants, but other lands further to the north and northwest, namely, the Stukel, Hill, and Pettit lands, and is now serving the Loomis lands. The Parrish lateral was serving the defendants' lands and the lands of Parrish; the latter being succeeded by purchasers from him of later date.

The Main Adams Canal was at first constructed farther to the south, but subsequently the route was changed to its present location, and this before the defendants acquired their interest in the lands and premises traversed by said canal and its laterals. J. Frank Adams was the initial promoter of the canal and the irrigation system, his scheme being to form a corporation, with shareholders of persons having lands for irrigation along the proposed route of the canal with its laterals, each holder to take a share of stock for each acre of land to be benefited, and it was in pursuance of this scheme that the organization was perfected and the Little Klamath Water Ditch Company incorporated.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At that time Samuel C. Trayner was in possession, under government right, of a tract of land through which the Stukel lateral was later constructed, and he, with Adams and others, entered into a mutual agreement, whereby each granted to the others perpetual rights of way for the construction and maintenance of all ditches and flumes necessary to convey water from the ditch of the Little Klamath Water Ditch Company across any and all lands held by them and lying under said ditch. At about the same time Trayner subscribed for 50 shares of stock in the Little Klamath Water Ditch Company. J. Ross Trayner was at the time in probable possession under government right of other lands through which the Adams Canal and the Stukel and Parrish laterals were later constructed, but does not seem to have entered into agreement, as did Samuel C. Trayner. Nor did he take stock in the ditch company. The defendants derive their title to a portion of the lands now owned by them through J. Ross Trayner; the latter having conveyed through mesne conveyances to Samuel C. Trayner. It should be further noted in this relation that the defendant C. A. Bunting succeeded to 25 of the 50 shares of stock which Samuel C. Trayner subscribed for in the ditch company.

Adams and other witnesses relate that, in the construction of the canal with its laterals, all parties holding lands along the course of the ditch and under it freely permitted the construction of said ditch and its laterals over their premises, without protest or objection, with a view to sharing in the benefits that would inure to their premises from use of the water for irrigation and other purposes, so that the ditches and laterals that were constructed were so constructed with the free assent of each person whose lands they traversed.

In connection with the Klamath Basin project, there was organized, under the laws of the state, a corporation known as the Klamath Water Users' Association, and it was only through membership therein that rights could be obtained for use of water to be supplied by means of the irrigation project. Under the by-laws of such association, such rules and regulations as the Secretary of the Interior might promulgate relating to the administration and use of water were made binding and obligatory upon the stockholders of the association; not more than one share of stock to be allotted for each acre of land or fraction thereof.

On March 17, 1905, the defendants became shareholders in the association to the extent of 290 shares, and thereby became obligated by the terms of their stock subscription to all the by-laws of the association, as well as to the observance of such rules and regulations for taking water and the use thereof as the Secretary of the Interior might promulgate. In due course the Secretary of the Interior adopted and put into effect certain rules and regulations relating to such project as in substance and effect prohibit water users from cutting, breaking down, or destroying the banks and retaining walls of any canals or laterals pertaining to the project, and from taking water from any of such canals or laterals, except at places and points designated and established by the government.

Now, it is alleged that, in violation of these contractual relations of the defendants toward the government, and of the rights of the gov-

ernment to maintain and operate its main ditch and laterals over and through the lands of the defendants, the defendants have cut the banks of the Stukel lateral at several places not designated by the government, and insist that they have a right to take water from said lateral and the main canal at whatever point and whenever they may desire, and the question is presented whether the defendants have such right.

The defendants deny that they have cut the banks of the lateral as alleged, but several witnesses have testified that C. A. Bunting admitted to them that he opened, widened, and deepened three or four outlets from the Stukel lateral at higher elevations, with a view to increasing the area of irrigation upon his premises, and there seems to be little doubt as to that. Furthermore, Bunting claims in his testimony that he had a right to do these things, although not affirming that he did them. His theory, however, as to the relative rights existing between himself and the government, is in effect that he is the owner of the fee of the land over which the water in the ditch and laterals flows, while the government has the right to the use of the canal and laterals for flowing water through them, and that, being the owner of the soil in fee, he has the right to control the banks of the runways, and therefore has the right to take water from such runways at whatsoever points he desires, and to devote the same to his uses.

Tracing the history of the construction of the main canal and these laterals, as above very briefly narrated, it would seem that the government, through its predecessor, at least acquired a permissive easement over the lands traversed by such canal and laterals. But, however this may be, the defendants are clearly estopped by what they have done in becoming shareholders in the Water Users' Association and accepting the form of stock issued by the association, and agreeing to be bound in taking water by the rules and regulations prescribed by the Secretary of the Interior. They are bound by their own agreement to conform to these rules and regulations, and will not and ought not to be permitted to insist upon taking water contrary thereto. The rules and regulations are designed for the government of all the water users, and, unless they are enforced, it is manifest that the project would soon be in a confusion that would defeat the very purposes of putting it on foot.

The government should have its injunction as prayed, and it is so ordered. But, considering that the defendants are not wholly without equity, and much expense has been incurred in taking the testimony that might and should have been avoided, for which neither party is free from fault, neither party will be permitted to recover costs and disbursements from the other.

CARLETON et al. v. THREE HUNDRED SIXTY-SEVEN TONS OF COAL.

(District Court, D. Maine. July 18, 1913.)

No. 217.

1. SHIPPING (§ 37*)—CHARTER—VALIDITY OF CONTRACT.

Telegrams and a letter passing between the parties construed, and *held* to constitute a valid charter of a schooner for the carriage of a cargo of coal; the vessel having at once entered upon and performed the contract.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 127-135; Dec. Dig. § 37.*]

2. SHIPPING (§ 175*)—DEMURRAGE—LIABILITY OF CHARTERER.

Where the agents of the charterer of a vessel for the carriage of a cargo of coal directed her to report to a coal company for loading, the charterer became responsible for the acts of such company, and liable for demurrage because of its failure to give customary dispatch in loading.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 572-574; Dec. Dig. § 175.*]

In Admiralty. Suit by Frank J. P. Carleton and others, owners of the schooner *Adelia T. Carleton*, against Three Hundred and Sixty-Seven Tons of Coal; The Camden Yacht Building & Railway Company, claimant. Decree for libelants.

H. L. Withee, of Rockport, Me., for libelants.

S. C. Perry, of Portland, Me., for respondent.

HALE, District Judge. The owners of the schooner *Adelia T. Carleton*, of Rockport, Me., bring the libel in this case against a cargo of 367 tons of coal carried by that schooner from South Amboy, N. J., to Camden, Me. They seek to recover demurrage for six days' detention in loading the vessel at South Amboy, and a small balance for freight. The claimant, the Camden Yacht Building & Railway Company contends that there was no valid charter; and that the schooner was given due dispatch in loading.

[1] The libelants rely upon a parol charter of the vessel. The following telegrams and letter are put in evidence:

"New York, N. Y., July 6, 1912.

"To S. E. & H. L. Shepherd, Rockport, Me.

"Can you use Carleton three eighty tons thirteen half draft coal eighty cents. Answer care Eliot Company.
D. S. Kent."

"Rockport, Me., July 6, 1912.

"To Capt. D. S. Kent, Cr. J. A. Eliot and Co., New York.

"Yes if we can buy coal. Will wire you Monday. When will vessel be ready?
S. E. & H. L. Shepherd."

"New York, July 6, 1912.

"To S. E. & H. L. Shepherd, Rockport, Me.

"Carleton ready about Tuesday. Understand Garfield Proctor can furnish coal.
D. S. Kent."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Rockport, Me., July 6, 1912.

"To Capt. D. S. Kent, Care J. A. Eliot & Co., New York.

"Have ordered coal of Garfield Proctor. S. E. & H. L. Shepherd Co."

"July 6, 1912.

"Capt. David S. Kent, c/o J. A. Eliot & Co., New York, N. Y.

"Dear Captain: We received your telegrams and without quoting beg to state that we understand that your vessel will be ready Tuesday and that you are willing to accept eighty cents freight to Camden and that the Garfield & Proctor Coal Company are in a position to furnish coal and we immediately wired them to load the Carleton for account of the Camden Yacht Building & Railway Company, Camden. We did not state the rate of freight. As a matter of fact that is immaterial. On the vessel's arrival here, say if they put in freight as agreed upon or eighty cents it is immaterial.

"Hoping you will have prompt dispatch and that you will have a quick passage and thanking you for taking the matter up with us, we are,

"Very truly yours,

S. E. & H. L. Shepherd."

The telegram of Capt. Kent, and the telegrams in reply signed by S. E. & H. L. Shepherd, who acted for the claimant, together with the letter of confirmation, may fairly be held to constitute an offer and acceptance. The proofs indicate that at the end of this correspondence both parties understood that a contract had been made, for the letter in behalf of the claimant expresses the hope that the ship will have prompt dispatch and a quick passage. The proofs show also a ratification of the contract, and that the schooner entered upon its performance. In *James v. Brophy*, 71 Fed. 310, 312, 18 C. C. A. 49, in speaking for the Circuit Court of Appeals in this Circuit, Judge Webb passed upon a parol contract, and gave weight to the fact that the ship had entered upon its performance, and that the subsequent action of both parties to the contract was of probative value in determining the existence of a charter. Upon a careful consideration of the proofs in the case at bar, I am of the opinion that the libellant has met the burden of proving a valid charter. The *Phebe*, 1 Ware, 268, Fed. Cas. No. 11,064; *Huron Barge Co. v. Turney* (D. C.) 71 Fed. 972; *James v. Brophy*, 71 Fed. 310, 312, 18 C. C. A. 49, and cases cited.

I cannot sustain the contention of the claimant that the charter was merely a conditional one. The proofs do not show that any conditions were accepted by the libellants. I think an unconditional charter has been proved.

[2] The claimant further urges that there was no delay in loading, but that the schooner was given customary dispatch. It appears by the evidence that the vessel reported at South Amboy at 7:30 a. m., July 10th; that the captain demanded a cargo every day; that she was loaded July 19th, and that thus she was lying at that port 10 days; that on the fourth day, July 13th, Capt. Kent notified the charterer that the vessel was then "on its hands"; and that it lay for six full days thereafter. The proofs satisfy me that three days are the customary lay days at South Amboy. The claimant seeks to justify the delay by showing a shortage of egg and stove coal at this time. The testimony does not, however, indicate that the size of the coal was specified between the parties when the contract was made. On July 10th the ship-pers were notified by a telegram from S. E. & H. L. Shepherd, through

the broker, to load the Carleton with "half egg and half stove; egg on bottom, if not too late." So far as I can find from the testimony, there was no notice before this as to the size of the coal required. There is nothing in the proofs to indicate but that the vessel might carry nut or pea coal under the contract, and it seems to be admitted on all sides that vessels carrying those sizes were getting prompt dispatch.

The claimant proves no sufficient reason for the delay. The testimony shows that the cargo was ordered direct from the Garfield & Proctor Coal Company, the shippers, who must be held to have acted for the charterer. In *Hinckley v. Wilson Lumber Co.*, 205 Fed. 974, an opinion was handed down on June 2d last, wherein this court had occasion to refer to *Donnell v. Amoskeag Mfg. Co.*, in this Circuit, 118 Fed. 10, 11, 55 C. C. A. 178, 179, where the charter provided:

"Vessel to report to the Consolidation Coal Company, Baltimore, for orders; it being understood vessel shall be loaded by them in turn."

And in speaking for the Court of Appeals Judge Putnam said:

"By consigning the vessel to the Consolidation Coal Company, the Garfield & Proctor Coal Company, in whose shoes the claimant stands, made itself responsible for the acts or omissions of the consignee, and in that respect it stands the same as though the stipulation had been that the vessel should report to itself."

In the case at bar, I am of the opinion that the charterer must be held responsible for the acts of Garfield & Proctor, the shippers, to whom the vessel was consigned. The claimant is also responsible for the acts of the Shepherd Company, its agent, throughout the transaction. After a careful consideration of the proofs, I am convinced that the responsibility for the delay in loading was upon the claimant and its agents. The vessel was delayed at South Amboy six days beyond the customary lay days, and this delay was due to the fault of the charterer and its agents. It is proved that the rate of demurrage for vessels of the class of the Carleton was eight cents per ton of cargo per day. Under the evidence, the schooner is entitled to six days' demurrage on the coal carried, \$176.16. It appears that Capt. Kent, for the vessel, refused to receive a balance of \$10 due him for freight; he evidently supposing that this action was necessary in order to "bind his claim." It appears that the \$10 has never been paid. I see nothing in the testimony to justify the conclusion that the payment of \$10 has been waived, and I see no reason why it should not be added to the amount of damages. Notice of the lien upon the cargo was promptly given the consignee, and I am of the opinion that the lien has not been waived. I have not undertaken to recite or to comment upon the testimony in detail.

The parties have expressed the intention that I shall pass upon the question of damages, without reference to an assessor. I am of the opinion that the libelants are entitled to a decree of \$186.16, with interest from July 28, 1912, the date when demand was made upon the cargo. A decree may be entered for the sum of \$196, with costs for the libelants.

In re WINK.

(District Court, D. Maryland. July 30, 1913.)

1. **BANKRUPTCY (§ 444*)—ORDERS—REVIEW—PETITION—FILING—TIME.**

A petition to review a referee's order in bankruptcy, not filed until 30 days after the entry of the order, was too late.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920-927; Dec. Dig. § 444.*]

2. **BANKRUPTCY (§ 120*)—TRUSTEE—QUALIFICATIONS—BANKRUPT'S ATTORNEY.**

The fact that an attorney has represented the bankrupt does not in itself disqualify him to act as the bankrupt's trustee; but, before he will be allowed to become trustee, there should be some evidence that his choice has been brought about, in part at least, by the activities of others than himself and the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 185; Dec. Dig. § 120.*]

3. **BANKRUPTCY (§ 123*)—TRUSTEE—ELECTION.**

Where a bankrupt's former attorney and the bankrupt were active in obtaining powers of attorney from creditors, which the attorney voted for himself as trustee, and, the referee having refused to allow the same, the attorney induced certain of the creditors whom he represented to give new powers to another, who on a subsequent election desired to vote the same for such attorney as trustee, the referee properly held that the attorney was ineligible.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 171-179; Dec. Dig. § 123.*]

In the matter of bankruptcy proceedings of William A. Wink. Petition by Ivan L. Hoff to revise certain referee's orders disallowing certain powers of attorney procured by petitioner, which he sought to vote for himself at an election of a trustee for the bankrupt. Affirmed.

Ivan L. Hoff, of Westminster, Md., in pro. per.

J. Milton Reifsnider, of Westminster, Md., for certain creditors.

ROSE, District Judge. The petitioner is a member of the bar. He was, until very recently, at least, attorney for the bankrupt. The latter made to him an assignment for the benefit of creditors. He accepted the trust. Certain creditors instituted bankruptcy proceedings. The making of the assignment was alleged to be an act of bankruptcy. An adjudication followed. Mr. Hoff prepared the bankrupt's schedules, and as his attorney filed them.

On June 2, 1913, a meeting of creditors to elect a trustee was held. Mr. Hoff had powers of attorney from a large number of creditors. These he voted for himself. As a result he received the votes of a majority in number and amount of the allowed claims. There was another candidate. Objection was made to the confirmation of his election. The bankrupt was examined. It appeared that at Mr. Hoff's request he had spent a day in personally soliciting creditors to give their powers of attorney to Mr. Hoff, and to the same end had co-operated with the latter in communicating with other creditors by mail. The referee refused to approve the choice of Mr. Hoff.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] It is here sought to revise his order then made. The petition for revision was not filed until 30 days after the order was entered. The rules of the court require that such petition shall be filed within 15 days. The petition for revision, so far as it relates to the order of June 2d, must therefore be dismissed. The petitioner loses nothing thereby. The same question subsequently arose, and has been properly brought here for re-examination.

The referee adjourned the meeting to June 20th. At that time Hoff presented most of the powers of attorney which he had used at the first meeting, and, as at that meeting, offered to vote under them for himself. Six of the creditors from whom at the first meeting he held powers of attorney were now represented by one Hunt under new powers executed since the adjournment of the preceding meeting. These six creditors executing these powers to Hunt were all persons from whom the bankrupt had in person secured the former powers to Hoff. After the first meeting Hoff prepared new drafts for these six creditors, filling in Hunt's name as the attorney in fact, instead of his own. He gave these drafts to Hunt, and told the latter to get them executed. At Hunt's request the creditors did so. Hunt sought to vote for Hoff. Had the votes of Hoff and Hunt been received, Hoff would again have had a majority in number and amount of the allowed claims. The referee, however, was of opinion that as both Hoff and the bankrupt had been unduly active in influencing the creditors to vote for Hoff, and as the latter had been the attorney for the bankrupt down to at least the time at which the schedules were filed, the powers of attorney held by Hoff and Hunt should be disallowed. If they were disallowed, another candidate had a majority in number and amount of the claims voting. The referee accordingly held that the latter had been elected. His election was thereupon confirmed.

[2] The petition seeks to have revised so much of this order as disallowed Hoff's and Hunt's powers of attorney and refused to declare Hoff elected, and to confirm such election. The petitioner relies on authorities which hold that a bankrupt's attorney is not necessarily and under all circumstances disqualified to be elected trustee, if before the election he has completely severed his professional connection with his former client. It is easy to conceive of cases in which everybody interested wants the bankrupt's attorney to be his trustee, because it is apparent that he can be of more use to the estate than any one else can be. When that is so, there ought to be no technical bar to prevent his acting. It is not necessary now to inquire whether such election should ever be permitted, unless the attorney is the practically unanimous choice of all the creditors. Without going so far, it is enough to say that, before he should be allowed to become trustee, there should be some evidence that his choice has been brought about, in part, at least, by the activities of others than himself and the bankrupt.

On general principles and in the overwhelming majority of cases, it is inexpedient that the former attorney for the bankrupt shall become his trustee. There are many and cogent reasons for so holding. One of the most obvious of these is the always existing possibility that it may become the duty of the trustee to take legal proceedings of some

kind against the bankrupt. If it does, the difficulties and embarrassments which may result from recent confidential relations between the two may be of the most serious character. Moreover, for the harmonious, and therefore economical, administration of the bankrupt's estate, it is desirable, if possible, that the trustee shall not only deserve, but shall in fact have, the confidence of the creditors generally, and that his motives shall not be distrusted by even a minority of them. Such confidence is not likely to be given to one who was the adviser of the bankrupt in the commission of the act of bankruptcy, and afterwards, by his own exertions and that of the bankrupt, contrived to have himself elected trustee.

[3] The presumptions against the eligibility as trustee of an attorney for the bankrupt are so strong that it is doubtful whether his choice should ever be confirmed, where he has solicited and obtained the assistance of the bankrupt in securing his election. In such cases the courts need not, and ordinarily, at least, should not, go into nice inquiries as to precisely how many votes had been secured by the direct or indirect influence of the bankrupt. That the *ci-devant* attorney and would-be trustee's relations with the bankrupt are still so close that the former calls upon the latter to aid him in getting votes, and the latter willingly does so, should be, as a rule, sufficient evidence to justify, if not to require, his exclusion from the trusteeship.

In this case the petitioner urges that what was done was worse in form than it was in either intention or result. The referee is of much experience. He is an official of ability and sound judgment. He has been in close contact with the case, and with all the parties to it. The witnesses have testified in his presence. He has reached the conclusion that under all the circumstances the petitioner is disqualified to act as trustee. In his so holding no error is apparent.

His orders will therefore be affirmed, and the petition denied, with costs.

In re MORSE.

(District Court, D. Kansas, Third Division. May 15, 1912.)

No. 609.

1. BANKRUPTCY (§ 396*)—ASSETS—LIFE POLICY—SURRENDER VALUE.

The surrender value of a policy on the bankrupt's life, payable to his wife as beneficiary, is a part of his estate in bankruptcy, unless exempted therefrom by state laws.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668; Dec. Dig. § 396.*]

2. BANKRUPTCY (§ 396*)—EXEMPT PROPERTY—LIFE INSURANCE POLICY.

Gen. St. Kan. 1901, § 3463, entitled an act to exempt the proceeds of life insurance policies and beneficiary certificates, after providing that all such policies and their reserves shall inure to the sole and separate use of the beneficiaries named therein, declares that they shall be exempt from all claims against the person whose life is insured, from all claims which the person or persons effecting the insurance and the creditors and representatives of such person or persons may make against the policy

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or its proceeds, from taxation, and all claims and judgments of creditors and representatives of the person or persons named in the policy. *Held*, that the title of the act was sufficient to indicate a legislative intent to exempt the proceeds of a policy to the beneficiary named therein as against creditors of the insured, and that, since the act should be construed as exempting its proceeds from liability for the payment of insured's debts, the surrender value of a policy did not become a part of insured's estate in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668; Dec. Dig. § 396.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Oliver S. Morse. On certified question by the referee as to the exemption of certain insurance on the life of the bankrupt. Reversed.

Wm. W. Shelley, of Kansas City, Mo., and A. M. Keene and Ed. C. Gates, both of Ft. Scott, Kan., for bankrupt.

Ewing, Gard & Gard, of Iola, Kan., for trustee.

POLLOCK, District Judge. The facts are the bankrupt, at the date of the institution of this proceeding and of adjudication, held an ordinary life policy on his life, issued by the United States Life Insurance Company of New York, March 20, 1907, for \$3,000; the beneficiary named therein being his wife. This policy was scheduled by the bankrupt among his assets and is now in the possession of his trustee.

[1] At the date of the adjudication, under the terms of the policy and the practice of the company issuing it, it had a surrender value of \$215.25; therefore the beneficial interest in the policy, to the extent of such surrender value, by virtue of the provisions of section 70 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565, 566 [U. S. Comp. St. 1901, p. 3451]), passed to his trustee in bankruptcy for the benefit of creditors, unless exempted therefrom under state laws. *Hiscock v. Mertens*, 205 U. S. 292, 27 Sup. Ct. 488, 51 L. Ed. 771; *Holden v. Stratton*, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018; *In re Orear*, 178 Fed. 632, 102 C. C. A. 78, 30 L. R. A. (N. S.) 990.

The question, therefore, presented for decision, is: Is the policy of insurance, including its surrender value at the date of adjudication, exempt from the payment of the debts of the bankrupt? The referee held to the contrary. The correctness of this ruling is certified for review.

[2] A statute of the state, in force at the date the policy was issued and since, provides as follows:

"In case any life insurance company, fraternal order or beneficiary society shall have issued or shall hereafter issue any policy or policies of insurance or beneficiary certificate upon the life of an individual and payable at the death of the assured, or in any given number of years, to any person or persons having an insurable interest in the life of the assured, all such policies and their reserves of the present value thereof shall inure to the sole and separate use and benefit of the beneficiaries named therein, and shall be free from the claims of the assured, and shall also be free from the claims of the person or persons effecting such insurance, their creditors and representatives, and shall be free from all taxes and the claims and judgments of the creditors and representatives of the person or persons named in said policy or policies of insurance." Gen. Stat. 1901, § 3463.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In so far as ascertained, this statute has received consideration from the Supreme Court of the state in but one case. *Emmert v. Schmidt*, 65 Kan. 31, 68 Pac. 1072. The question presented and determined in that case was the right of the beneficiary named in the beneficiary certificates issued to a member of a lodge of United Workmen and a member of a camp of Modern Woodmen to claim the proceeds of such certificates paid on the death of the member, theretofore received by the beneficiary and deposited in bank, exempt from the payment of a judgment against both the deceased member and the beneficiary named in the certificates, his wife. In passing on this question, the statute was construed, and the exemptions thereby created stated to be, as follows:

"The body of the act, after providing that all such policies and their reserves of the present value, as enumerated in the act, 'shall inure to the sole and separate use and benefit of the beneficiaries named therein,' proceeds to enumerate and classify the exemptions created. By this classification it is seen that life policies and beneficiary certificates, and their proceeds, are exempt: (1) From all claims against the person whose life is insured; (2) from all claims which the person or persons effecting the insurance and the creditors and representatives of such person or persons may make against the policy or its proceeds; (3) from taxation; (4) from all claims and judgments of creditors and representatives of the person or persons named in the policy."

Under the statute as thus construed there can be no possible contention but that it was the legislative intent in the passage of the act to exempt the contract of insurance in question in this case, including its present surrender value, to the sole use and benefit of the beneficiary named therein, his wife, freed from all debts, claims, and demands of every kind and nature held by the creditors of the assured bankrupt.

However, it was thought by the referee, as shown by his decision, the title to the act is not sufficiently broad to uphold this construction. The title reads:

"An act to exempt from legal process to beneficiaries the proceeds of life insurance policies and beneficiary certificates."

The subject and purpose of the title to a legislative act is to furnish an index to the contents of the act. While it is true the title to the act in question declares the intent of the Legislature to be to create exemptions in favor of beneficiaries named in policies of insurance, and not for the benefit of those assured thereby, yet this declared intent may be carried out in the body of the act by exempting the policy of insurance for the benefit of the beneficiary from the claims of creditors of the assured as well as the demands of creditors of the beneficiary, or any other claimant. As, therefore, the title to the act in question clearly states it to have been the legislative intent to exempt to the beneficiary named in the policy in dispute the proceeds of the policy, and as one of such proceeds thus exempted by the act from the demands of creditors of the assured bankrupt is its surrender value, sought by the trustee to be recovered for the benefit of the creditors of the bankrupt estate in his hands under the provisions of section 70 of the Bankruptcy Act, it must be held the title is broad enough to include such exemption.

Therefore, as the policy and its proceeds are not subject to the pay-

ment of such demands, but are exempted therefrom by the terms of the act, it must be held title to such proceeds did not pass to the bankrupt, but inures to the sole use and benefit of the wife as beneficiary in the policy. This exemption, made for her benefit by the terms of the act, it is clearly the duty of the court to maintain and protect under the provisions of state laws, which are by the courts regarded with favor in the protection of dependents from want arising out of the misfortunes coming to those on whom the law casts the duty of providing. *In re Orear*, 189 Fed. 888, 111 C. C. A. 150.

It follows the decision of the referee must be reversed, and the policy or its proceeds, including its surrender value, delivered to the beneficiary therein named by the trustee; and this regardless of the fact whether the exemption be directly asserted by the beneficiary, or asserted by the bankrupt for her protection as her representative by nature.

It is so ordered.

SHADE v. NORTHERN PAC. RY. CO. et al.

(District Court, W. D. Washington, N. D. July 8, 1913.)

No. 2,466.

1. MASTER AND SERVANT (§ 256*)—EMPLOYER'S LIABILITY ACT—ACTION—PLEADING.

An action cannot be maintained against a corporation under the Employer's Liability Act (Act Cong. April 22, 1908, c. 149, § 1, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), where the complaint neither alleges nor pleads facts showing that defendant is a common carrier.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809-812, 815; Dec. Dig. § 256.*]

2. COURTS (§ 280*)—JURISDICTION OF FEDERAL COURTS—PRESUMPTION.

It will be presumed that a cause is without the jurisdiction of a federal District Court, unless the contrary affirmatively appears from the record.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816-818; Dec. Dig. § 280.*]

At Law. Action by Pete Shade against the Northern Pacific Railway Company and the Oso Logging Company. On demurrer to complaint by defendant Logging Company. Demurrer sustained.

John T. Casey, of Seattle, Wash., for plaintiff.

Hulbert & Husted and John A. Coleman, all of Everett, Wash., for defendant Oso Logging Co.

CUSHMAN, District Judge. This cause is for decision upon the demurrer of the defendant Oso Logging Company to plaintiff's complaint, urged upon the ground that, the jurisdiction of the court being invoked solely under the federal Employer's Liability Act, sufficient facts are not stated in the complaint to constitute a cause of action against the demurring defendant.

It is alleged in the complaint that the plaintiff was injured by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
206 F.—23

fall of one of the cars of the defendant railway company, which, with others, had been wrecked and ditched, and that:

"Plaintiff was employed at said time by the defendants to assist in repairing said cars of the Northern Pacific Railway Company and replacing them upon the railroad track as aforesaid."

It is further alleged:

"That on or about the 15th day of March, 1913, the defendant Northern Pacific Railway Company owned, controlled, and operated an interstate railroad and many lines and branches in the state of Washington, and at said time owned, controlled, used, and operated many engines, cars, and other railroad equipment; and at said time said defendant Oso Logging Company was engaged with the said Northern Pacific Railway Company in using some of the freight cars of the said railroad company in hauling and transporting logs, poles, lumber, and other materials along and upon one of the branch lines of the said Northern Pacific Railway Company for a distance of five miles or more from the station or town of Halterman, in Snohomish county, Washington. * * * That all of said injuries were caused to the plaintiff through the fault, carelessness, and negligence of the defendants and of each of them, and at said time and place the defendants were engaged in transporting logs, poles, piling, and other timber, lumber, and freight to various parts of the United States, and said defendants and each of them were engaged at said time and place in interstate and foreign commerce, and plaintiff was employed thereon by the defendants in working about and around and upon said car, which car had been and was to be used in such commerce, and plaintiff claims herein the benefit of the federal Employer's Liability Acts passed by the Congress of the United States, and all other acts and laws passed by said Congress relating to such matters and to the relations of master and servant."

Plaintiff relies upon the following authorities: *N. P. Ry. Co. v. Maerkl*, 198 Fed. 1, 117 C. C. A. 237; *Johnson v. S. P. Ry.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; *Colasurdo v. Railway*, 180 Fed. 832, affirmed 192 Fed. 901, 113 C. C. A. 379; *S. P. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310.

Defendant relies upon the following authorities: Act April 22, 1908, c. 149, 35 Stat. 65, Fed. Stat. Ann. Supp. 1909, pp. 584, 585 (U. S. Comp. St. Supp. 1911, p. 1322); 2 Words and Phrases, pp. 1313 and 1314.

The federal Employer's Liability Act provides:

"That every common carrier by railroad, while engaging in commerce between any of the several states, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce. * * *" 35 Stat. 65, Supp. 1909, Fed. Stat. Ann. 584, 585.

[1] Under this act a cause of action is not set out against the Oso Logging Company, for the complaint neither alleges that the Oso Logging Company is a common carrier, nor does it set out facts sufficient to justify that conclusion. In other words, all the facts recited might be true, and the defendant Oso Logging Company not be a common carrier, as, for example, if "the logs, poles, lumber, and other materials" being hauled in the freight cars belonged to the defendant logging company, and if this defendant was transporting logs and lumber products owned by it from the state of Washington to other states, it might be engaged in interstate commerce, but it would not thereby become a common carrier.

As above stated, it is alleged in the complaint that:

"Plaintiff was employed at said time [at the time of his injury] by the defendants to assist in the repairing of said cars of the Northern Pacific Railway Company and replacing them upon the railroad track as aforesaid."

This might be true, and, further, it might use some of the cars of the railroad company, as alleged, in hauling and transporting lumber, logs, and other materials, without being or becoming a common carrier. This alone would not justify the conclusion that the logging company was such a carrier. To be a common carrier it is necessary that such carrier should undertake to serve all who see fit to employ it. It is not alleged in express terms that the logging company is a common carrier, nor are any facts stated from which it might reasonably be so inferred.

The plaintiff contends that, having alleged a cause of action under the general law, as well as under the liability law, the demurrer should be overruled, because defendant has not demurred expressly on the ground that the court has no jurisdiction. If the Employer's Liability Act does not apply to the defendant logging company, as above pointed out, the only other ground giving this court jurisdiction would be diversity of citizenship, concerning which there is no allegation in the complaint.

[2] It will be presumed that a cause is without the jurisdiction of the United States District Court, unless the contrary affirmatively appears from the record. *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Continental Ins. Co. v. Rhoads*, 119 U. S. 239, 7 Sup. Ct. 193, 30 L. Ed. 380; *King Bridge Co. v. Otoe Co.*, 120 U. S. 226, 7 Sup. Ct. 552, 30 L. Ed. 625; *Freeman v. Butler* (C. C.) 39 Fed. 2; *Craswell v. Belanger*, 56 Fed. 530, 6 C. C. A. 1, 15 U. S. App. 104; *Gilbert v. York*, 111 N. Y. 548, 19 N. E. 270; *Marks v. Marks* (C. C.) 75 Fed. 324.

Where the jurisdiction of the federal court depends on the diversity of citizenship, facts essential to support that jurisdiction must appear in the record. *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Grace v. Central Ins. Co.*, 109 U. S. 283, 3 Sup. Ct. 207, 27 L. Ed. 935; *Shaw v. Mining Co.*, 145 U. S. 447, 12 Sup. Ct. 935, 36 L. Ed. 770; *Bors v. Preston*, 111 U. S. 255, 4 Sup. Ct. 407, 28 L. Ed. 420; *Mansfield, etc., Ry. Co. v. Swan*, 111 U. S. 382, 4 Sup. Ct. 510, 28 L. Ed. 464; *Cameron v. Hodges*, 127 U. S. 325, 8 Sup. Ct. 1154, 32 L. Ed. 134; *Stevens v. Nichols*, 130 U. S. 231, 9 Sup. Ct. 518, 32 L. Ed. 915; *Chapman v. Barney*, 129 U. S. 681, 9 Sup. Ct. 426, 32 L. Ed. 801; *Stuart v. Easton*, 156 U. S. 47, 15 Sup. Ct. 268, 39 L. Ed. 341; *Stephenson v. The Francis* (D. C.) 21 Fed. 718; *Adams v. County of Republic* (C. C.) 23 Fed. 212; *Lonergan v. Illinois & R. Co.* (C. C.) 55 Fed. 551; *Bondurant v. Watson*, 103 U. S. 286, 26 L. Ed. 449; *Steamship Co. v. Tugman*, 106 U. S. 122, 1 Sup. Ct. 58, 27 L. Ed. 89; *Mexico South Bank v. Reed*, 17 Fed. Cas. 243; *Oxley Stave Co. v. Butler Co.*, 166 U. S. 655, 17 Sup. Ct. 709, 41 L. Ed. 1152; *Mutual Life Ins. Co. v. Kirchoff*, 169 U. S. 111, 18 Sup. Ct. 260, 42 L. Ed. 680.

Demurrer will be sustained.

In re STONE.

(District Court, E. D. Pennsylvania. July 3, 1913.)

No. 4,854.

1. BANKRUPTCY (§ 81*)—INVOLUNTARY PETITION—SUFFICIENCY.

General allegations, in a petition in involuntary bankruptcy, that defendant committed acts of bankruptcy by transferring property with intent to prefer creditors, or concealed property with intent to defraud creditors, without setting out any facts from which such intent may be inferred, are not sufficiently specific.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113-118, 125; Dec. Dig. § 81.*]

2. BANKRUPTCY (§ 81*)—INVOLUNTARY PETITION—SUFFICIENCY.

A petition in involuntary bankruptcy is insufficient where the acts of bankruptcy charged consist of the giving of an unlawful preference and the transfer and concealment of property with intent to defraud creditors, where it does not show that at the time of the alleged preference there was more than one creditor, nor that the debts to the petitioners had been created at the time of the alleged fraudulent transfer and concealment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113-118, 125; Dec. Dig. § 81.*]

In the matter of Jacob Stone, trading as J. Stone & Company, alleged bankrupt. On motion to expunge petition. Motion sustained.

Alfred Aarons and Bernard Harris, both of Philadelphia, Pa., for alleged bankrupt.

Harry S. Mesirov, and Frederick S. Drake, both of Philadelphia, Pa., for petitioners.

THOMPSON, District Judge. The present application by the alleged bankrupt is based upon the ground that the petition shows upon its face that it is filed by but one petitioning creditor, to wit, the York Manufacturing Company, and contains no allegations that the creditors are less than 12 in number as required by section 59b of the Bankruptcy Act. The creditors joining in the petition are the York Manufacturing Company, Paul Gilbert, and Harry Bromberg. The petition sets out that the petitioners are creditors having provable claims in excess of \$500. It is alleged that the claim of the York Manufacturing Company is for goods sold and delivered by that company on or about the 2d day of April, 1913, to the alleged bankrupt at the agreed price and value of \$411.72; that the claim of Gilbert is for goods sold and delivered on the 9th and 14th days of May, 1913, by the York Manufacturing Company to the alleged bankrupt at the agreed price and value of \$219.42, which claim the York Manufacturing Company thereafter and before the filing of the petition for value assigned to Gilbert; that the claim of the petitioner Bromberg is for goods sold and delivered on May 17, 1913, by the York Manufacturing Company to the alleged bankrupt at the agreed price and value of \$258.30, which claim the York Manufacturing Company thereafter and before the filing of the petition for value assigned to Bromberg.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] The acts of bankruptcy alleged are: (1) That at various times in the months of May and June, 1913, Stone, while insolvent, transferred property belonging to him consisting of cash to certain of his creditors whose names are now unknown to the petitioners in excess of \$5,000 with intent to prefer said creditors over other creditors of the said Stone of the same class; and (2) that, within four months preceding the filing of the petition, Stone transferred and concealed certain of his property consisting of quantities of merchandise located at his place of business at No. 415 Market street, Philadelphia, with intent to hinder, delay, and defraud his creditors. While the petition to expunge does not raise objections to the allegations of the act of bankruptcy, objections were urged by counsel at the argument, and it is apparent that the petition in bankruptcy is not sufficiently specific as to the alleged acts of bankruptcy to conform to the rulings of this and other courts. *In re Cliffe* (D. C.) 94 Fed. 354; *In re White* (D. C.) 135 Fed. 199; *In re Hark et al.* (D. C.) 135 Fed. 603; *In re Pressed Steel Co.* (D. C.) 27 Am. Bankr. Rep. 44, 193 Fed. 811; *Conway v. German*, 166 Fed. 67, 91 C. C. A. 653; *In re Nelson* (D. C.) 98 Fed. 76; *In re Blumberg* (D. C.) 133 Fed. 845; *In re Lackow* (D. C.) 140 Fed. 573.

[2] The objection that it is apparent on the face of the petition in bankruptcy that there is but one petitioning creditor is based upon the allegations that Gilbert and Bromberg hold their claims by assignments for value from the York Manufacturing Company. If the allegations as to acts of bankruptcy were sufficiently definite and specific to establish that the acts of bankruptcy were committed after the creation of the indebtedness upon which Gilbert and Bromberg claim by assignment, I think the objection would not avail, as there is nothing upon the record to show that the claims derived from the York Manufacturing Company were split up for the mere purpose of enabling the alleged creditors to become petitioners. The dates of the assignments to Gilbert and Bromberg are not set out, but, assuming that the status of Gilbert and Bromberg as creditors relates back to the dates of the creation of the debts, we have the date of the Gilbert claim as of May 9 and 14, 1913, and that of the Bromberg claim as of May 17, 1913. From all that appears in the petition the acts of bankruptcy may have antedated those dates. The weight of the authorities is in support of the doctrine stated by Collier (9th Ed.) on page 767, that:

"A creditor who was not such at the time of the commission of an alleged act of bankruptcy cannot petition his debtor into bankruptcy. This appears to be not only the conclusion of the courts upon well-considered cases, but a reasonable construction. It is unquestionably based upon the well-established principle that creditors cannot complain of a conveyance by the debtor made prior to the time they became creditors, unless such conveyance was made with the direct purpose of defeating their claim"—citing *In re Callison* (D. C.) 130 Fed. 987, affirmed sub nom. *Brake v. Callison*, 129 Fed. 201, 33 C. C. A. 359; *In re Brinckman* (D. C.) 103 Fed. 35; *Beers v. Hanlin* (D. C.) 99 Fed. 695; *In re Muller*, Fed. Cas. No. 9,911; *In re Burke*, Fed. Cas. No. 2,156.

In the case of *Lewis F. Perry & Whitney Co.*, decided in the district of Massachusetts, reported in 172 Fed. 745, Judge Dodge, while

not expressly disapproving of the doctrine, held that it did not apply to a case where the indebtedness, under which the petitioning creditor claimed by assignment, arose prior to the act of bankruptcy.

In the case of *In re Hanyan*, decided in the Southern district of New York, 180 Fed. 498, Judge Holt held that there is nothing in section 59b or any other provision of the Bankruptcy Act requiring that a petitioning creditor should have been a creditor at the time of the act of bankruptcy. In Judge Holt's opinion, after referring to the cases holding the doctrine from which he dissents, he says:

In each of these cases it appears that there was but one creditor at the time the alleged fraudulent conveyance or preference took place. Under such circumstances, of course, there could be no fraudulent intent or intent to prefer, and the cases might all have been properly decided on that ground."

Whatever may be the grounds in those cases for not following *Brake v. Callison*, I am inclined to agree with the reasoning in that case, which seems to be supported by the decision of the Supreme Court upon a bill to set aside an alleged fraudulent conveyance in *Horbach v. Hill*, 112 U. S. 144, 5 Sup. Ct. 81, 28 L. Ed. 670.

So far as appears by the allegations of the petition in this case excepting from inferences to be drawn from the use of the word "creditors" in stating the acts of bankruptcy, the York Manufacturing Company was the only creditor of the alleged bankrupt prior to the alleged act of bankruptcy consisting of an unlawful preference. There is nothing to show that it was a creditor at the time of the alleged unlawful transfer and concealment of his property.

I am of the opinion, therefore, that the allegations in the petition are not sufficient in substance to meet the requirements of the act, and that the petition in bankruptcy should be expunged from the record. An order to that effect will be entered.

In re DE MAURIAC.

(District Court, E. D. New York. July 31, 1913.)

BANKRUPTCY (§ 407*)—DISCHARGE—OBJECTIONS—CONCEALMENT OF ASSETS.

Where a bankrupt received \$2,000 from his brokers shortly before bankruptcy, which amount was not scheduled, but used for his own purposes and in the name of his wife, such concealment constituted ground for the denial of a discharge, without reference to whether the money was his, or was the proceeds of a loan to him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.*]

In the matter of bankruptcy proceedings of Norman P. De Mauriac. Application for discharge denied.

Henry B. Singer and James J. Franc, both of New York City, for objecting creditors.

Crocker & Wickes, of New York City (Frank L. Crocker, of New York City, of counsel), for bankrupt.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CHATFIELD, District Judge. The bankrupt has applied for a discharge, and after a hearing before a special commissioner a report was filed recommending that the discharge be denied.

The bankrupt brought to the attention of the court certain statements in the commissioner's report, from which he inferred that the commissioner had prematurely received a mistaken impression of the facts, and by reason of the situation involved the court has read the testimony, and, having heard argument *de novo*, has disregarded the findings of the special commissioner, and has made its own determination with respect to the matter.

The record shows that some seven grounds of objection to discharge were stated. Of these but two need be considered. The first one, that the bankrupt, in anticipation of insolvency, and with intent to hinder, delay, and defraud his creditors, concealed certain property, to wit, \$2,000, is the one principally urged. The second objection is that, in verifying his schedules in bankruptcy, the bankrupt neglected and intentionally omitted to state the securities with which he was credited in certain speculative accounts at his brokers', and to offset against these the amounts borrowed and debited by the brokers in the same transactions.

The creditors have examined the witnesses and prosecuted the case with the greatest diligence, and much testimony has been taken. It appears that one of the objecting creditors, who were stockbrokers, had brought suit against the bankrupt, and trial was had in December, 1911. Upon the 15th day of that month a verdict was rendered for the plaintiffs, upon which judgment was entered upon the 12th day of January, 1912. Bankruptcy was instituted upon March 29, 1912.

Upon the same day on which the verdict was rendered against the bankrupt, he obtained from his brokers \$2,000 in the form of cash, which was kept in the company's strong-box a few days, later deposited in the name of the company's cashier, and upon the 1st day of February, 1912, returned into an account in the name of the bankrupt's wife, with which he continued to speculate.

Dispute has arisen as to whether the broker suggested this course of procedure, or whether the bankrupt asked the broker to do it in this way. It appears to be the fact that the broker did suggest that the money could be left in this particular form of account, and that the broker did not figure up the bankrupt's balance, but in a sense loaned or advanced upon his own credit, as one of the firm, this sum of \$2,000 to the bankrupt.

It is apparent, also, that the bankrupt and the broker had in mind at the time the necessities of the bankrupt in the way of living expenses, and that they both knew of the probability of a judgment going against De Mauriac. It is also apparent that this was an endeavor to place \$2,000 out of the reach of De Mauriac's creditors, and, even if the money was loaned by the broker, title was vested in the bankrupt, and his creditors had the right to obtain the money upon execution.

As a matter of fact the money was not used for household necessities, but these were met from any and every source, including the play-

ing of whist at a club, and the bankrupt ultimately used the \$2,000 to pay his gambling debts and to pay for other speculations.

At the time the bankruptcy petition was filed, certain accounts, such as the Alice De Mauriac "short account" were in existence, of which the trustee did not learn for a long time, and which showed a credit balance. Although this account was in Mrs. De Mauriac's name, it was actually the bankrupt's property, and he used it as his own, and should have included it in his assets.

The testimony finally shows, however, that at the time the petition was filed and the schedules made out the balance of all the accounts with the broker was either a debit balance, or very small on the credit side, and by the advice of De Mauriac's attorney (it being De Mauriac's opinion that the balance would be upon the wrong side, but that the broker would not hold him for this slight debt) nothing was put in the schedules with respect thereto.

As to this last objection, it is apparent that if De Mauriac had been entirely frank, and had not indicated that he considered the brokers' accounts as outside of his creditors' reach, there would be insufficient ground for denying discharge. Taken with the first allegation, as to the concealment of the \$2,000, it is apparent that the attorney's advice was based upon De Mauriac's statement as to these accounts, and that De Mauriac's actions with respect thereto did not show any attempt to put his creditors in possession of the information which they were entitled to have.

As to the first allegation, viz., the concealment of the \$2,000, but one construction can be given to what De Mauriac did. Whether the money was his, or was borrowed, his estate was enriched by that amount, which was available at that time to his creditors, and he concealed the sum prior to bankruptcy, used it for his own purposes, and in the name of his wife, who appears to have supposed that it was really hers, and that her husband's actions were within his rights.

Such disregard for his creditors' rights and for the law makes out a plain case of concealment of assets, with the idea of delaying, hindering, and defrauding creditors in realizing upon their debts. As this occurred within four months before bankruptcy, it is sufficient to prevent discharge, and the additional indifference shown by De Mauriac in giving the information to his attorney, at the time of making up the schedules, strengthens the conclusion of the court that the discharge should be denied.

In re ROSENZWEIG.

(District Court, E. D. New York. April 29, 1913.)

BANKRUPTCY (§ 288*)—ORDER TO TURN OVER PROPERTY—EVIDENCE TO WARRANT.

Where a bankrupt, two or three days before the filing of the petition against him, fraudulently and in violation of the law of the state sold his stock of goods in bulk, and it was removed, the court cannot make an order to turn over the property or its proceeds against a number of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

persons collectively, although they were each concerned in some manner with its disposal and removal, and their testimony is not worthy of full credence, when there is, nevertheless, no evidence that any one of them has either the property or its proceeds in his possession or under his control.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

In the matter of Barnet Rosenzweig, bankrupt. On rule against certain persons to show cause why they should not be required to turn over property of the bankrupt. Rule discharged.

Lesser Bros., of New York City, for petitioner.

Archibald Palmer, of New York City, for Isaac Singer.

Clarence H. Seigle, of Brooklyn, N. Y., for William Friend.

Elias A. Deutschman, of Brooklyn, N. Y., pro se.

CHATFIELD, District Judge. A petition in bankruptcy was filed against Barnet Rosenzweig upon the 12th day of August, 1912. It appears that upon the 9th and 10th days of August, which were the Friday and Saturday before the filing of the petition, the stock of goods of the bankrupt was offered for sale at the office of one Elias A. Deutschman, attorney for Rosenzweig, and was examined by certain individuals, among them one Leventhal, by an unknown man called Rothstein, and by other parties. One of these individuals, Isaac Singer, an auctioneer, who knew all about the bankrupt and his stock of goods, and had had previous dealings with his attorney, made a bid thereon jointly with one Harris Glass. Another individual, Leventhal, made a bid of \$2,000, of which \$1,500 was to be used to pay creditors; but, according to the statement of the attorney for the bankrupt, a lower bidder, the man Rothstein, secured the stock and consummated the purchase. This sale was clearly against the provisions of the New York Personal Property Law (Consol. Laws 1909, c. 41), and was therefore in fraud of creditors.

A truckman was called in by the purchaser, the goods were removed at night to Singer's auction room, and the next day, according to Singer's statement, upon his refusal to sell the goods, except upon giving notes and not for cash, they were removed by the purchaser and have not been seen since that time.

Upon the testimony showing these facts, Singer, the auctioneer, Deutschman, the lawyer, Wittenstein, the truckman, Glass, one of the prospective purchasers (who knew of the attempt at sale and estimated the value of the goods), and one Friend, whose father subsequently sold the fixtures on a chattel mortgage, and who himself assisted in selling these fixtures in the very store from which the goods had been removed, were brought into court on an order to show cause why they should not account for the assets of the bankrupt.

On the testimony of these various parties, it is evident that the statement of none of them is satisfactory or worthy of entire credence. It is impossible to see how the attorney for the bankrupt could undertake a sale of this character and actually arrange for the transfer to a party whose name he forgets, and about whom he knows as little of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

what he should remember as is shown in the testimony of Deutschman. Singer's testimony does not satisfy the court that he has told all he knows of the matter. But there is nothing upon the record from which to find that any one of the parties before the court has any of the property of the bankrupt. To say that the court does not believe their statements of what became of it, when none of it is actually traced into the possession of any one of these parties, is not sufficient upon which to base an application upon which to turn over property.

Charges of perjury and of contempt of court might result in suitable punishment for such statements and relations to a bankrupt's stock of goods. But even criminal prosecution and conviction would not take the place of some evidence indicating that the men accused are the ones who have the property or its proceeds in their possession or under their control. The counsel for the trustee himself states his position as follows:

"It is our contention that these parties, or some one of them, have possession of the stock, or its proceeds; that they should be compelled to account for it; that the bankruptcy court is not without power, if it is impressed by our argument, to compel the parties to disgorge, and to uncover the real facts with respect to this stock of goods." Memorandum, folio 4.

"Need anything more be said about this case? We have shown to the court the relationship of all parties to this transaction. We have narrated the events leading up to the disappearance of the stock. We have dug into the matter as far as we could, but our efforts have been in vain. Ours has been, up to the present time, a case of energy uselessly spent. Realizing this fact, we ask for the court's aid. We submit to the court facts, and upon these facts we ask for an order directing all parties to account for the stock or its proceeds." Folio 109.

Upon the present record it appears that the creditors cannot obtain the information or the property, and on this testimony an order to turn over the property cannot be made. The matter may be referred to the United States attorney for the proper action, if any charge of perjury or concealment of assets can be substantiated. But this court cannot inflict punishment for criminal contempt or apparent perjury, for the purpose of forcing the production of evidence or payment of property and money in the civil proceeding. *Gompers v. Bucks Stove Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874.

CROWN FEATURE FILM CO. et al. v. BETTIS AMUSEMENT CO. et al.

UNIVERSAL FILM MFG. CO. v. BETTIS et al.

(District Court, N. D. Ohio, W. D. February 28, 1913.)

Nos. 2,338, 2,365.

1. COPYRIGHTS (§ 71*)—SUITS FOR INFRINGEMENT—IMPOUNDING ALLEGED INFRINGING ARTICLES—PROCEDURE TO OBTAIN RETURN.

The court cannot entertain a motion for an order to show cause why articles impounded as alleged infringements of a copyright, under Copyright Act March 4, 1909, c. 320, § 25, 35 Stat. 1081 (U. S. Comp. St. Supp. 1911, p. 1480), should not be returned, unless a showing is made

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by affidavit, as required by rules 9, 10, and 11, adopted by the Supreme Court (172 Fed. v), that the articles seized are not infringing copies.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 84; Dec. Dig. § 71.*]

2. EQUITY (§ 271*)—PLEADING—AMENDMENTS.

It is within the discretion of the court to permit the amendment of a bill pending a demurrer thereto.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 558-560; Dec. Dig. § 271.*]

3. EQUITY (§ 241*)—PLEADING—DEMURRER.

Affidavits cannot be considered in support of a demurrer to a bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 515; Dec. Dig. § 241.*]

In Equity. Suits by the Crown Feature Film Company and the Royal Feature Film Company against the Bettis Amusement Company and Will C. Bettis, and by the Universal Film Manufacturing Company against Will C. Bettis and the Western Exhibitors' Feature Film Company. On motions for orders to show cause, and demurrers to bills. Motions denied, and demurrers overruled.

Isaac B. Owens, of New York City, and Owen & Owen and Marshall & Fraser, all of Toledo, Ohio, for complainants.

A. J. Croll, of Toledo, Ohio, for defendants.

KILLITS, District Judge. These cases have been jointly argued before us by the same counsel, raising the same propositions, and the questions may be disposed of jointly. We are asked to consider in each case a motion for an order to show cause why films seized by the marshal pursuant to paragraph C, section 25, of the act of March 4, 1909 (the Copyright Act), and the rules of the Supreme Court for practice and procedure under said section, should not be returned, and also demurrers to the complaints.

[1] The only authority shown to us for a motion to show cause such as is filed here is found in rules 9, 10, and 11 of the Supreme Court (172 Fed. v), adopted by authority of law to provide for procedure under the Copyright Act. Fundamental to the court's right to take up such a motion is a showing by affidavit:

"That the articles seized are not infringing copies, records, plates, molds, matrices, or means for making the copies alleged to infringe the copyright."

The defendants have failed to comply with this provision, but, on the contrary, in filing an affidavit in each case that the photographic films seized are original positives made from the original negatives by the authors and original producers, they have destroyed their opportunity to invoke the benefits of rules 9, 10, and 11; for, if the films seized are exact duplicates of the films of the complainants, obviously the use of them, if copyrights are owned by complainants, must be an infringement.

In the court's judgment, all other matters urged in support of these motions are propositions which find their logical place in a trial of the cases on the merits, and, however they might otherwise apply to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the motion, they are out of place here, for want of fundamental allegation that no infringement is in fact involved.

[2, 3] Pending demurrers, the court permitted the bills to be amended. This was entirely within the discretion of the court, and we are confident upon careful consideration that such discretion was not abused. The bills now appear to us to be invulnerable against demurrer. We are asked to consider the affidavits in connection with the demurrer. This, of course, is not the proper practice. The facts stated in the affidavits, so far as they tend to meet the allegations of the bills, can only be brought to the court's attention by way of a joinder of issues through the proper pleadings and upon a hearing on the merits.

Respecting the mooted question of fact touching the filing of sufficient copies with the Librarian of Congress of the film "St. George and the Dragon," we need but suggest that the complaint in cause No. 2,338 contains allegations which meet the requirements of the statute touching that matter, and no amount of proof or insistence that such allegation is untrue can avail on a demurrer; but the demurrant must be held to the old rule that for the purposes of the demurrer all allegations well pleaded must be assumed to be true.

The demurrers in each case are overruled, and the defendants may have exceptions to the action of the court respecting both motions and demurrers.

In re WAGNER'S ESTATE.

(District Court, E. D. Pennsylvania. July 23, 1913.)

No. 4,831.

BANKRUPTCY (§ 217*)—JURISDICTION OF COURT—STAY OF PROCEEDINGS IN STATE COURT.

Bankr. Act July 1, 1898, c. 541, § 11a, 30 Stat. 549 (U. S. Comp. Stat. 1901, p. 3426), which authorizes a court of bankruptcy to stay suits against a bankrupt founded on claims from which a discharge will be a release, does not vest it with jurisdiction to stay a suit in a state court to foreclose a valid mortgage, which was pending at the time of the filing of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 323, 330, 340; Dec. Dig. § 217.*]

In the matter of Charles M. Wagner, bankrupt. On petition of receiver for stay of sale of real estate in foreclosure suit and for leave to sell. Petition denied.

John Kent Kane, of Philadelphia, Pa., for receiver.

John A. Schappet, of Philadelphia, Pa., for mortgagee.

THOMPSON, District Judge. The petition recites that among the assets of the bankrupt estate are two parcels of real estate, Nos. 201-203 South Twelfth street, in the city of Philadelphia, the title to which is in the name of Samuel Clark, a straw man, who holds the title for the bankrupt, George M. Wagner; that the two parcels of land

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

are subject to a first mortgage of \$50,000 to the Commonwealth Title Insurance & Trust Company and a second mortgage to Peter Thompson for \$13,500, dated February 20, 1912. The petition sets out that the equity in the property over and above the mortgages is approximately \$7,000. Suit upon the second mortgage was brought by the mortgagee, Peter Thompson, on May 16, 1913, before the filing of the petition in bankruptcy, and the suit has been so proceeded with that the real estate, unless a stay is had, will be sold by the sheriff on the first Monday of August next. The receiver has no funds in his possession to protect the equity of the bankrupt estate, and, fearing that the equity will be lost if the property is sold at sheriff's sale, prays for stay of the sale and for leave to sell the property at public sale subject to the mortgages. It is undisputed that the mortgages are valid liens upon the real estate in question and that the claims thereon would not be released by the discharge of the bankrupt.

Section 11a of the Bankruptcy Act, which vests in the District Court jurisdiction to stay suits, confines the jurisdiction to "a suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him," and, as stated by Judge Dallas, speaking for the Circuit Court of Appeals for this circuit, in the case of *Tennessee Producer Marble Co. v. Grant et al.*, 135 Fed. at page 323, 67 C. C. A. at page 677, this is—

"obviously for the purpose of assuring to the court of bankruptcy exclusive authority to adjudicate the claims which, by their orders of discharge, they may release. It does not apply to a suit brought in a state court to enforce an asserted right in rem under the law of such state."

Judge Dallas continues:

"The proceeding which the order in question restrained the marble company from further prosecuting had been instituted in a court of Pennsylvania prior to the filing of the petition in bankruptcy. It was a hostile proceeding, and it attached a fund which the marble company claimed by adverse right. The state court had jurisdiction over the parties and the subject-matter, and possession of the property; and it is well settled that, where property is in the actual possession of the court, this draws to it the right to decide upon conflicting claims to its ultimate possession and control' *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122. The state court had acquired jurisdiction of the res, and was fully empowered to pass upon any and all conflicting claims to it."

See, to same effect, *In re Rohrer*, 177 Fed. 381, 100 C. C. A. 613.

Section 265 of the Judicial Code of March 3, 1911 (36 Stat. 1162, c. 231 [U. S. Comp. St. Supp. 1911, p. 236]), provides:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The interpretation by the Circuit Court of Appeals for this circuit of the provisions of the Bankruptcy Act granting jurisdiction to the District Court in the stay of suits is conclusive upon this court, and the petition for stay is denied. The prayer for leave to sell was withdrawn at bar.

B. BORCHARDT CO. v. YARYAN NAVAL STORES CO.

(District Court, S. D. Georgia, E. D. August 2, 1913.)

RECEIVERS (§ 120*)—RECEIVERS' CERTIFICATES.

Where only one small creditor objected to the issuance of receivers' certificates, 85 per cent. of the creditors joining in the request for the issuance, and it was manifestly to the interest of all parties before the court that they be issued, the receivers were ordered to pay the claim of the objecting creditor and issue the certificates.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 208; Dec. Dig. § 120.*]

Action by the B. Borchardt Company against the Yaryan Naval Stores Company. On petition of receivers for defendant for authority to issue certificates. Petition allowed.

Bennet, Twitty & Reese and Max Isaac, all of Brunswick, Ga., and A. H. Heyward, Jr., of Macon, Ga., for receivers.

Bolling Whitfield, of Brunswick, Ga., for objecting creditor.

SPEER, District Judge (orally). This is a case wherein the flexible powers of a court of equity are invoked to conserve, not only the interests of the parties actually before the court, but a great venture, which may be of inestimable service to a whole people. It would be singularly unfortunate if the court did not have the power. Three years ago in that empire once covered by the majestic pine forests of Georgia there was everywhere incalculable waste. It was in the decaying tree tops, which had been left by the ax of the lumberman. It was in the millions of stumps, which disfigure the cleared fields, and which interfere with the operations of the farmer and the husbandman. A genius in chemistry, Mr. Homer T. Yaryan, who has devoted his astonishing original powers and his mastery of that occult science to the special task of extracting values from various materials, values to be utilized commercially and in the arts for the benefit of mankind, has evolved a system by which all this waste may be conserved—not only conserved, but transmuted into gold, by turning these waste products into rosin and turpentine, known as "naval stores." The probability of immense benefit, not only to those far-sighted men in the great state of Ohio who took part with him, but also to thousands of other people among whom this court exercises its jurisdiction, and whose every interest is and should be dear to its every motive and purpose, is incontestible. It is true that there has been some loss—indeed, considerable loss—in building the plant, in the initiative operations, and in vast experiments to cheapen operation and augment production. This is now behind these enterprising and far-sighted men. Certainly there has been the most astonishing success. The testimony of Mr. Brailey demonstrates that all of this waste material belonging to the Southern farmers is of great commercial value. If the demonstration progresses proportionately as it seems it may do, this process may be of scarcely less value to the people of South Georgia and oth-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

er Southern states, where pine forests grew and are now growing, than the cotton crop itself.

The process relates only to dead material; it has no relation to the growing pine. He has an exceedingly small regard for the day and time in which he lives who would refuse the opportunity to men when they wish to pay the privilege of expending their own money for continuing this demonstration and bringing to profitable fruition the labors which have been designed by the genius who discovered the process. I cannot find it in my heart to do this. It is, besides, the best thing for the creditors. This is plain enough. These receivers' certificates in my judgment ought to be issued. Eighty-five per cent. of the creditors unite in the purpose of the bill. Eighty per cent. of the stockholders agree to underwrite the certificates. Among all the creditors, only one party, the Fulton Bag Company, owning a claim of \$300, comes forward to object. It has the right to object. It is entitled to have its \$300 paid. It threatens to make trouble for these receivers' certificates. It has the legal right to attempt this, however much we may question its wisdom. But, in order that it may not make great trouble for the progress promising so much, the court directs that the receivers pay its \$300. This is all it can ask. The receivers' certificates will be issued, and these citizens of Ohio who manifest the purpose to do so much for the Southern people will, so far as my power goes, be accorded the opportunity. In a long judicial life, never have I seen the promise of such amazing benefits in any project for the betterment of all before the court and the people at large.

UNITED STATES v. LEE CHUNG.

(District Court, D. New Jersey. July 26, 1913.)

1. ALIENS (§ 32*)—DEPORTATION OF CHINESE—FINDINGS—REVIEW.

On appeal from a commissioner's decision in Chinese deportation proceedings, the commissioner's finding that one or more witnesses were not entitled to belief will not be disturbed, unless it is manifest that he acted arbitrarily.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*]

2. ALIENS (§ 32*)—CHINESE PERSON—DEPORTATION—DEFENSE—CITIZENSHIP.

Where, in a Chinese deportation proceeding, defendant claimed that he was born in the United States, and both he and his alleged uncle so testified, and there was no evidence introduced by the United States, except an interpreted statement made by defendant before his arrest, taken down stenographically, in contradiction of some of the evidence given by him, and the commissioner analyzed the testimony of both witnesses, but discredited only that given by defendant, leaving the evidence of the uncle unquestioned, a judgment directing defendant's deportation cannot be sustained.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*]

Lee Chung was ordered deported to China, and he appeals. Remanded with instructions.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Robert M. Moore, of New York City, for appellant.
John B. Vreeland, of Morristown, N. J., for the United States.

RELLSTAB, District Judge. In appropriate proceedings, instituted before a United States commissioner, Lee Chung was found to be a Chinese laborer without the certificate of residence required by law, and ordered deported to China. From this order an appeal was taken to this court.

The case is here, not for a trial *de novo*, but on the testimony taken before the commissioner, and turns on the issue of fact whether the appellant was born in the United States. Section 3 of the act of May 5, 1892 (27 Stat. 25, c. 60 [U. S. Comp. St. 1901, p. 1320]), places upon appellant the burden to "establish, by affirmative proof, to the satisfaction" of the commissioner, his "lawful right to remain in the United States." But two witnesses testified—the appellant and Lee Lin, his alleged uncle. On the part of the United States, only an interpreted statement, made by appellant before his arrest and taken down stenographically, was put in evidence in contradiction of some of the evidence given by him. As is usual in such cases, there was enough testimony (if believed) offered upon the part of the accused to justify the conclusion that he was born in this country.

[1] What credit is to be given to a witness is peculiarly the province of the tribunal before whom he testifies, and what weight is to be accorded to his testimony is involved in his credibility. Where the reviewing court has nothing before it except the transcribed testimony, and the commissioner declares that the witnesses were not entitled to belief, his finding will not be disturbed, unless it is manifest that he acted arbitrarily. See *In re Jew Wong Loy* (D. C.) 91 Fed. 240; *U. S. v. Leung Sam et al.* (D. C.) 114 Fed. 702; *Wong Chun v. U. S.*, 170 Fed. 182, 95 C. C. A. 198. Otherwise, the explicitly expressed direction of the statute would be frustrated.

[2] In the present case, the commissioner analyzed the testimony given by both witnesses; but in his estimate thereof he discredits only that given by the appellant. If this is not an inadvertence, the testimony given by Lee Lin is unimpeached, and as he positively asserts that appellant was born in this country, and there is nothing inherently improbable in such testimony, the conclusions reached by the commissioner cannot be affirmed as the record stands.

That the final judgment, when entered, may not stand on premises the result of inadvertence, the record is remanded to the commissioner, with instruction that he report specifically his estimate of the testimony given by Lee Lin, and his reasons therefor, that this court may be advised whether and why such testimony should not be given the effect to which it, on its face, appears to be entitled.

In re BENSEL et al., Board of Water Supply.

CITY OF NEW YORK v. SAGE.

(Circuit Court of Appeals, Second Circuit. July 15, 1913.)

No. 68.

1. REMOVAL OF CAUSES (§ 35*)—FEDERAL COURTS—CONDEMNATION PROCEEDINGS—COMMENCEMENT—OWNERSHIP OF PROPERTY.

Since proceedings by New York City to condemn land for a water reservoir were not commenced when maps were filed in the clerk's office of Ulster county, where the land was located, and notices posted on the property and published in newspapers, nor until the petition was actually filed in the state court, the land having been conveyed, prior to the filing of the petition, and subsequent to the filing of the maps, etc., to claimant, who was a citizen and resident of New Jersey, it sufficiently appeared that at the time the proceeding was commenced it involved a controversy between citizens of different states, and was therefore removable to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 77, 78; Dec. Dig. § 35.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.]

2. REMOVAL OF CAUSES (§ 102*)—REMAND—GROUNDS.

Where land sought to be condemned for public use was conveyed to a nonresident before condemnation proceedings were instituted, and neither fraud nor collusion was charged, the proceedings to assess damages, having been removed to the federal court, could not be remanded, on the ground that the conveyance to claimant was made to create jurisdiction in the federal court for the sole purpose of securing a tribunal where a more liberal rule of damages obtained than in the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218-220, 223, 224; Dec. Dig. § 102.*]

3. EMINENT DOMAIN (§ 134*)—CONDEMNATION PROCEEDINGS—DAMAGES—SEPARATE AWARD—AVAILABILITY AND ADAPTABILITY.

Where land sought to be condemned for a reservoir site to afford a water supply for New York City was particularly adaptable and available therefor, and had been so recognized for many years, there being evidence that the site would inevitably at some time be appropriated, if not by New York, by some other city or group of cities, to furnish a water supply, it was not error to allow a separate award in addition to the value of the land for availability and adaptability.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 356; Dec. Dig. § 134.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Application and petition of John A. BenseL and others, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of the city under Laws N. Y. 1905, c. 724, and amendatory acts, in the town of Hurley, Ulster county, N. Y., to provide an additional water supply. From an order awarding damages for a certain parcel of land belonging to William Sage, Jr. (In re Ashokan Dam, 190 Fed. 413), condemned for a reservoir, the City of New York brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
206 F.—24

On writ of error to the Circuit Court of the United States for the Southern District of New York to review an order confirming awards made by commissioners of appraisal for certain land, known as Parcel No. 733, Section 15, Ashokan Reservoir, owned by William Sage, Jr. The commissioners allowed him \$7,624.45 for the land and buildings thereon and the further sum of \$4,324.45 for reservoir availability and adaptability, amounting in the aggregate to \$11,948.90, with 5 per cent. on the total amount to cover counsel fees and expenses. The plaintiff in error also seeks to review an order made by the Circuit Court refusing to remand the proceedings to the Supreme Court of the state of New York held in and for Ulster county.

The argument in this court took place on November 14, 1912, but the decision was withheld pending the action of the Supreme Court in *McGovern v. City of New York*, 229 U. S. 363, 33 Sup. Ct. 876, 57 L. Ed. —, previously argued. The decision in the McGovern Case was announced June 9, 1913.

Archibald R. Watson, of New York City (William McM. Speer and Louis C. White, both of New York City, of counsel), for plaintiff in error.

Edward A. Alexander, of New York City, for defendant in error.

Before COXE and WARD, Circuit Judges, and HOLT, District Judge.

COXE, Circuit Judge. Two principal questions are involved in this review:

First. Were the condemnation proceedings properly removed to this court?

Second. Were the commissioners and the court in error in adding to the sum awarded for the value of the land and buildings, viz., \$7,624.45, the further sum of \$4,324.45, for reservoir availability and adaptability?

[1] We think the proceedings were properly removed to this court and that the motion to remand to the state court was properly denied. William Sage, Jr., the claimant and defendant in error, was at the time of the commencement of the proceedings to condemn his property and since has been a citizen of New Jersey, residing at Orange, Essex county, in that state. The city of New York is a municipal corporation created by the state of New York and the members of the board of water supply of the city are all citizens and residents of New York. We have, then, a controversy which is wholly between citizens of different states and we see no reason why it was not removable on April 29, 1910 to the Circuit Court of the United States for the Southern District of New York. It is urged that Sage did not obtain title to the land in question until May 17, 1909, when the deed to him was executed, and that proceedings to condemn the land had been instituted prior to this date. This argument rests upon the contention that the proceedings to acquire the land in question were commenced when maps were filed in the clerk's office of Ulster county and notices posted on the property and published in newspapers. We are convinced that the proceeding was not commenced until the petition had been actually filed in the state court and this was done after the deed to Sage had been executed and recorded. As pointed out by Judge Noyes, the filing of maps and the publishing of notices did not commence any legal

proceedings, but at best only indicated an intention so to do. That intention might be abandoned or modified and no actual proceeding to acquire the land in question was commenced until the petition was filed.

[2] The only reason urged for remanding the case in the brief of the plaintiff in error is that the land in question was transferred to a nonresident for the purpose of creating jurisdiction in the federal courts. Neither fraud nor collusion is charged, but it is asserted that after the state court had obtained jurisdiction the controversy was removed for the sole purpose of securing a tribunal where a more liberal rule of damages obtains than in the New York courts. This contention cannot be sustained for the reason, already pointed out, that the land was purchased by the defendant in error before the condemnation proceedings were begun in the state court. We cannot indulge in conjecture or guesswork. For aught that appears in the record the sale to William Sage, Jr., was a perfectly fair, honest and legitimate one.

[3] The second, and principal, question is, was the court justified in awarding an additional sum of \$4,324.45 because of the availability and adaptability of the land for reservoir purposes? The answer to this question depends largely upon whether we are to be controlled by the rule of the state or the United States courts. The McGovern Case throws very little, if any, light upon the present controversy. Although the same question was involved, it was decided adversely to the contention of the land owner by the commissioners, by the Supreme Court and by the Court of Appeals of New York, which courts sustained the ruling of the commissioners, refusing to admit testimony as to the exceptional value of the land for a reservoir site. The claimant thereupon sued out a writ of error, insisting that the refusal to hear the testimony was in effect depriving him of his property without due process of law, contrary to the fourteenth amendment of the Constitution of the United States. The Supreme Court decided that the record did not show that the plaintiff in error had been deprived of his property without due process of law, even if it be assumed that it was error to exclude the proffered evidence.

Although there are expressions in the opinion which, perhaps, indicate that the court regarded the ruling of the state court correct, the question now in issue was not decided. The opinion concludes as follows:

"We are satisfied on all the authorities that whether we should have agreed or disagreed with the commissioners, if we had been valuing the land, there was no such disregard of plain rights by the courts of New York as to warrant our treating their decision made without prejudice, in due form and after full hearing, as a denial by the state of due process of law."

The question here is not whether the property of the defendant in error has been taken without due process of law, but whether the commissioners and the Circuit Court erred in allowing the defendant in error damages based upon the availability of his land for reservoir purposes. The award was made by commissioners appointed by the state court prior to the removal, and, had the amount of \$11,948.90 been awarded for the value of the land, buildings and quarry, it would

not, in view of the testimony, have been exorbitant. However, the separate award of \$4,324.45 for reservoir availability and adaptability makes it necessary for us to consider the question as stated above.

That the Ashokan site is peculiarly suitable for reservoir purposes cannot be disputed. Indeed, it may almost be said that it is the only available location for a reservoir from which the great city of New York can be supplied with an abundance of pure water. Located, as the city is, on a narrow peninsula, between two tidal rivers, it is evident that the choice of sites which the state can control is an exceedingly limited one. A glance at the map seems to demonstrate the proposition that the supply of water for such an immense number of people must come from a reservoir located west of the Hudson and above the New Jersey line. The Ashokan site could not escape the attention of a competent engineer employed to make the selection. The process of exclusion would inevitably bring him to the Esopus watershed. Its availability for furnishing New York with pure water was appreciated 14 years ago, when the Ramapo Company was organized for the purpose of selling the water in question, not only to the city of New York, but to other cities of the state located on both banks of the Hudson. The availability of the Ashokan site induced the city of Kingston to make a careful examination of its capacity for furnishing a supply of water to that city. In short, without entering further into details, it can hardly be disputed that the Ashokan site was the natural place for the reservoir which is to supply the fast increasing multitude of people who dwell on both sides of the Hudson, and that this availability had been proved and was publicly known long before the city of New York instituted these proceedings. It must have been evident to all intelligent land owners that their property would, in the near future, inevitably be acquired as part of an immense water system. That this demand increased the value of these lands follows as a necessary conclusion. To value them only according to the tons of hay or the bushels of potatoes they produce, ignores the other element of value, namely, that their possession was necessary in order that water might be furnished to the increasing millions along the banks of the Hudson. We are not at all convinced that, with the question presented upon the testimony in this record, the state courts would have decided as they did in the cases reported in *Matter of Simmons*, 130 App. Div. 350, 356, 114 N. Y. Supp. 571, affirmed 195 N. Y. 573, 88 N. E. 1132. Thus, in the opinion confirming the award of the commissioners relating to parcel 271-A the court says:

"It is true that he (the owner) is not limited in compensation to the use which he makes of his property, but is entitled to a fair market value, for any use to which it is adapted by virtue of its location and for which it is available. * * * The value of property is not limited by the present use or the use for which it is sought, as either may be more or less than its market value. For example, land may be valuable, abstractly considered, for reservoir purposes, but its market value would depend upon a demand for such a purpose. If no one desired the property for a reservoir, its value might be much less than for any other purpose. * * * No evidence was given in the present case tending to show that before the land was taken by the city it was regarded as more valuable because of its advantage of location and adaptability for use as a reservoir."

Again, on the appeal from the order of confirmation as to section 6, the Appellate Division said:

"The appellant did not prove or attempt to prove that the value of the property in question or any of the property included in the reservoir site, had been increased by its adaptability or availability for reservoir purposes before the commencement of this proceeding. There is no shadow of evidence of any prior demand for the property as a reservoir site or of any customer who would give more for it for that purpose, or of any circumstance by which the value of the parcel in question as a part of a natural reservoir site, could be estimated or determined."

Such evidence has, we think, been given in the case at bar—evidence from which the presumption follows, almost as a conclusion, that with the increase of population in the valley of the Hudson, the Ashokan site would inevitably be appropriated, if not by New York, then by some other city or group of cities.

There is in the present case evidence that the Ashokan site had long been known and its availability as a great reservoir recognized by experts and business men and efforts to acquire it had from time to time been made. If the state courts had passed upon the identical question presented by the evidence in the case at bar, we might feel constrained, in the absence of a controlling authority of the Supreme Court, to follow their decision, but, for the reasons just stated, we cannot find that they have passed upon the precise question involved in the cases relied on by the plaintiff in error. In these circumstances we deem it our duty to follow the case of *Boom Company v. Patterson*, 98 U. S. 403, 25 L. Ed. 206, which holds, in substance, that the value of the land in question is increased because of its availability as a reservoir site. Patterson owned some islands in the Mississippi river about an eighth of a mile from its western bank; when connected with the mainland a boom of immense capacity for holding logs was formed which was of great value to the company. The islands were worth about \$300, but their availability for forming, in connection with the mainland, a receptacle in which millions of logs could be stored added to their value about \$5,000 and a judgment for \$5,500 was affirmed. The Supreme Court held that the adaptability of the islands for boom purposes added greatly to their value and was properly considered in estimating the value of the land. See also *Great Falls Mfg. Co. v. U. S.*, 16 Ct. Cl. 160, affirmed 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846; *Matter of Gilroy*, 85 Hun, 424, 32 N. Y. Supp. 891; *In re Gough*, L. R. 1 K. B. 417.

We have examined the other assignments of error and are of the opinion that none of them requires a reversal of the orders.

The orders are affirmed.

FIRST NAT. BANK OF ANAMOOSE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 13, 1913.)

No. 3,751.

(Syllabus by the Court.)

1. STATUTES (§ 47*)—CERTAINTY.—PENAL STATUTE—PARTICULAR CLASSES OF PERSONS.

A penal statute which creates a new crime and prescribes a punishment for it must clearly state the persons and acts denounced.

A person who, or an act which, is not by the expressed terms or plain meaning of the law clearly within the class of persons or within the class of acts it denounces, will not sustain a conviction under it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 47; Dec. Dig. § 47.*]

2. STATUTES (§ 194*)—CONSTRUCTION—EJUSDEM GENERIS—DEFINITION OF CRIMES.

The rule that, where general words follow the enumeration of particular classes of persons or of acts, the general words should be construed to apply to persons or acts of the same general nature or class as those enumerated, is especially applicable to statutes defining crimes and regulating their punishment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 272; Dec. Dig. § 194.*]

3. STATUTES (§ 218*)—CONTEMPORANEOUS CONSTRUCTION—EXECUTIVE OFFICERS.

It is an established rule of the national courts that the contemporaneous construction given to an act of Congress by the executive officers charged with its enforcement, though not controlling, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, nor unless it is clear that their interpretation was erroneous.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 294, 295; Dec. Dig. § 218.*]

4. INTOXICATING LIQUORS (§ 138*)—TRANSPORTATION AND SALE—COLLECTION OF PRICE—BANKS.

The collection by a bank of a sight draft for the purchase price of liquor transported in interstate commerce and the delivery to the consignee of a bill of lading attached to the draft, the possession of which bill was necessary to enable the consignee to obtain a delivery of the liquor, does not subject the bank to a fine under section 239 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1136 [U. S. Comp. St. Supp. 1911, p. 1662]).

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148; Dec. Dig. § 138.*]

Trieber, District Judge, dissenting.

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

The First National Bank of Anamoose was convicted of violating Pen. Code, § 239, in collecting a draft attached to a bill of lading for intoxicating liquors (190 Fed. 336), and it brings error. Reversed, with directions.

George A. Bangs, of Grand Forks, N. D., and Lawrence Maxwell, of Cincinnati, Ohio (George R. Robbins, of Grand Forks, N. D., and Joseph S. Graydon, of Cincinnati, Ohio, on the brief), for plaintiff in error.

Edward Engerud, U. S. Atty., of Fargo, N. D., and Charles E. Littlefield, of New York City, Sp. Asst. Atty. Gen., for the United States.

William W. Watts, of Louisville, Ky., *amicus curiæ*.

Before SANBORN, Circuit Judge, and WILLIAM H. MUNGER and TRIEBER, District Judges.

SANBORN, Circuit Judge. The First National Bank of Anamoose complains that it was convicted and fined under section 239 of the Penal Code upon these conceded facts: One Meyers, a resident of Anamoose, in North Dakota, ordered a case of beer of the Hamm Brewing Company, a corporation of Minnesota. The Brewing Company accepted the order at St. Paul, shipped the beer thence to Anamoose via the "Soo" Railway Company, and received a bill of lading from that company under an agreement that the company would not deliver the beer to Meyers until he presented the bill of lading to its agent at Anamoose. The Brewing Company then attached a sight draft on Meyers for the purchase price of the beer to the bill of lading, and sent them to the bank at Anamoose, which agreed with the vendor to collect the draft from Meyers, and to deliver the bill of lading to him so as to enable him to receive the shipment of beer from the Railroad Company, and thereby to complete the sale and delivery of the beer. Section 239 of the Penal Code reads in this way:

"Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined not more than five thousand dollars."

Counsel for the bank contend that the facts of the case did not bring it, or its act, within any of the classes of persons or acts which this statute subjects to fine for collecting the price of liquor. The attorneys for the government, on the other hand, insist that the statute subjects to punishment all persons and all corporations that collect the purchase price of liquor transported in interstate commerce, or that act as agents of vendor or vendee in the buying or selling thereof, and this interpretation of the law was sustained in an elaborate opinion by the learned judge below which may be found in 190 Fed. 336.

The statute, however, does not read, as it seems as though it naturally would have read if such had been the intention of Congress, that every person who, in connection with the transportation thereof in in-

terstate commerce should collect the purchase price of interstate liquor, or who should act as the agent of the buyer or seller for the purpose of buying, selling, or completing the sale thereof, should be fined thereunder. By the terms it contains it does not embrace within its denunciation all persons, but expressly limits its condemnation to "any railroad company, express company, or other common carrier, or other person," who in connection with the interstate transportation collects or acts as agent. And, if the contention of counsel for the government were to prevail, the words "railroad company, express company, or other common carrier, or other" in the law would become futile, and the statute would be made to read "any person who," etc., in violation of the maxim that "all the words of a law must have effect rather than that part should perish by construction." *City of St. Louis v. Lane*, 110 Mo. 254, 258, 19 S. W. 533; *Knox Co. v. Morton*, 15 C. C. A. 671, 675, 68 Fed. 787, 790; *Wrightman v. Boone County*, 31 C. C. A. 570, 572, 88 Fed. 435, 437; *Paving, etc., Company v. Ward*, 28 C. C. A. 667, 674, 85 Fed. 27, 34.

[1] The statute creates and denounces a new offense. A penal statute which creates a new crime and prescribes its punishment must clearly state the persons and acts denounced. A person who, or an act which, is not by the expressed terms of the law clearly within the class of persons, or within the class of acts, it denounces will not sustain a conviction thereunder. One ought not to be punished for a new offense unless he and his act fall plainly within the class of persons or the class of acts condemned by the statute. An act which is not clearly an offense by the expressed will of the legislative department before it was done may not be lawfully or justly made so by construction after it is committed, either by the interpolation of expressions or by the expunging of some of its words by the judiciary. Ex post facto construction is as vicious as ex post facto legislation. "To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous indeed to carry the principle that a case which is within the reason or mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of kindred character, with those which are enumerated. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words in search of an intention which the words themselves did not suggest." *United States v. Wiltberger*, 18 U. S. (5 Wheat.) 76, 96, 5 L. Ed. 37; *United States v. Ninety-Nine Diamonds*, 139 Fed. 961, 964, 72 C. C. A. 9, 12, 2 L. R. A. (N. S.) 185, and cases there cited.

The apparent and natural meaning of the terms of a statute is always to be preferred to any curious or hidden signification reached by the reflection and ingenious reasoning of unusually strong and acute minds. And, unless at the time this bank was charged with the violation of this statute this act of Congress clearly expressed to a man of ordinary ability and intelligence the meaning that the collection by a bank of a sight draft for the purchase price of liquor that had been transported in interstate commerce and the delivery to the purchaser of the bill of lading therefor attached to the draft subjected that bank

to the fine which the statute prescribed, the defendant below ought not to be and must not be punished by this fine. We confess that the first reading of this law did not suggest to our minds that a bank which made such a collection would thereby subject itself to the punishment specified in the act. It is evident that the law failed to suggest such a thought to the mind of Judge Smith, who in writing the opinion of this court in *United States Express Company v. Friedman*, 191 Fed. 673, 681, 112 C. C. A. 219, spoke of this section 239 as prohibiting "common carriers from collecting the purchase price of liquors on interstate shipments, or from in any way acting as agent of the buyer or seller of such liquors, except in the transportation and delivery of the same, under the penalty of a fine of not over \$5,000," or of Judge Hough who, in his opinion in *United States v. Eighty-Seven Barrels, etc., of Wine* (D. C.) 180 Fed. 215, 216, said:

"Section 239 renders it criminal for any common carrier transporting or delivering liquor after interstate or international transportation to 'collect the purchase price or any part thereof,' or 'in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same.'"

In January, 1910, Judge Campbell of the Eastern District of Oklahoma, in a considered opinion, decided that such a collection by a bank did not subject it to the fine imposed by this law. *Danciger v. Stone* (C. C.) 188 Fed. 510, 512. The Secretary of the Treasury and the Attorney General of the United States, the heads of the executive departments of the government to which the enforcement of this law was intrusted, were of the same opinion. The Attorney General, speaking of the statute, said:

"The act does not apply to banks, collecting drafts with bill of lading attached, where the shipment is made to a real consignee upon an order sent by him and filled by shipment from the dealer's place of business. The collection of a draft for the purchase price of a commodity in that manner is the usual and ordinary method of carrying on business and is not connected with the transportation of the property within the meaning of the statute under consideration." 29 Opinions Attorneys General, 58, 62.

Indeed, although this statute was enacted on March 4, 1909, no one except the United States Attorney for North Dakota seems to have discovered that it was intended to subject banks collecting such drafts to punishment by fine, until the opinion of the court below to that effect was formed and expressed in June, 1911. The act for which this bank has been convicted and fined was done on March 15, 1911. If the concession were made that it was the intention of the Congress to include banks among those liable to fines for such acts as that committed by the defendant below, how, in view of these opinions of judges and executive officers, can the conclusion that this intention was not clearly expressed by the statute be escaped? It is only when a penal statute clearly and plainly subjects parties and acts to its denunciation that they may be lawfully punished thereunder. If it is doubtful whether or not it includes them they ought to be and must be exempt from criminal prosecution thereunder. And it is the intention expressed in the statute and that alone to which courts may give effect. They

may not assume or presume purposes and intentions that the terms used in the statute do not indicate and then by construction practically enact or expunge provisions to accomplish such supposed intentions. *United States v. Ninety-Nine Diamonds*, 139 Fed. 961, 964, 72 C. C. A. 9, 12, 2 L. R. A. (N. S.) 185. Conceding that by study, reflection, and ingenious reasoning unusually acute and able minds may discover and convince themselves of a construction of this statute and an intention of its makers which would include this bank and the collection of the draft with which it is charged in its denunciation, still it is certain that that construction and intention are so curious and recondite that the statute failed to express them to the minds of the Secretary of the Treasury, of the Attorney General, and of Judge Campbell after a careful study of the law for the purpose of its official interpretation. It fails to manifest such a meaning and intention to our minds, and we cannot hold that it so clearly or plainly expressed them to bankers, and persons unlearned in the law that they may be lawfully condemned thereunder.

And in our opinion the reason why the Secretary, the Attorney General, Judge Campbell, and the defendant below failed to find in this statute any intention of the Congress, or any expression of any intention to condemn the collection by banks of sight drafts for liquor transported in interstate commerce and the delivery of bills of lading therefor to consignees to enable them to obtain possession of the liquor, is that they did not exist. The history of the times and of the proceedings in Congress which led up to the enactment of this statute have convinced that the mischief at which it was leveled was not the collection of sight drafts by banks or ordinary collectors for the purchase price of liquors, although bills of lading were attached thereto and delivered upon the collection, and that it was the collection by carriers, or their agents, of the purchase price for C. O. D. shipments of liquor into prohibition states whereby they became virtually the agents of the liquor dealers in selling their liquors. This mischief existed only in the states wherein the manufacture and sale of liquor was prohibited, for it was only in those states that such C. O. D. shipments evaded the spirit of the state laws. The collection by banks of sight drafts and the delivery of bills of lading attached thereto was, and long had been, a common and universal method of collection of the purchase price of liquors and other articles throughout the entire nation. This is a general law applicable in every state of the Union, and it is incredible that the Congress intended, without mentioning or referring to it in the statute, to strike down this method of collection for the sale of liquors transported in interstate commerce in all the states, in the large majority of which the manufacture and sale of intoxicating liquors were not prohibited.

[2] To our minds the natural and manifest meaning of the declaration in this law that "any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation," etc., shall collect the purchase price, or act as the agent of the buyer or seller, shall be fined, excludes banks, ordinary collectors, and all persons who are not members of the general class of carriers.

This interpretation finds support in the fact that the contrary construction expunges the words "railroad company, express company, or other common carrier, or any other," and makes the statute read "any person who," etc., and in the rule, which is especially applicable to statutes defining crimes and regulating their punishment, that where general words follow the enumeration of particular classes of persons or acts the general words should be construed to apply to persons or acts of the same general nature or class as those enumerated. Thus, where a statute imposed a forfeiture for forbidden acts of the goods of any "owner, importer, consignee, agent, or other person," it was held that the words "other person" did not include a stranger to the goods, but was limited to "some one of the same general class as those described by the words with which it is associated." *United States v. 1150½ Pounds of Celluloid*, 27 C. C. A. 231, 237, 240, 82 Fed. 627, 633, 636; 36 Cyc. 1119, 1120; 2 Lewis' Sutherland Statutory Construction (2d Ed.) § 422; *United States v. Bevans*, 3 Wheat. 336, 390, 4 L. Ed. 404; *Moore v. American Transportation Co.*, 24 How. 1, 35, 36, 16 L. Ed. 674; *United States v. Chase*, 135 U. S. 255, 258, 259, 10 Sup. Ct. 756, 34 L. Ed. 117. It is well said at page 1120, 36 Cyc., that:

"The particular words are presumed to describe certain species, and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that, if the Legislature had intended the general words to be used in their unrestricted sense, they would have made no mention of the particular classes. The words 'other' or 'any other' following an enumeration of particular classes are therefore to be read as 'other such like' and to include only others of like kind or character."

[3] This is the interpretation of this act of Congress which was given to it by the Secretary of the Treasury and by the Attorney General, who were charged with the duty of executing it, and it is an established rule of the national courts that the contemporaneous construction given to an act of Congress by those charged with its execution, though not controlling, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, nor unless it is clear that their construction was wrong. *Edward's Lessee v. Darby*, 12 Wheat. 206, 210, 6 L. Ed. 603; *United States v. Moore*, 95 U. S. 760, 763, 24 L. Ed. 588; *United States v. Johnston*, 124 U. S. 236, 253, 8 Sup. Ct. 446, 31 L. Ed. 389; *United States v. Philbrick*, 120 U. S. 52, 59, 7 Sup. Ct. 413, 30 L. Ed. 559; *United States v. Hill*, 120 U. S. 169, 182, 7 Sup. Ct. 510, 30 L. Ed. 627; *Baker v. Swigart*, 199 Fed. 865, 873, 118 C. C. A. 313; *United States v. Miller* (C. C.) 187 Fed. 369, 370; *United States v. Newport News Shipbuilding & D. D. Co.*, 178 Fed. 194, 204, 101 C. C. A. 514, 524.

[4] Because the reasons in support of the construction given to section 239 of the Penal Code by the Secretary and the Attorney General are in our opinion more cogent and persuasive than those against it, because it is not clear that their interpretation was erroneous, but it seems to us to give to this act of Congress its true meaning, because the bank and the act for which it has been fined are not specified in the statute, nor included within the classes of persons or acts denounced by it, nor within other classes of their kind, and because the statute is

a new law creating a new offense and prescribing its punishment, and it fails plainly or clearly to express any denunciation of the collection by a bank, or any other collector of its class, of a sight draft for the purchase price of liquor transported in interstate commerce and the delivery of a bill of lading attached to the draft to the consignee to enable him to get possession of the liquor, our minds have been forced to the conclusion that the acts charged against the bank in the second count of the indictment in this case upon which it was convicted constituted no offense, and that the judgment below must be reversed, with directions to the court below to discharge the bank.

It is so ordered.

TRIEBER, District Judge (dissenting). After giving the questions involved the most diligent consideration, I find myself unable to concur in the conclusions reached by the majority, as, in my opinion, they are in conflict with the letter as well as the spirit of the statute. In view of the far-reaching effect of this decision, which substantially nullifies the provisions of this act of Congress by opening the doors to the introduction of liquors in localities where the sale thereof is prohibited by law, and permits the collection of the purchase money at the time and place of delivery, I deem it my duty to state briefly my reasons for the dissent.

The history of the entire liquor legislation, as affected by the Interstate Commerce clause of the national Constitution, the mischief existing, and sought to be remedied by this act, are fully set out in the opinion of the learned trial judge in this case (190 Fed. 336), and therefore need not be restated.

I concur with the majority opinion that:

"A penal statute which creates a new crime and prescribes a punishment for it must clearly state the persons and acts denounced. A person who, or an act which, is not by the expressed terms of the law clearly within the class of persons and within the class of acts it denounces, will not sustain a conviction under it."

But it is equally well settled that penal laws are not to be construed so strictly as to defeat the obvious intention of the Legislature. *United States v. Lacher*, 134 U. S. 624, 628, 10 Sup. Ct. 625, 33 L. Ed. 1080; *United States v. Corbett*, 215 U. S. 233, 242, 30 Sup. Ct. 81, 54 L. Ed. 173; *United States v. Union Supply Co.*, 215 U. S. 50, 55, 30 Sup. Ct. 15, 54 L. Ed. 87. And this rule specially applies when the statute is enacted for the public good, and to suppress a public wrong. *Taylor v. United States*, 3 How. 197, 210, 11 L. Ed. 559; *United States v. Stowell*, 133 U. S. 1, 12, 10 Sup. Ct. 244, 33 L. Ed. 555; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 16, 25 Sup. Ct. 158, 49 L. Ed. 363.

In my opinion the statute clearly includes not only all common carriers and their employes, but "any other person" who "in connection with the transportation of intoxicating liquors in interstate commerce, shall collect the purchase price thereof before, on or after delivery, from the consignee or from any other person," regardless of the fact that he is not an employé of the carrier. It is a well known fact that

shipments of all kinds of merchandise, cotton, grain, lumber, raw material as well as manufactured articles, which are sold for cash upon delivery are shipped by the method employed in this case, i. e., either naming no specific consignee, but requiring the delivery to be made to the order of the shipper, or that the bill of lading specifically requires its production and surrender by the consignee before the property can be delivered. In such cases a draft is usually drawn for the purchase money, and the bill of lading attached thereto, to be delivered upon payment of the draft. The effect of such shipments differs in no wise from those usually referred to as C. O. D., as the purchaser can in neither event obtain the goods shipped without first paying the purchase price. It is to be noted that the statute itself does not use the expression "C. O. D." and draws no such distinction as stated in the opinion of the majority. For that matter, such shipments are frequently spoken of as C. O. D. shipments. *Norfolk & West. R. R. Co. v. Sims*, 191 U. S. 441, 446, 24 Sup. Ct. 151, 48 L. Ed. 254. As liquor shipments made in this manner to prohibition localities from other states practically nullified the prohibition laws of those states, as had been determined by the Supreme Court in a number of cases (*American Express Co. v. Iowa*, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417; *Adams Express Co. v. Kentucky*, 214 U. S. 218, 29 Sup. Ct. 633, 53 L. Ed. 972), efforts were made to induce Congress to enact some legislation which would prevent violations of the prohibition laws of the states by these methods. To accomplish this object a number of bills were introduced; but, as the act now involved is the Senate Bill prepared by the committee to whom all Senate bills on that subject had been referred, it is only necessary to refer to the Senate proceedings seeking to accomplish this object. Among these bills was one known as the "Bacon Bill," and the part of that bill which refers to the subject now in controversy was section 2 of that bill. That part of it bearing on this subject is worded as follows:

"That whenever any spirituous, intoxicating and malt liquors of any kind shall be or become a part of a foreign or interstate commerce, it shall be unlawful for any railroad company, express company or other carrier, or any officer, employé or agent thereof engaged in or in connection with the transportation of such liquors of any kind from one state or territory or district into another state or territory or district," etc.

The "Brantley Bill," although it had been introduced in the House, was before the subcommittee which finally drafted the bill as enacted, and which is known as the "Knox Bill," provided:

"That any railroad company, express company or other common carrier or other person, who shall in connection with the transportation of spirituous, vinous, malt and intoxicating liquors of all kinds from one state or territory into another state or territory collect on, before or after delivery from the consignee or other person the purchase price or any part thereof of such liquors, or who shall in any manner act as the agent of the consignor or seller of such liquors, for the purpose of selling or completing the sale thereof," etc.

The subcommittee had a number of public hearings on these bills, and finally adopted the bill which is now section 239 of the Penal Code, practically adopting the language used in the "Brantley Bill."

It would be unreasonable to presume that the members of that

subcommittee, composed of some of the ablest lawyers of the Senate, were not familiar with the practice of collecting for the goods by draft with bill of lading attached as hereinbefore set forth, so general in the commerce of the country, and that that practice was, in effect, a C. O. D. shipment as had been held several years before in *Norfolk & West. R. R. Co. v. Sims*, supra; and, if the intention of this act was to make the bill effective, it was just as important to prohibit such shipments as those made C. O. D. with directions to the carrier to collect the purchase price before delivery. But, even assuming that the subcommittee was not familiar with that custom, their attention was expressly called to it by a letter from Robert Norris, secretary of the Kansas State Temperance Union, which was filed with the committee and appears on page 113 of the committee's report. In that letter Mr. Norris says:

"Intoxicating liquors are shipped into Kansas under interstate commerce just as though there were no prohibitory laws in the state. The money is either sent with the order or is collected by some agency in the state. A sight draft is usually sent to the bank and the bank collects the money for the liquor house. The express companies no longer handle C. O. D. liquors but send them express charges prepaid, and a sight draft to the bank. * * * Since the express companies refuse to handle the C. O. D. liquors there is not much complaint of shipping in fictitious names, but express agents that are inclined to violate the law have a means of handling bills of lading and collecting for liquors where the express charges are prepaid that is very hard to detect. Agents have informed me in various parts of the state that they have been offered by liquor houses a commission of fifty cents to one dollar and one-half for handling the liquors through the express office, and oftentimes this temptation to make money causes them to yield and they deliver it to any parties who will pay the charges that may be against the person to whom it is sent. * * * Of all phases of the prohibitory law this interstate commerce feature is the hardest to control, even to keep it within the bounds of interstate commerce law. The keeper of a 'blind tiger,' or a 'bootlegger' or a druggist who may violate the provisions of his permit are very easily caught as compared with the persons who overreach the bounds of the law in the shipment of liquor."

If the construction placed upon this statute by the majority opinion is correct, then nothing has been accomplished by the enactment of this statute, for the brewer or liquor dealer can make a large number of shipments to his agent or the person who is willing to engage in the sale of liquors or beer, some in boxes containing dozens of bottles, others in jugs or single bottles, taking separate bills of lading for each, attach a separate draft for the purchase price of each package of the liquor or beer covered by each bill of lading, all drawn on one person who, after having paid the drafts, would receive these bills of lading and deliver them with an order to the carrier indorsed thereon to any person who would purchase the quantity covered by any one bill of lading, and thus the mischief which the statute clearly intended to remedy can be continued without fear of being punished, for he could justly claim that he is not "a person connected with any railroad company, express company or other common carrier."

It is true, as stated by the majority of this court, that courts "may not assume or presume purposes and intentions that the terms used in the statute do not indicate and then by construction practically

enact or expunge provisions to accomplish such supposed intentions." But, on the other hand, it is equally true that it is the duty of the courts to give effect to every word found in the statute. *Bend v. Hoyt*, 13 Pet. 263, 10 L. Ed. 154; *Lawrence v. Allen*, 7 How. 785, 12 L. Ed. 914; *Washington Market Co. v. Hoffman*, 101 U. S. 112, 25 L. Ed. 782; *Montclair Twp. v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391, 27 L. Ed. 431. As stated by Judge Sanborn, delivering the opinion of this court in *Stevens v. Nave-McCord Merc. Co.*, 150 Fed. 71, 75, 80 C. C. A. 25, 29:

"Cardinal rules for the construction of a statute are that the intention of the legislative body which enacts it should be ascertained and given effect, if possible, regardless of technical rules of construction and the dry words of the enactment; that that intention must be deduced not from a part but from the entire law; that the object which the enacting body sought to obtain and the evils which it was endeavoring to remedy may always be considered for the purpose of ascertaining its intentions; that the statute must be given a rational, sensible construction; and that, if this be consonant with its terms, it must have an interpretation which will advance the remedy and repress the wrong."

The effect of the majority opinion is to practically eliminate the words "any other person" unless Lord Tenterden's rule of *ejusdem generis*, which is invoked by the plaintiff in error, governs the construction of this statute. In my opinion it does not. *United States v. Mescall*, 215 U. S. 26, 32, 30 Sup. Ct. 19, 54 L. Ed. 77, is directly in point on this proposition. In that case the statute under which the prosecution was had provided:

"That if any owner, importer, consignee, agent or other persons shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoices," etc.

The defendant, who had been indicted for a violation of this statute, was neither the owner, importer, consignee, or their agent, but was an assistant weigher of the United States in the customs service at the port of New York, and engaged in the performance of his duties as such assistant weigher when the fraud was perpetuated on the government. Lord Tenterden's rule was invoked on behalf of the defendant, and the claim set up that the general term "other person" should be read as referring to some one similar to those named, whereas the defendant was not an owner, importer, consignee, or agent, or of like class with either; he was not making or attempting to make an entry. The Circuit Court sustained this contention, but upon writ of error the Supreme Court reversed this ruling and held that the words "other person" included all persons, although having a different relation to the importation than the owner, consignee or agent. Mr. Justice Brewer, who delivered the unanimous opinion of the court, said:

"Congress was broadening the scope of the legislation and meaning to reach other persons having something to do in respect to the entry beyond that which was done by the owner, importer, consignee or agent, or else the term 'other person' was a meaningless addition. Now the defendant was a person other than the owner, importer, consignee or agent, by whose act the United States was deprived of a portion of its lawful duties. His act comes

within the letter of the statute as well as within its purpose, and the intent of Congress by the legislation is the ultimate matter to be determined."

The court, in discussing the effect of Lord Tenterden's rule, cited and adopted the rule laid down in *National Bank of Commerce v. Ripley*, 161 Mo. 126, 61 S. W. 587:

"But this is only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast iron rule; it does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose must be gathered from the whole instrument. * * * Whilst it is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the genus, there is nothing ejusdem generis left, and in such case we must give to the general words a meaning outside of the class indicated by the particular words or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose."

There are many other cases in which the words "any other" were similarly construed. *Regina v. Payne*, L. R. 1 C. C. 27, where the statute made it a felony to facilitate the escape of a prisoner by conveying to the prison "any mask, dress or other disguise, or any letter or *any other* article or thing" was held to include a crowbar. In *Hilton's Appeal*, 116 Pa. 358, 9 Atl. 342, the statute authorized every lessee of any colliery, mining land, manufactory, or *other premises* to mortgage his lease or term, and it was held that the statute was not restricted to leases of the same or like nature as colliery, mining, or manufactory leases. In *Grissell v. R. R. Co.*, 54 Conn. 467, 9 Atl. 137, 1 Am. St. Rep. 138, the statute made railways liable for fires to buildings or *other property*, and it was held that the words "or other property" should not be confined to subjects ejusdem generis. To the same effect are *Harlow v. Tufts*, 4 Cush. (Mass.) 453; *Phœnix Cotton Co. v. Hazen*, 118 Mass. 350; *Archer v. People's Savings Bank*, 88 Ala. 254, 7 South. 53; *Holcomb v. Van Zylén* (Mich.) 140 N. W. 521; and this is especially true if the particular words, as is the case in this statute, exhaust a whole genus, in which case the general words must refer to some larger genus. *Fenwick v. Schmaltz*, L. R. 3 C. P. 315.

Applying this rule, it is clear to my mind that the intention of Congress was to cover such a transaction as is involved in the instant case. If the construction placed upon that act by the majority is correct, and that was the intention of Congress, it would have adopted the language found in section 2 of the "Bacon Bill," which did not use the words "or any other person," but in lieu thereof used the words "or any officer, employé or agent thereof," clearly indicating that the law was intended to apply only to the carriers, their officers, employés, and agents.

The majority also lay stress upon the construction placed upon this statute by the Secretary of the Treasury and the Attorney General. While it is true that the contemporaneous construction given to an act of Congress by those charged with its execution is entitled to great weight and should not be disregarded or overturned except for cogent

reasons, nor unless it is clear that the construction was wrong, such interpretation is not controlling, and is never conclusive upon the courts. *Hemmer v. United States*, 204 Fed. 905, decided by this court on April 25, 1913, where Judge Sanborn, delivering the opinion of the court, said:

"A decision of a question of law by the officers of the Land Department, or by any officer of any other executive department is never conclusive upon the courts. * * * And it is the function and duty of the officers of the judicial department of a government, which they may not lawfully renounce, to exercise their own independent judgments, guided only by the established legal principles and the recognized canons of interpretation, in the construction of its statutes and to adjudge their just and true interpretation, even though the officers of an executive department have construed them otherwise."

A large number of authorities are cited by the learned judge to sustain that conclusion.

It must not be overlooked that these departmental officers, including the Attorney General, determine these questions in most instances, and did in this, without the assistance of argument from lawyers or other persons learned in the law. How much aid is derived from such arguments and briefs is well known to every judge on the bench. There can be no better illustration of this than the fact that frequently the judges of the Supreme Court call for rearguments in order to assist them in reaching a correct determination of important principles of law. And it has been well said that "a strong bar makes a strong bench."

Neither in *United States Express Co. v. Friedman*, 191 Fed. 673, 112 C. C. A. 219, nor in *United States v. 87 Barrels of Wine* (D. C.) 180 Fed. 215, was this question before the court, and what was there said was clearly obiter so far as it affects the principle now in issue.

The act is also attacked as being unconstitutional, for it is alleged that the courts have uniformly held that liquors are an article of commerce, and the effect of this act is to deprive the owners of their property in violation of the fifth amendment to the Constitution of the United States. But the statute does not prohibit commerce in liquors; it only regulates the transportation thereof. *United States v. Delaware & Hudson R. R. Co.*, 213 U. S. 366, 410, 29 Sup. C. 527, 53 L. Ed. 836, goes much further than is necessary to sustain this act.

In view of the decisions of the Supreme Court in the Lottery Cases, 188 U. S. 321, 358, 23 Sup. Ct. 321, 47 L. Ed. 492; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 58, 31 Sup. Ct. 364, 55 L. Ed. 364; and *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. —, it is no longer open to contention that the powers of Congress in matters of interstate commerce have the quality of police regulations. As stated in *Hoke v. United States*, after reviewing the former decisions of the court:

"The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over 'transportation among the several states,' that the power is complete in itself, and that Congress, as an incident to it, may adopt not only the means necessary but convenient to its exercise, and the means may have the quality of police regulation."

That under the police power every government has the right to regulate or prohibit the manufacture and sale of liquors is no longer open to controversy. The License Cases, 5 How. 504, 576, 12 L. Ed. 256; *Bartemeyer v. Iowa*, 14 Wall. 129, 21 L. Ed. 929; *Foster v. Kansas*, 112 U. S. 201, 206, 5 Sup. Ct. 8, 97, 28 L. Ed. 629; *Kidd v. Pearson*, 128 U. S. 1, 16, 9 Sup. Ct. 6, 32 L. Ed. 346; *Mugler v. Kansas*, 123 U. S. 623, 668, 8 Sup. Ct. 273, 31 L. Ed. 205.

In my opinion the judgment of the court below was right, and should be affirmed.

JOHN GUND BREWING CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 30, 1913.)

Nos. 3,854, 3,855.

INDICTMENT AND INFORMATION (§ 125*)—INDICTMENT—DUPLICITY.

An indictment which charges a single conspiracy to commit distinct offenses is not duplicitous, since a conspiracy is an offense entirely distinct from the crimes the parties intend to commit thereby.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.*]

On motion for rehearing. Judgment on original opinion modified, and rehearing denied.

For original opinion, see 204 Fed. 17.

TRIEBER, District Judge. In case No. 3,855 we have reached the conclusion, after more careful consideration and examination of the authorities, that we were in error in holding that the indictment was duplicitous because it charged a conspiracy to commit two distinct offenses. The law permits this if there is no duplicity charged in the conspiracy itself, for the conspiracy is entirely distinct from the crimes or unlawful acts which the parties have in view when they enter into the conspiracy. Parties may enter into a conspiracy to commit the crime of burglary, and, for the purpose of destroying the evidence thereof, also commit the crime of arson. While burglary and arson are two distinct offenses, punishable differently, and could not be charged in one count of an indictment, a charge of conspiracy to commit the two offenses is only one offense. The conspiracy is entirely distinct from the crimes or unlawful acts which the parties have in view when they enter into the conspiracy or the object which they intend to accomplish in pursuance of it. 2 Bishop on Crim. Law, § 192; *State v. Kennedy*, 63 Iowa, 197, 18 N. W. 885; *Hamilton v. People*, 24 Colo. 301, 51 Pac. 425. Cases upon which we relied in our former opinion are not in point, as they do not refer to the crime of conspiracy.

However, the motion for rehearing must be denied for the following reasons: As stated in our former opinion, in case No. 3,854, the court erred in refusing to admit the evidence offered by the defendant in relation to the instructions given to its agents, and also erred in its

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

charge to the jury that as a matter of law "the company was responsible for the acts of its agent at Moorhead in the transactions that are disclosed to you by the evidence here." The case must also be reversed in view of the principle laid down by the majority of this court in *First National Bank of Anamoose v. United States*, 206 Fed. 374, decided at the present term of this court, and which the majority now adheres to.

For these reasons, the former judgment in case No. 3,855 will be set aside, and judgment entered reversing the cause, with directions to grant a new trial and proceed in conformity with the views herein expressed. This does away with the necessity of granting a rehearing.

In No. 3,854 the motion for rehearing is denied.

UNITED STATES v. MYERS.

(Circuit Court of Appeals, Eighth Circuit. May 3, 1913.)

No. 3,825.

1. INDIANS (§ 37*)—TRESPASS ON INDIAN LANDS—"INDIAN COUNTRY."

By the treaty of October 21, 1892, ratified by Act June 6, 1900, c. 813, § 1 Stat. 676, between the United States and the Kiowa, Comanche, and Apache tribes of Indians in Oklahoma, such tribes ceded to the United States absolutely all their lands therein described subject to the allotment of lands to their members in severalty and the setting apart of a tract for grazing purposes. *Held*, that by such cession all the lands embraced therein ceased to be "Indian country," or subject to the provisions of Rev. St. § 2148, that "if any person who has been removed from the Indian country shall thereafter at any time return or be found within the Indian country he shall be liable to a penalty of \$1,000," and that such character as Indian country was not restored to lands subsequently set apart by executive order of the Interior Department of June 20, 1901, for the purposes of an Indian school.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 56; Dec. Dig. § 37.*]

2. INDIANS (§ 37*)—"INDIAN COUNTRY."

"Indian country," as the term is used in federal statutes, is a country to which the Indians retained the right of use and occupancy, involving under certain restrictions freedom of action and of enjoyment in their capacity as a distinct people, and ceases to be such when their title is extinguished unless by virtue of some reservation expressed at the time and clearly appearing.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 56; Dec. Dig. § 37.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3545-3549.]

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action for a penalty by the United States against L. W. Myers. Judgment for defendant, and plaintiff brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Isaac D. Taylor, Asst. U. S. Atty., of Guthrie, Okl. (Homer N. Boardman, U. S. Atty., of Oklahoma City, Okl., George F. Zimmerman and W. B. Herod, Asst. U. S. Attys., of Guthrie, Okl., and H. E. Bretschneider, Sp. Asst. U. S. Atty., of Anadarko, Okl., on the brief), for the United States.

Everett W. Pattison, of St. Louis, Mo. (Edward D'Arcy, of St. Louis, Mo., on the brief), for defendant in error.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge. [1] Plaintiff in error instituted this action in the district court of Caddo county, in the then territory of Oklahoma. November 16, 1905, it filed an amended petition, the following paragraphs of which are especially pertinent to the questions here to be considered:

"That on the 5th day of June, 1901, the following described tract of land, to wit, the northeast quarter of section thirteen, township six north, range sixteen west of the Indian meridian, in Kiowa county, Oklahoma Territory, was duly set apart by order of the Secretary of the Interior from the Kiowa, Comanche and Apache reservations for the use of the Rainy Mountain Boarding School commonly known as the Rainy Mountain Indian Training School, a school established by the government of the United States for the education and civilization of Indians; that said tract of land was at all of the times hereinafter stated and now is exclusively used for the use of the Kiowa, Comanche and Apache Indians and is and was at all the times hereinafter mentioned Indian country within the meaning of section 2148 of the Revised Statutes of the United States, and was and is under the control of Col. James F. Randlett as United States Indian agent for the Kiowa agency.

"Plaintiff further avers that the defendant, L. W. Myers, has for the past four years been in the business of loaning money for himself and others at usurious rates of interest to Kiowa, Comanche and Apache Indians, wards of the government and under the charge and control of said James F. Randlett, as United States Indian agent, and which said Indians received allotment of land during the year 1900 and 1901 under the act of Congress of June 6, 1900."

It is then further averred that the defendant in error unlawfully trespassed upon the land in question for the purpose of collecting usurious interest from the Indians; that his presence and purpose were detrimental to the welfare of the Indians; that he was ejected from said tract by order of the Indian agent in charge, and notified that he must not return thereon under penalty of law; that thereafter, in defiance of such order, defendant in error returned and twice repeated the trespass. The petition in two counts prays judgment against the defendant in error in the sum of \$2,000, under section 2148 of the Revised Statutes, which reads as follows:

"If any person who has been removed from the Indian country shall thereafter at any time return or be found within the Indian country, he shall be liable to a penalty of one thousand dollars."

To this petition the defendant in error interposed a general demurrer, which was sustained, and judgment was entered dismissing the cause; thereafter plaintiff in error perfected its appeal, which, after

the admission of Oklahoma as a state passed to the United States District Court for the Western District of Oklahoma, by which the judgment was affirmed. The affirmance of this judgment, sustaining the demurrer of defendant in error and dismissing the cause, is the only error assigned. The court below based its action upon the ground that the land in question had ceased to be Indian country at the time of the alleged violation, and therefore that section 2148 of the Revised Statutes was inapplicable.

The act of June 6, 1900, c. 813, 31 Stat. 676, was passed in ratification of an agreement between the United States and the Kiowa, Comanche, and Apache tribes of Indians in Oklahoma entered into October 21, 1892, whereby, in return for the allotment of land in severalty to the individual members of these tribes, and other good and valuable considerations specified, all these tribal lands, including that in question, were relinquished to the United States. The comprehensiveness of the grant made is disclosed by the following quotations from the act:

"Subject to the allotment of land, in severalty to the individual members of the Comanche, Kiowa, and Apache tribes of Indians in the Indian Territory, as hereinafter provided for, and subject to the setting apart as grazing lands for said Indians, four hundred and eighty thousand acres of land as hereinafter provided for, and subject to the conditions hereinafter imposed, and for the considerations hereinafter mentioned, the said Comanche, Kiowa, and Apache Indians hereby cede, convey, transfer, relinquish, and surrender, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced in the following described tract of country in the Indian Territory, to wit: [Here follows the specific description.] * * *

"As a further and only additional consideration for the cession of territory and relinquishment of title, claim, and interest in and to the lands as aforesaid, the United States agrees to pay to the Comanche, Kiowa, and Apache tribes of Indians, in the Indian Territory, the sum of two million (2,000,000) dollars. * * *

The only reference made to the sections of land of which the tract here involved forms a part is the following:

"That sections sixteen and thirty-six, thirteen and thirty-three, of the lands hereby acquired in each township shall not be subject to entry, but shall be reserved, sections sixteen and thirty-six for the use of the common schools, and sections thirteen and thirty-three for university, agricultural colleges, normal schools, and public buildings of the territory and future state of Oklahoma; and in case either of said sections, or parts thereof, is lost to said territory by reason of allotment under this act or otherwise, the governor thereof is hereby authorized to locate other lands not occupied in quantity equal to the loss."

June 20, 1901, the Secretary of the Interior issued an order reserving from the public domain, thus ceded, certain lands for agency, school, religious, and other public uses. That order, in so far as it pertains to the subject-matter of this controversy, is in the following terms:

Schedule of land reserved for agency, school, religious, and other public uses in the Comanche, Kiowa, and Apache reservation in Oklahoma, in accordance with the sixth section of the act of Congress approved June 6, 1900

(Public No. 185) and under instruction of the Commissioner of Indian Affairs, dated June 11, 1900, and approved by the Secretary of the Interior.

Permanent Name	Subdivision	Sec.	Tn.	R.	A.
Rainy Mountain Boarding School	All	13	6	N	16 W 640
	All	14	6	N	16 W 640
	All	23	6	N	16 W 640
	All	24	6	N	16 W 640.

The government claims that this school tract, now occupied as a boarding or training school, either remained Indian country by virtue of some provision or reservation contained in the treaty and act of cession, or was made such by the executive order aforesaid.

It must be and is conceded that if this land is not Indian country, as spoken of in section 2148 of the Revised Statutes, upon which the petition is founded, then no cause of action is stated against the defendant. Indian country was first defined in the Act of June 30, 1834, c. 161, 4 Stat. 729. It was there declared:

"That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country."

Section 2148 is a substantial re-enactment of section 2 of the Act of August 18, 1856, c. 128, 11 Stat. 80, and was passed as a supplement to the act of 1834. So that, whatever was Indian country within the meaning of the act of 1834, was Indian country within the meaning of section 2148, as originally enacted. In *Bates v. Clark*, 95 U. S. 204-207, 24 L. Ed. 471, decided October 18, 1877, the Supreme Court had occasion to consider this definition of Indian country. It called attention to the fact that, notwithstanding immense changes had taken place in the vast region under contemplation by the act of 1834, nevertheless Congress had not thought it necessary to make any new definition of Indian country; that during that time a large body of laws had been in existence and confined to that country; that men had been punished by death, fine, and imprisonment in cases where the courts inflicting the punishment had no jurisdiction, if the offenses were not committed in the Indian country. The court says:

"These facts afford the strongest presumption that the Congress of the United States, and the judges who administered those laws, must have found in the definition of Indian country, in the act of 1834, such an adaptability to the altered circumstances of what was then Indian country as to enable them to ascertain what it was at any time since then. * * *

"If the section be read as describing * * * lands alone to which the Indian title has not been extinguished, we have a description of the Indian country which was good then, and which is good now, and which is capable of easy application at any time.

"The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case."

The Revised Statutes, while containing the substance of many of the important provisions of 1834, omitted all definition of Indian country. Referring to this omission, the Supreme Court, in *Ex parte Crow Dog*, 109 U. S. 556, 561, 3 Sup. Ct. 396, 399 (27 L. Ed. 1030), had this to say:

"Nevertheless, although the section of the act of 1834 containing the definition of that date has been repealed, it is not to be regarded as if it had never been adopted, but may be referred to in connection with the provisions of its original context which remain in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes. It is an admitted rule in the interpretation of statutes that clauses which have been repealed may still be considered in construing the provisions that remain in force. * * *

"This definition, though not now expressed in the Revised Statutes, is implied in all those provisions, most of which were originally connected with it when first enacted, and which still refer to it. It would be otherwise impossible to explain these references, or give effect to many of the most important provisions of existing legislation for the government of Indian country."

And later in *United States v. Le Bris*, 121 U. S. 278, 280, 7 Sup. Ct. 894, 895 (30 L. Ed. 946):

"The repeal of this section does not of itself change the meaning of the term it defines when found elsewhere in the original connection. The re-enacted sections are to be given the same meaning they had in the original statute unless a contrary intention is plainly manifested."

The criterion established by Mr. Justice Miller in *Bates v. Clark*, supra, "which will always distinguish what is Indian country from what is not," has been steadfastly retained and many times restated by the Supreme Court; its last utterance being found in *Clairmont v. United States*, 225 U. S. 551, 558, 32 Sup. Ct. 787, 789 (56 L. Ed. 1201).

"It follows from this that all the country described by the act of 1834 as Indian country remains Indian country as long as the Indians retained their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress." *Dick v. United States*, 208 U. S. 340-359, 28 Sup. Ct. 399, 405 (52 L. Ed. 520).

It is to be noted that the land in question is within the territory described by the act of 1834 as Indian country, and section 2148 is one of the "provisions of its original context which remain in force." When the Kiowa, Comanche, and Apache tribes ceded this land to the United States, it ceased to be Indian country, unless by the treaty by which the Indians parted with their title, or by some act of authority, a different rule was made applicable to the case.

Was there any reservation, express or implied, incidental to the cession and relinquishment by these Indians by which their title to the lands in question was extinguished, that this or any other land conveyed should be devoted to these purposes? We can find none. The treaty of October 31, 1892, confirmed by act of Congress of June 6, 1900, specifies explicitly the conditions and considerations subject to which the conveyance and cession was made. They are the allotment of land in severalty, the setting apart of 480,000 acres as grazing land,

and the payment of \$2,000,000 in the manner provided. For these considerations the Indians "ceded, conveyed, transferred, relinquished and surrendered forever and absolutely, without any reservation whatever, express or implied, all their claim, title and interest of every kind and character." It would be impossible to select words operating more completely to extinguish every vestige of Indian title, and releasing the government more absolutely from every obligation, moral as well as legal. In article 6 this purpose is made still more apparent. It is there said:

"As a further and only additional consideration for the cession of territory and relinquishment of title, claim, and interest in and to the lands as aforesaid," the United States agrees to pay the \$2,000,000.

Nor do we find throughout the body of the act any provisions which operate to modify these positive and emphatic declarations. Article 3 has no bearing upon thirteenth sections, and, in any event, only operates to confirm allotments and title in third parties to land theretofore occupied for specific purposes. Article 11, which undertakes in terms to reserve certain sections for school purposes, contains no reservation for the benefit of the Indians, but rather for the territory and future state of Oklahoma. It may be conceded that if parts of the school sections thus allotted were lost to the state, it was duly reimbursed by lieu land granted. This is immaterial. The reservation of the lands in question vested the beneficial title either in the territory and future state or in the United States, but in neither case for Indian school purposes, nor as a continuance of any beneficial interest in the Indians.

The treaty with these Indians of 1867 (15 Stat. 581) contains no guaranty upon which can be founded a right carried forward and inferentially recognized in that of 1892, and the act of June 6, 1900. Article 7 of the former treaty, in which the United States agrees to provide a schoolhouse and a teacher competent to teach the elementary branches of an English education, for a period of not less than 20 years, is insufficient for such purpose and whatever obligation was thereby created expired by limitation long prior to these transactions. The common school contemplated by that section bears no resemblance to the institution established by the order of June 20, 1901. Furthermore, when Congress in the act of June 6, 1900, was expressly reciting all considerations moving and rights reserved to these Indians, and also making provision for schools and colleges for the territory and future state of Oklahoma, the omission of all reference to Indian schools is significantly exclusive. But counsel for the government contend that in default of treaty reservation, or act of Congress, nevertheless the character of this land as Indian country was restored by the executive order of the Interior Department above quoted. In *re Wilson*, 140 U. S. 575, 576, 11 Sup. Ct. 870, 35 L. Ed. 513, *Spalding v. Chandler*, 160 U. S. 394-403, 16 Sup. Ct. 360, 40 L. Ed. 469, and the General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388, are cited as recognizing and conferring authority to create Indian reservations by executive order. In the *Wilson Case* suggested doubts as to the validity of such an order were put at rest by express legislative

recognition and ratification. In *Spalding v. Chandler*, the treaty, in terms, provided "that the United States would secure to the Indians a perpetual right of fishing and a place of encampment upon the tract ceded." We find it unnecessary, and therefore undesirable, to declare to what extent such authority has been lodged in the executive department; because we do not find any executive order in this case which operated to restore title to these Indians, and thereby to create Indian country within the meaning of the statutes employing that term.

The General Allotment Act provides:

"That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States, etc.," is authorized to allot the lands in said reservation in severalty.

The reservation of these lands for the Rainy Mountain Boarding School falls far short of creating a reservation for tribal use as contemplated by the allotment act; nothing short of express provision or plain implication could have that effect. The order in terms does not purport to make such a reservation. It undertakes to reserve certain public lands for agency, school, religious, and other public uses including the establishment of a boarding school for Indians. The public lands of the United States fall naturally under the jurisdiction of the Interior Department and matters affecting Indians to the Commissioner of Indian Affairs. That the order recites that it is made in accordance with the sixth section of the act of June 6, 1900, cannot enlarge the scope of that act.

The act of 1834 was entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." This title is significant, and it, together with the definition of Indian country there first laid down, indicates that the various provisions were enacted in recognition of the existence of a distinct line of demarcation between Indian country and that which was not Indian country. The Indians were considered in their tribal relation living apart as a people distinct from the white race. The Indian title necessary to stamp the land with the character of Indian country is merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit until such right of occupation has been surrendered to the government.

"When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated." *Spalding v. Chandler*, 160 U. S. 394, 403, 16 Sup. Ct. 360, 364 (40 L. Ed. 469).

In such case the government deals with the Indians practically as a foreign and distinct people with a distinct tribal organization recognized by the political department of the government, with substantial agrarian rights of use and occupancy which would only be terminated by treaty or act of Congress recognizing such property rights. *Lone Wolf v. Hitchcock*, 187 U. S. 553, 23 Sup. Ct. 216, 47 L. Ed. 299.

"Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the

members." *Cherokee Nation v. Hitchcock*, 187 U. S. 294-307, 23 Sup. Ct. 115, 120 (47 L. Ed. 183).

[2] Indian country, therefore, is, as conclusively appears from all the cases, a country to which the Indians retained the right of use and occupancy, involving—under certain restrictions—freedom of action and of enjoyment in their capacity as a distinct people, unless by virtue of some reservation expressed at the time of extinguishment of such title, and clearly appearing. In the absence of such, the term does not apply to any tract owned and controlled by the government and devoted by it, whether as a so-called reservation or mere foundation, to the benefit of the Indians, exclusively or otherwise, unattended by any semi-independent use and occupancy involving such title, ownership, and control as has always inhered in the Indians as a distinct people and not merely as individual wards. In *re Lelah-Puc-Ka-Chee* (D. C.) 98 Fed. 429-433; *Benson v. United States* (C. C.) 44 Fed. 178. Whether a reservation for any purpose affecting Indians is of a character sufficient to stamp such lands as Indian country within the meaning of the law must depend upon the scope and purpose of the act creating it, and the nature of the title, use, and occupancy, how held, exercised, and enjoyed. In *United States v. Celestine*, 215 U. S. 278, 285, 30 Sup. Ct. 93, 95 (54 L. Ed. 195), the Supreme Court said:

"The word 'reservation' has a different meaning, for while the body of land described in the section quoted as 'Indian country' was a reservation, yet a reservation is not necessarily 'Indian country.' The word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide."

It follows that this setting apart of a limited tract of the public domain for a school which the government devotes mainly, or even entirely, to the training and education of Indian children, attending in their individual capacity, could not operate to convert that tract into Indian country as defined in the statute invoked by plaintiff in error.

Many cases may be found which recognize the right of the government to preserve or extend the limits of Indian country, and the force of laws applicable thereto in the case of lands to which the Indian title has in other respects been extinguished (*United States v. Forty-Three Gallons of Whiskey*, 93 U. S. 188, 23 L. Ed. 846; *Dick v. United States*, 208 U. S. 340, 28 Sup. Ct. 399, 52 L. Ed. 520; *Hallowell v. United States*, 221 U. S. 317, 31 Sup. Ct. 587, 55 L. Ed. 750); others declare the right to prohibit the sale of liquor to Indians, who are wards of the government and in charge of Indian agents (*Mosier v. United States*, 198 Fed. 54, 117 C. C. A. 162; *United States v. Holliday*, 3 Wall. 407, 18 L. Ed. 182); and still others recognize the power of Congress under the commerce clause to prohibit shipments of liquor into what was formerly known as the Indian Territory (*United States Express Co. v. Friedman et al.*, 191 Fed. 673, 112 C. C. A. 219; *Ex parte Webb*, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248). Nothing herein is in conflict with the views expressed in these cases. They serve largely to emphasize and confirm the distinctions we have drawn.

None of them either involve or support the contention that tracts such as this are Indian country, as defined in this statute.

The principles involved are similar to those discussed in *Rainbow v. Young*, 161 Fed. 835, 88 C. C. A. 653. There Judge (now Justice) Van Devanter, for this court, pointed out that the reservation from which Sloan was removed was the property of the United States, and in respect of it the United States had the right of an individual proprietor, could maintain its possession and deal with intruders in like manner as can an individual with respect to his property. The question of Indian country was not involved. The following section of the Revised Statutes was there under consideration:

"Sec. 2149. The Commissioner of Indian Affairs is authorized and required, with the approval of the Secretary of the Interior, to remove from any tribal reservation any person being thereon without authority of law, or whose presence within the limits of the reservation may, in the judgment of the commissioner, be detrimental to the peace and welfare of the Indians; and may employ for the purpose such force as may be necessary to enable the agent to effect the removal of such person."

In any event, there can be no doubt that the department and officials in charge can make and enforce ample regulations for the government of such properties and institutions; and Congress can pass laws imposing penalties upon trespassers and intruders.

We have before us a defendant in error upon whom the government seeks to impose a penalty provided in a statute highly penal. He can be charged only with an offense falling clearly within the terms of that act. Those terms should not be arbitrarily extended. This defendant cannot be punished under any strained construction made because it is conceived that public policy requires that acts, such as that with which he is charged, should be prohibited. There is no doubt that the government should have and does have complete control over these schools and over all dealings and intercourse with their inmates. But, as we have seen, Congress has ample power to provide all needed remedies, if, in fact, they do not already exist.

It follows that the judgment of the court below must be affirmed, And it is so ordered.

LOUISVILLE & N. R. CO. v. BELL.

(Circuit Court of Appeals, Sixth Circuit. July 2, 1913.)

No. 2,244.

1. RAILROADS (§ 480*)—FIRES—BURDEN OF PROOF.

In an action for damages from fire, alleged to have been negligently set out by defendant railroad company, the burden is on plaintiff to establish: First, that the fire was set by a spark from defendant's engine; and, second, that the spark escaped through defendant's negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1709-1716, 1733; Dec. Dig. § 480.*]

2. RAILROADS (§ 484*)—FIRES—NEGLIGENCE—QUESTION FOR JURY.

In an action for damages from fire, alleged to have been negligently set out by defendant railroad company and to have consumed plaintiff's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tobacco factory, circumstantial evidence *held* to justify the court in submitting to the jury the question whether the fire originated from a spark from defendant's locomotive and whether the spark was permitted to escape through defendant's negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740-1746; Dec. Dig. § 484.*]

3. TRIAL (§ 142*)—INFERENCES FROM EVIDENCE.

While the jury may not infer defendant's causal relation to plaintiff's injury merely from equally balanced uncertainties, yet plaintiff's evidence need not exclude every other possible source of injury, but it is sufficient if the inference of defendant's liability is fairly and reasonably probable and distinctly more probable than any other suggested explanations.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.*]

4. TRIAL (§ 244*)—INSTRUCTIONS—SINGLING OUT EVIDENCE.

In an action for the destruction of plaintiff's tobacco factory by sparks alleged to have escaped from defendant's engine, a request to charge that the fact that a particular witness heard cinders fall on the tin roof of the factory was no evidence that the cinders were alive or hot enough to set fire to the tin roof or other more inflammable substance, as boards or tobacco, was properly refused as attempting to characterize the effect of a particular portion of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

5. APPEAL AND ERROR (§ 977*)—REVIEW—NEW TRIAL—DENIAL.

In the absence of a clear showing of abuse of discretion, an order of a federal court denying a motion for a new trial will not be reviewed on error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

In Error to the Circuit Court of the United States for the Middle District of Tennessee; Edward T. Sanford, Judge.

Action by C. C. Bell, individually, etc., against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. B. Keeble, of Nashville, Tenn. (A. E. & J. E. Garner, of Springfield, Tenn., of counsel), for plaintiff in error.

Pitts & McConnico, of Nashville, Tenn., Robert L. Peck, of Springfield, Tenn., and James S. Pilcher, of Nashville, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. This action was brought by Bell, hereafter called the "plaintiff," to recover damages for the destruction of his tobacco factory by a fire set by sparks from a passing engine of the railroad company, hereafter called the "defendant." The plaintiff recovered a verdict and defendant brings this writ of error.

It was plaintiff's theory that the spark, which set the fire, entered an open second-story window of the factory facing north toward the railroad, and distant about 225 feet from the track. (This distance, and all others hereafter stated, are measured on the angle of the northwest-

erly wind then blowing.) This upper story was full of dry tobacco, hanging in frames, and very combustible. All the windows were open, or removed, as is customary in drying tobacco. It was defendant's theory that the fire caught from a defective furnace flue in the southerly part of the building. This main issue was clearly submitted to the jury, which found in favor of the plaintiff. Defendant insisted that a verdict for it should be directed, and this insistence raises the questions of chief importance.

[1] No one saw the spark enter the window and no one saw the kindling and first moments of the flames. Plaintiff depends wholly upon circumstantial evidence. This court has considered that two things are essential to plaintiff's right to recover: First, that the fire was set by such a spark; and, second, that the spark escaped through defendant's negligence. *Garrett v. Railroad*, 101 Fed. 102, 41 C. C. A. 237, 49 L. R. A. 645; *Railway v. South Fork Co.*, 139 Fed. 528, 537, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533. There is no statute in Tennessee declaring prima facie liability in such case, or changing the common-law rules of liability or of proof.

[2] Upon the first subject—whether the fire was set by a spark from the engine—plaintiff's evidence fairly tended to show these things, in addition to those already stated: Before any alarm had been given, and while all other parts of the factory were free from smoke, several people noticed smoke coming from this window and from the roof just above it. Then, looking through the window, they saw a small flame in the hanging tobacco, just inside the window. There was not then, and there had not been, any fire maintained in that room or in any part of the building from which smoke could have reached this point, which was upon the side toward the wind. The fire occurred immediately after the noon hour, while most of the hands were away. Employés had been, not long before, in the room in question, and there was then no fire there, and no one had entered the room after that time. The wind was blowing 30 miles an hour from the track toward the factory. An engine and freight train passed, going upgrade, and laboring hard, just before the fire; the interval between the passing of the engine and the first observation of the fire being variously stated at from 5 to 15 minutes. As the engine passed, a shower of cinders was heard to fall upon the roof of a wing of the factory, which roof, on the slope towards the witness, was from 100 to 200 feet from the track. A pedestrian on the adjacent highway, who was waiting for this train to pass, at a distance from the track which he is unable to state, and which, from his testimony, might have been anywhere from 75 to 150 feet (he thinks it was this maximum), and who was in the line between the engine and the factory, observed the laboring engine and heavy smoke and that a shower of cinders fell on him, and that some of them were alive so that they burned his hat.

On the other hand, it was claimed that an engine equipped as this one was cannot throw out a spark which can have sufficient vitality to set out fire at anything like the distance here involved. If this was established in any clear way, it might be difficult for circumstantial

probabilities to prevail against it; but we do not think it was so established. It is true that plaintiff called witnesses of some practical experience who testified that, in their opinion, if the spark arrester was in good condition, a live spark big enough to set anything afire could not be carried more than 20 or 30 feet from the track. While this is a matter of opinion and the plaintiff might not have been absolutely bound thereby, yet, if the record stopped here, plaintiff would have had difficulty in supporting recovery upon the theory that apparatus which may have been in good condition was negligently operated. Plaintiff is not confined to this theory. His declaration alleged both the imperfect apparatus and negligent operation of apparatus assumed to be perfect. The case was eventually submitted to the jury upon both theories. Plaintiff apparently preferred the former theory, and offered testimony supporting that theory and inconsistent with the other. Defendant was not satisfied to leave the record in this shape. It put on expert witnesses showing qualifications which may have impressed the jury more favorably than the qualifications of plaintiff's witnesses, and who testified in effect that, if the arrester was in good condition and the engine properly operated, the danger zone ought not to extend more than 100 feet though even this limit would be elastic, but said in effect that if the engine was improperly operated, even though in good condition, the danger that live sparks would be carried further would be increased and they could not undertake to fix any absolute limit. It was conceded that the force of the wind would be an element operating not only to carry the cinders further, but tending to keep them alive at a greater distance from the engine, and that how long a spark would live would depend on its size, on the force of exhaust and the force of the wind, and on the extent of the combustion which had taken place when it came into the air. Taking all the expert and opinion evidence together, it cannot be said that it operates conclusively to prevent any inference otherwise proper to be drawn from the facts in evidence.

We do not overlook defendant's testimony tending to show that fire first broke out in another part of the building, where it had several times before been set on fire by a defective furnace flue, and that the fire was burning before the train passed; but those considerations were for the jury. On the motion to direct a verdict for the defendant, it must be assumed that plaintiff's testimony is true, and he must have the benefit of every fair inference therefrom.

[3] We have recently had occasion to examine and reaffirm the rule that while merely from equally balanced uncertainties the jury may not infer defendant's causal relation to plaintiff's injury, yet plaintiff's evidence need not exclude every other possible source of injury; it is enough if the inference of defendant's liability is fairly and reasonably probable and distinctly more probable than other suggested explanations. *Railway v. Jones*, 192 Fed. 769, 773-775, 113 C. C. A. 55; *Railway v. Scherer*, 205 Fed. 356, decided May 6, 1913. Judged by this principle and on the whole record, we are satisfied that plaintiff was entitled to have submitted to the jury the issue whether the spark set the fire. Plaintiff's testimony shows a continual shower of

cinders going toward the factory just before the fire, falling on parts of the building, and some of them alive at a distance half or two-thirds the distance from the track to the supposed point of ignition; it shows the fire originating in material so inflammable as to be very easily set on fire in the strong wind then blowing; and it suggests no other plausible cause for the fire. On all the evidence, a presumption that a live spark was carried 225 feet cannot be said to be "contrary to reason, or opposed to natural and physical laws." *Railroad v. O'Neill* (C. C. A. 6) 186 Fed. 13, 15, 108 C. C. A. 115. For some instances of verdicts sustained under more or less analogous circumstances, see *Greenfield v. Railway*, 83 Iowa, 270, 49 N. W. 95; *Hammond v. Railroad*, 211 Mass. 549, 98 N. E. 582; *Railroad v. Burley Society*, 147 Ky. 22, 143 S. W. 1040.

This leaves the question whether there was sufficient evidence of negligence. Concededly, if the spark guard was out of order because of a broken netting or some such defect which would permit large burning cinders to escape, its use in that condition would be negligence. Plaintiff seems to maintain that as defendant claimed the use of a screen in proper condition would surely prevent the escape of sparks which could live for 225 feet, and as plaintiff proved that this fire was set by a spark from this engine, thereby it would be established that the screen was defective. Defendant attacks this position as reasoning in a circle, or as an inference upon an inference, and says that since the first conclusion, viz., that the spark set the fire, is only an inference drawn from the circumstances, we cannot base thereon the further inference that the spark guard was defective, appealing to the well-known prohibitory rule of evidence. *U. S. v. Ross*, 92 U. S. 281, 283, 23 L. Ed. 707. We do not need to decide whether a conclusion that the spark guard was defective would be a forbidden inference based upon an inference, or whether, under these circumstances, it would be a composite and unitary inference based upon all the facts and circumstances in their mutual relations to each other; and this is unnecessary because the refusal to direct a verdict may well rest upon evidence of other negligence.

There was proof fairly tending to show that this engine, in the matter of throwing sparks, was not operated with the care and prudence which the situation required. Although there was an upgrade, the engine was not pulling anything like its capacity; if it had been carrying the proper amount of steam, it would have pulled the train without effort or labor. It did in fact labor, with the wheels slipping, and was making a great noise with the exhaust from the stack; a new fire had been put in just before starting upgrade; the furnace doors were open below the grates, instead of being there closed and being open above the fire. With the doors in that condition and the exhaust turned into the stack and with the ports working rapidly, as when the wheels are slipping, a very powerful draft would be created up through the fire, which would greatly increase the normal proportion of cinders going through the spark guard and correspondingly increase the number if not the proportion of live cinders among them, and would tend to keep these alive for a longer time than with normal operation. If we

add to these circumstances the positive proof that showers of cinders and sparks were thrown by this engine at this time, we have sufficient indications that the enginemen, having failed to maintain a proper fire and proper steam to come up this grade easily, were at this point forcing the draft in a way which, considering the force of the wind and the inflammable character of the surroundings, the jury was authorized to think imprudent and negligent.

It follows that the request for an instructed verdict was properly denied.

[4] Defendant submitted six special requests which the court refused to give, and error is assigned thereon. One of these requests was directed to the burden of proof, and we think it was fairly covered by the general charge. Of the others, request No. 4 is typical. It is:

"The mere fact that Watson heard cinders fall on the tin roof is no evidence that these cinders were alive or hot enough to set fire either to the tin roof or other more inflammable substance, as boards or tobacco."

It is the settled rule that requests like this, which specify one particular bit of testimony and attempt to characterize it as evidence or as no evidence, are as apt to be misleading as to be helpful to the jury, whose duty it is to consider all the facts in their mutual relations and not in any isolated way, and that it is within the discretion of the trial court to deny such requests. *Railroad v. Ives*, 144 U. S. 408, 433, 12 Sup. Ct. 679, 36 L. Ed. 485; *Watson Co. v. Berberich* (C. C. A. 8) 94 Fed. 329, 333, 36 C. C. A. 364.

[5] There was nothing in the action of the court in denying a new trial to make it an abuse of discretion or to take the case out of the familiar practice by which we refuse to review the decision of such motions.

We agree with the District Judge that the excluded evidence of a statement, made during or just after the fire, to plaintiff's superintendent and of his reply, was not admissible, either as an admission by plaintiff or as a part of the *res gestæ*. We think it not necessary to state more fully the circumstances upon this point. The ruling would not be useful elsewhere.

The judgment must be affirmed, with costs.

POWELL v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1913.)

No. 2,486.

1. EXTRADITION (§ 5*)—TREATY—LARCENY—BURGLARY.

A complaint charged that accused did commit the crime of burglary, in that he did feloniously break and enter, in New Westminster, British Columbia, a certain countinghouse, and did steal and take therefrom and carry away a large sum of money, and the commissioner's warrant of commitment was upon the charge of "burglary, larceny, and theft." The warrant was based on evidence sufficient to sustain the charge that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

accused did break and enter the countinghouse, etc., and that he did then and there steal, contrary to the statute of the Dominion of Canada. *Held*, that the complaint charged a crime, which is theft or stealing in Canada, and which is larceny in the United States, under which accused was subject to extradition, though the breaking and entering of a banking house was not burglary at common law.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 6, 7; Dec. Dig. § 5.*]

2. EXTRADITION (§ 5*)—COMPLAINT—DESCRIPTION OF OFFENSE.

If a complaint on which extradition proceedings are based intelligibly describes and identifies the offense, and the offense so described is punishable by the laws of both countries, and by any name is included in the extradition treaty, it is not material that it is not described by the same name in the laws of both countries or at common law.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 6, 7; Dec. Dig. § 5.*]

3. EXTRADITION (§ 11*)—COMPLAINT—INFORMATION AND BELIEF.

Where a complaint on which extradition proceedings were instituted alleged that it was made by the authority of and at the request of the officials of British Columbia by the British vice consul at Detroit, and that the information on which it was based was communicated to complainant by such officials, it was not fatally defective because it was made on information and belief.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 12; Dec. Dig. § 11.*]

4. EXTRADITION (§ 11*)—FOREIGN COMPLAINT AND WARRANT—CERTIFIED COPIES.

While it is advisable in extradition proceedings that certified copies of the foreign complaint and warrant be attached to and made a part of the local complaint, it is sufficient if those documents, alleging positively the guilt of the accused, are presented to the commissioner with the complaint and depositions showing probable cause are produced at the hearing.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 12; Dec. Dig. § 11.*]

5. HABEAS CORPUS (§ 30*)—EVIDENCE—INSUFFICIENCY—IDENTIFICATION OF ACCUSED.

Where accused was arrested in the United States, charged in extradition proceedings with having committed larceny from a bank in British Columbia, and the chief item of evidence in habeas corpus proceedings consisted of identification of accused by a witness who saw him near the scene of the robbery immediately afterwards, and of his possession at the time of his arrest of \$2,700 of Canadian bills, identified as among those stolen, the fact that the evidence of the identifying witness was incredible, and that mere possession of the stolen property long after the robbery raised no presumption of guilt, affected only the weight of the evidence, and did not entitle accused to his release.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Habeas corpus on petition of Martin Powell. From an order discharging the writ, he appeals. Affirmed.

Navin, Sheahan & Kennary, of Detroit, Mich., for appellant.

O. F. Hunt, of Detroit, Mich. (Charles Fox, of New York City, of counsel), for the United States.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 206 F.—26

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. In September, 1911, there was a bank robbery in New Westminster, British Columbia. In June, 1912, due complaint was made and warrant issued thereupon by the police magistrate at New Westminster, charging Martin Powell with this crime. The complaint and warrant alleged that he "did break and enter the countinghouse of the Bank of Montreal," and that the sum of \$270-000 found therein he did "then and there steal, contrary to the form of the statute," etc. In July, 1912, His Britannic Majesty's vice consul, at Detroit, made complaint before the United States commissioner that Powell was a fugitive from justice on account of this crime. Powell was arrested on the commissioner's warrant, and after hearing was committed to the custody of the United States marshal to await the extradition warrant of the Secretary of State. Powell's petition for a writ of habeas corpus was denied by the District Court, the writ which had been issued was discharged, and Powell was remanded to the custody of the marshal; and Powell appeals.

Appellant raises three distinct questions: (1) That the commissioner's warrant was insufficient (a) because contradictory or ambiguous in charging any extraditable crime, and (b) because only on information and belief; (2) that there is no evidence sufficiently tending to show Powell's guilt to authorize his commitment; and (3) that the commissioner put on Powell the burden of establishing his innocence.

[1] 1. The complaint to the commissioner says that it is in connection with the prosecution of Martin Powell "for burglary and theft," and then alleges that Powell "did commit the crime of burglary," and that he "did feloniously break and enter the countinghouse," etc., and "did steal and take therefrom and carry away," etc. The commissioner's warrant of commitment was upon the charge of "burglary, larceny, and theft," and the warrant proceeds to find that there is evidence sufficient to sustain the charge that Powell "did break and enter the countinghouse," etc., and the sum of money found therein "did then and there steal, contrary to the form of the statute of the Dominion of Canada." The extradition treaty (7 Federal Statutes Annotated, 603) covers larceny, burglary, and housebreaking or shopbreaking. The Canadian Revised Statutes of 1906 (chapter 146, §§ 344 and 347) define the crime of "theft or stealing" in a comprehensive way, which includes the common-law crime of larceny. They do not retain the word "larceny" as the name of any crime. Whether they modify the common-law definition of burglary we are not advised. In Michigan, these offenses remain as defined at common law, but with statutory additions and modifications not now important.

Appellant relies mainly upon the claim that breaking and entering a banking office is not a common-law burglary, and hence that the crime of burglary is not charged. We do not regard it as necessary to determine all the questions to which this inquiry would lead. The complaint clearly does charge a crime, which is theft or stealing in

Canada, and which is larceny in this country. If it charges larceny, it is a sufficient complaint, under the treaty. It can make no difference whether the offense which answers to that name in this country is called by the same or another name in Canada.

[2] If the complaint intelligibly describes and identifies the offense, and if the offense so described is punishable by the laws of both countries, and if by any name it is included in the extradition treaty, that is enough. *Yordi v. Nolte*, 215 U. S. 227, 230, 30 Sup. Ct. 90, 54 L. Ed. 170, and cases cited; *Strassheim v. Daily*, 221 U. S. 280, 31 Sup. Ct. 558, 55 L. Ed. 735; *Greene v. U. S.* (C. C. A. 5) 154 Fed. 401, 406, 85 C. C. A. 251.

[3, 4] The complaint is upon information and belief, but it sets forth that it is made by the authority of, and at the request of, the British Columbia officials, and that the information upon which it was based was communicated to the complainant by those officials. It is advisable that certified copies of the foreign complaint and warrant be attached to and made a permanent part of the complaint; but it is sufficient if, as was done in this case, those documents, alleging positively the respondent's guilt, are presented to the commissioner with the complaint, and if depositions showing probable cause are produced at the hearing. *Glucksman v. Henkel*, 221 U. S. 508, 514, 31 Sup. Ct. 704, 55 L. Ed. 830; *Yordi v. Nolte*, supra, 215 U. S. 230-232, 30 Sup. Ct. 90, 54 L. Ed. 170.

[5] 2. The chief item of evidence against appellant consisted of his identification by a witness who saw him near the scene of the robbery and immediately afterwards, and of his possession, at the time of his arrest at Detroit, of about \$2,700 of Canadian bills identified as among those stolen. It is said that the identifying witness' own description of his opportunity to see Powell makes his later identification wholly incredible, and that the mere possession of stolen property so long a time after the robbery raises no presumption of guilt. We are satisfied that these objections go only to the weight of the evidence, and that these facts, in connection with others which give additional color, amply support the commissioner's finding that Powell ought to be held for trial. *Glucksman v. Henkel*, supra, 221 U. S. at page 512, 31 Sup. Ct. 704, 55 L. Ed. 830; *In re Urzua* (C. C.) 188 Fed. 540, 542 (Lacombe, C. J.); *McNamara v. Henkel*, 226 U. S. 520, 33 Sup. Ct. 146, 57 L. Ed. —.

3. The evidence which Powell offered tended to show that he was in the United States at the time of the robbery. The commissioner said:

"The defense in this cause is an alibi. It being a defense on the merits, it should be proved on the trial in the state where the crime is charged to have been committed. Evidence, however strong, the practical effect of which is to set up nothing more than a defense of alibi, raises an issue that can only be tried by the court having the exclusive jurisdiction to convict or acquit of crime. Any other rule would tend, in many cases, to defeat the salutary purpose of the constitutional provisions and the law intended to give it operation. This being so, I must certify these proceedings to the Secretary of State."

It is urged that the commissioner here misapplied the rule of *Ex parte Charlton* (C. C.) 185 Fed. 880 (affirmed by the Supreme Court June 10, 1913), where the affirmative defense offered (insanity) did not tend to disprove that the respondent had committed the crime, and it is said that the commissioner, in effect, rejected all proofs tending to show that Powell was in the United States when the crime was committed, although such proof might make it impossible to believe that Powell was then at New Westminster. If the commissioner's action would bear this construction, a serious question might arise; but it does not. The commissioner also said, orally upon the hearing, and in his return to the writ issued from the District Court, that he did not disregard the testimony tending to show an alibi, but gave it due consideration and did not believe it, and from the whole testimony drew the conclusion that there was probable cause to believe Powell guilty.

From these considerations, it follows that the order of the District Court, discharging the writ of habeas corpus and remanding Powell, must be affirmed.

OREGON COAL & NAVIGATION CO. v. ANDERSON et al.

(Circuit Court of Appeals, Ninth Circuit. July 7, 1913.)

No. 2,153.

1. INJUNCTION (§ 37*)—RIPARIAN RIGHTS—ACCESS TO WATERS—SUIT TO PROTECT.

That the boundary lines of the shore lands of different riparian owners on tidewater, if projected beyond mean low tide, would intersect, does not raise a question of disputed boundary which must be determined by an action at law, under the law of Oregon by which such proprietors own only to high-water mark, the shore being the property of the state, but the right of such an owner to access to navigable water may be protected by injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 85; Dec. Dig. § 37.*]

2. NAVIGABLE WATERS (§ 43*)—RIPARIAN RIGHTS—ACCESS TO WATERS.

The water frontage belonging to the land of a riparian owner on a navigable stream or tidewater, over which he has the right of access and to wharf out to navigable water, is measured by lines extending at right angles from the shore line at the points where it is intersected by his upland boundaries.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 104, 256-265; Dec. Dig. § 43.*]

Appeal from the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Suit in equity by E. A. Anderson and R. B. Herron against the Oregon Coal & Navigation Company. Decree for complainants, and defendant appeals. Affirmed.

This is a suit in equity brought by the appellees, plaintiffs in the court below, for an injunction to restrain the appellant, defendant in the court below, from driving piles or posts, or erecting any structure, on certain property situated in the town of Marshfield, Coos county, Or., alleged to be owned by the plaintiffs.

The parties will be designated as in the court below. The plaintiff E. A. Anderson was the owner in fee of lot 16 in block 65 in Nasburg's addition to the town of Marshfield, Coos county, Or., and the plaintiff R. B. Herron was the owner in fee of lot 17, in block 65, in that addition. The lots in this block were bounded on their easterly and northerly sides by the shore line of Coos Bay, a navigable body of water wherein the tide ebbs and flows. The plaintiffs, as owners of said lots, claimed, as appurtenant thereto, the right and privilege to build docks or wharves out into the water of Coos Bay to the edge of navigable water. The principal value of said lots arose from the fact that the owners thereof had such right and privilege, and without such right and privilege the lots would be comparatively worthless.

It was alleged in the bill of complaint that the defendant, the Oregon Coal & Navigation company, by its agents and its employés, without any right, permission, or authority so to do, did, in the month of March, 1907, secretly, surreptitiously, and in the nighttime, go upon the submerged lands lying between plaintiffs' lots and the navigable water of Coos Bay and drive therein and thereon numerous piles and posts, which were firmly embedded in the soil and extended and protruded above the waters of Coos Bay a distance of from 6 to 12 feet, thus entirely shutting off the plaintiffs from all access to the ship canal and the navigable waters of Coos Bay; that the defendant threatened and gave forth that it would continue so to drive piles and posts in front of plaintiffs' lots, and that it would place timbers and planks thereon, and that it would erect structures thereon that would completely shut off the plaintiffs from and prevent all access to the ship canal and the navigable waters of Coos Bay; that the plaintiffs believed that unless prevented by order of the court the defendant would so do; that such acts would cause great and irreparable damage and injury to the plaintiffs; that the amount and extent of such injury could not be measured or ascertained; and that the plaintiffs had no plain, speedy, or adequate remedy at law.

The plaintiffs asked for an order restraining the defendant and its agents, servants, and employés from driving any piles or posts or erecting any structure in front of their lots, or in any way obstructing, occupying, or encroaching upon the space between the lots and the ship canal on the navigable waters of Coos Bay; that the defendant be ordered to remove all piles or posts so driven by it in front of plaintiffs' property; and that the plaintiffs have judgment against the defendant for their costs and disbursements.

The answer of the defendant alleged that it was the owner in fee of a certain tract of land particularly described in the answer, situate in the town of North Marshfield, Coos county, Or., together with all rights and privileges, by virtue of being riparian owner, or otherwise, to wharf out in front of said tract of land.

The defendant further alleged in its answer that as appurtenant to the land described in the answer and owned by it, and by virtue of being riparian owner thereof, it had the right and privilege of wharfing out in front of said premises to the navigable waters of Coos Bay; that the land described in the answer, owned by the defendant, and the riparian rights, and right to wharf out to the navigable waters of Coos Bay appurtenant to said land, included all of the land over which the defendant had driven piles or posts, or otherwise exercised acts of domain; that the lands described in the answer, owned by the defendant, and the riparian rights or right to wharf out to navigable waters of Coos Bay appurtenant thereto, lay in front of lots 16 and 17, block 65, of Nasburg's addition to the town of Marshfield, Coos county, Or., and between lots 16 and 17 and the navigable waters of Coos Bay.

The complaint was filed in the circuit court of the state of Oregon, in and for the county of Coos; but on the petition of the defendant the cause was subsequently ordered removed to the Circuit Court of the United States in and for the District of Oregon.

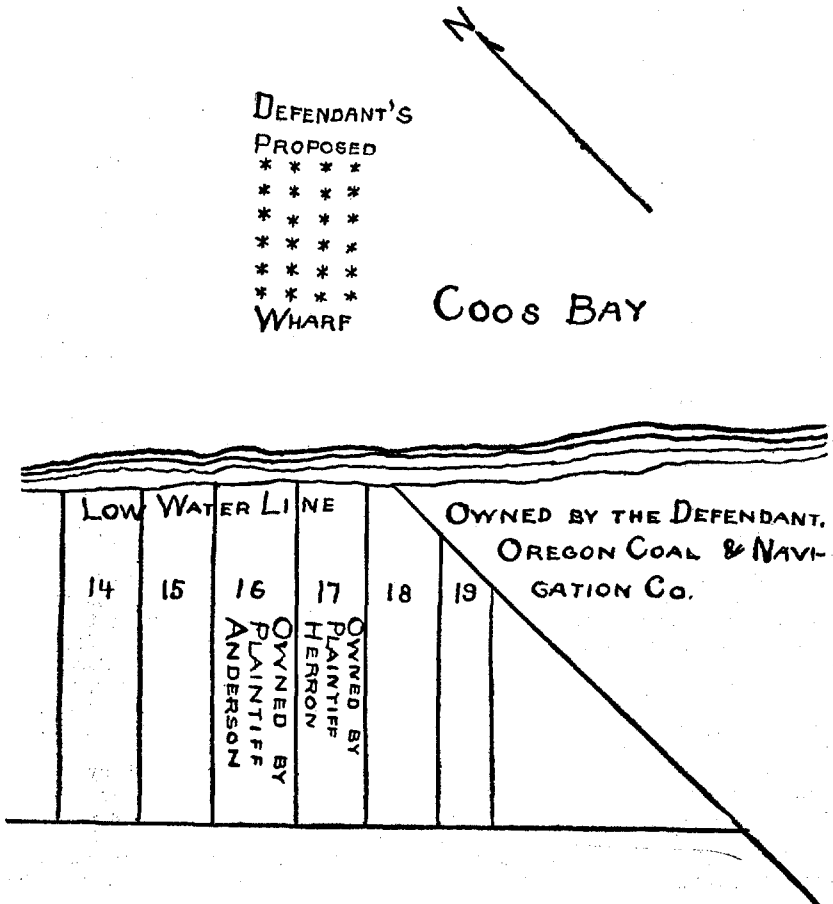
Upon the filing of the complaint in the state court, supported by affidavits, a temporary order of injunction was issued, restraining the defendant and its servants, employés, and agents from driving any piles or posts, or erecting any structure in front of lots 16 and 17 in block 65 in Nasburg's addition to the town of Marshfield, Coos county, Or., or in any way obstructing, occupying, or encroaching upon the space between said lots and the

ship channel on the navigable waters of Coos Bay, during the pendency of the suit.

It was stipulated between the plaintiffs and the defendant that the plaintiffs were the owners of the property described in the complaint, and that the defendant was the owner of the property described in the answer, except in so far as the descriptions of the said premises might conflict, if they did conflict.

Testimony on behalf of the plaintiff was taken, and the case was submitted on the issue thus raised by the complaint and answer. The defendant offered no testimony, and thereupon the court made and entered its decree wherein it found that the equities were with the plaintiffs, and that they were entitled to the relief prayed for in their bill of complaint. By the decree, the defendant was perpetually enjoined from driving any piles or posts, or erecting any structure, in front of and within the space comprised by the laterals extended to the ship channel, of lots 16 and 17 in block 65 in Nasburg's addition to the town of Marshfield, Coos county, Or., or in any way obstructing, occupying, or encroaching upon the space between said lots and the ship channel on the navigable waters of Coos Bay.

The sketch hereto annexed is made from the plats introduced in evidence and shows the relative locations of the lots owned by the plaintiffs and the tract of land owned by the defendant, and the defendant's proposed wharf:



J. M. Upton, of Marshfield, Or., and J. Le Roy Smith, of Portland, Or., for appellant.

A. S. Hammond, of North Bend, Or., John F. Hall, of Marshfield, Or., Edmund Nelson, of San Francisco, Cal., and James T. Hall, of Spokane, Wash., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] It is contended by the defendant that the plaintiffs have mistaken their remedy; that the controversy between the parties is as to the boundary line between their respective lots, and the conflicting littoral or riparian rights of the parties growing out of this alleged disputed boundary line; and that such a controversy should be determined by an action at law. Neither the allegations of the complaint and answer, nor the maps introduced in evidence showing the relative locations of the lots owned by the plaintiffs and the tract of land owned by the defendant, show any conflicting boundary line at any point between the two tracts on the upland, or at any point above mean low tide. It is true that the plaintiffs allege in their complaint that their lots "are bounded on the easterly and northerly side by low-water mark of Coos Bay," and the defendant in its answer alleges that the northwesterly side line of its tract runs "due north to low-water mark of Coos Bay." There is also in the record the testimony of two surveyors to the fact that the northwesterly side line of defendant's tract of land, projected from the point of beginning, in the line of its direction, due north to extreme low tide in Coos Bay, would intersect the southeasterly side line of lot 17, owned by the plaintiff Herron, at extreme low tide. One of these witnesses testified that at extreme low tide the defendant's northwesterly side line would cut into lot 17 five or six feet, but at ordinary low tide the lines would not touch. The other witness testified that at extreme low tide the defendant's side line would probably touch the southwesterly side line of lot 17 three or four feet, but at ordinary low tide they would not touch. Plaintiffs' lots are each 25 feet wide and approximately 100 feet in length, if extended to the mean low-water line of Coos Bay. The lots in their length are at right angles to the shore line, as are all the lots in block 65. The defendant's tract of land is triangular in shape. The northwesterly side line running due north, from the point described in the answer as the point of beginning, has a measured length of 440.3 feet to mean low tide. The southerly side of the tract, running due east from the same point of beginning, is about 300 feet long, and the line along the shore is about 550 feet long. These last two measurements are estimated from the maps and are only approximately correct, but they indicate the triangular shape of the defendant's tract of land; that it has a shore line of approximately 550 feet; and that its northwesterly side line projected due north from the point of beginning would add to this shore line and at some point in the bay, below mean low tide, would pass in front of the lots in block 65 in which is located plaintiffs' lots.

But this line below mean low tide is not a "disputed boundary line," within the meaning of the law relating to upland boundaries. These upland boundaries are not in dispute here, and the projection of defendant's northwesterly side line from the shore, at an angle other than that of a right angle to the shore line or line of navigable water, as a boundary for defendant's littoral or riparian right, would be manifestly unjust to other littoral or riparian owners, and is a claim that can find no support in defining the defendant's littoral or riparian rights under any law known to the court.

In Oregon the upland owner bordering upon a navigable stream or tidewater owns only to the high-water line. The shore belongs to the state. *Montgomery v. Shaver*, 40 Or. 244, 247, 66 Pac. 923; *State v. Portland General Electric Co.*, 52 Or. 502, 519, 95 Pac. 722, 98 Pac. 160; *Switzler v. Earnheart*, 59 Or. 344, 346, 117 Pac. 296; *Shively v. Bowlby*, 152 U. S. 1, 52, 14 Sup. Ct. 548, 38 L. Ed. 331.

[2] In *Gould on Waters* (3d Ed.) § 149, the littoral or riparian right is stated as follows:

"A littoral proprietor, like a riparian proprietor, has a right to the water frontage belonging by nature to his land, although the only practical advantage of it may consist in the access thereby afforded him to the water, for the purpose of using the right of navigation. This right of access is his only, and exists by virtue and in respect of his riparian property. It exists, in the case of tidewaters, even when the shore is the sovereign's property, both when the tide is out and when it is in. It is distinct from the public right of navigation, and an interruption of it is an encroachment upon a private right, whether caused by a public nuisance, or authorized by the Legislature."

The state of Oregon has provided by statute that the owner of any land in the state lying upon any navigable stream or other like water, and within the corporate limits of any corporate town, may construct a wharf or wharves upon the same, and extend such wharf or wharves into such stream or other like water beyond low-water mark as far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other water. Section 5201, Lord's Oregon Code.

Whether Nasburg's addition to the town of Marshfield, in which defendant's tract of land is located, is an incorporated town or not, does not appear from the record; nor is it material to this controversy. The littoral or riparian right would not be greater for land lying outside of an incorporated town than within it. It would not give the riparian owner the right of access or the right to wharf out into the stream except in front of his own upland. *Montgomery v. Shaver*, *supra*.

The defendant's proposed structure in front of plaintiffs' lots was therefore without any color of right, and if completed would have cut off the plaintiffs' right of access to their lots on the shore from the navigable waters of the bay. The plaintiffs by reason of owning the upland are entitled under the law of Oregon to access to the navigable part of the bay to and from the front of their lots. The defend-

ant's structure would have deprived the plaintiffs of this access, and their remedy is in equity to have the defendant enjoined from its construction.

The decree was therefore correct, and must be affirmed.

LOCOMOTIVE ENGINEERS' MUT. LIFE & ACCIDENT INS. ASS'N
v. THOMAS.

(Circuit Court of Appeals, Eighth Circuit. May 20, 1913.)

No. 3,767.

1. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where a general custom of the secretary of a subdivision of defendant, a mutual insurance order, to leave receipts for assessments with the proprietor of a drug store for collection, for the convenience of the members, was conclusively proved, the exclusion of testimony offered on the trial of an action on a benefit certificate to show that such practice was not authorized by the association was not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.*]

2. INSURANCE (§ 760*)—MUTUAL LIFE INSURANCE—FORFEITURE FOR NONPAYMENT OF ASSESSMENTS—REINSTATEMENT.

The by-laws of a mutual life insurance association provided that, on the failure of a member to pay an assessment when due, his membership and all rights of his beneficiary under his certificate should be forfeited, but that he might be reinstated at any time before the next assessment became delinquent "by paying the current assessment and the preceding assessment he is reported forfeited on and obtaining a dated and numbered receipt for the same." *Held*, that the requirement that he obtain a receipt was a reasonable and substantial one and that payment without obtaining a receipt did not effect a reinstatement.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1923; Dec. Dig. § 760.*]

Smith, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Action at law by Eliza Thomas against Locomotive Engineers' Mutual Life & Accident Insurance Association. Judgment for plaintiff, and defendant brings error. Reversed.

William W. Hooper, of Leavenworth, Kan., and William G. Holt, of Kansas City, Kan., for plaintiff in error.

Benjamin F. Endres, of Leavenworth, Kan., for defendant in error.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge. The plaintiff in error is a mutual life and accident insurance association, incorporated under the laws of the state of Ohio. Its business is to provide life and accident insurance on the assessment plan for members of the Brotherhood of Locomotive Engineers, a voluntary labor organization. The de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defendant in error is the mother of one John G. Thomas, who, as a member of subdivision No. 186 of the Grand International Division of the said Brotherhood at Denver, Colo., became the holder of two certificates of membership, or policies of insurance, in the defendant association. Subject to certain conditions hereinafter noted, these certificates called for the payment of \$1,500 each, upon the death of the holder. John G. Thomas met his death by accident October 21, 1907, and plaintiff in error, as the beneficiary designated in the certificates, brings this suit to recover the insurance claimed to be due thereunder.

The by-laws of the association, among other things, provide:

"Sec. 26. Any member failing to pay an assessment when ordered as provided in the by-laws, or within the prescribed time, shall forfeit his membership and shall forfeit all right and title he or his beneficiaries may have to any benefits or claims in or against this association; and though not protected while in arrears, a member may be reinstated at any time before two assessments are past due by paying the current assessment and the preceding assessment he is reported forfeited on and obtaining a dated and numbered receipt for the same."

Thomas failed to pay the assessment falling due August 1, 1907. Another assessment was levied for September, 1907, and unless these two assessments were paid prior to October 10, 1907, all rights under the certificates were forfeited. The secretary of the subdivision was one John Hockenberger, himself a locomotive engineer. For the convenience of the members he had arranged with a jeweler in Denver, named Burnam, to collect the assessments as they fell due. Hockenberger made out proper receipts and left them with Burnam to be delivered as members called and payments were made. David Thomas, brother of the deceased certificate holder, testifies that on September 27, 1907, and consequently before any forfeiture could become final, he went to Burnam's place of business and paid all assessments then due from his brother, as well as from himself, including those for August and September above mentioned; that Burnam tendered him the receipts. He did not take them away, but says he asked Burnam to forward them to his brother John at Como, Colo. The defendant association denies that this payment was made, and asserts that the policies were forfeited and void prior to October 21st, the date on which John G. Thomas died. Burnam returned the receipts to Hockenberger, and Thomas was duly reported to the association as delinquent. It is unnecessary to consider in detail the evidence bearing upon the controverted issue of payment. The case was submitted to the jury, which returned a verdict in favor of the plaintiff. Counsel for plaintiff in error, in their brief, rely upon three assignments of error:

(1) That the court erred in excluding and not permitting the witness W. E. Futch to testify as to the authority given its (defendant's) agents, by the defendant company.

(2) That the court erred in instructing the jury to the effect that the only question for them to determine was whether the money had been paid to L. W. Burnam, defendant's agent, as testified to by plaintiff's witnesses.

(3) That the court erred in not instructing the jury that, before the plaintiff was entitled to recover, she must prove that her son, John G.

Thomas, paid his dues for the months of August and September and obtained receipts therefor as provided by the by-laws of said association or that by some act the defendant knowingly waived such condition.

These assignments will be considered in their order.

[1] That part of the record relied upon to disclose the first error complained of embraces a portion of the examination of W. E. Futch, president of the insurance association, called as a witness on behalf of the defendant:

"Q. I will get you to state whether or not the secretaries of your insurance have any authority to employ any agent or other person to do collecting for them.

"Mr. Endres (counsel for plaintiff): Objected to as incompetent, irrelevant, and immaterial, and for the further reason that Mr. Hooper in his opening statement to the jury admitted that Mr. Burnam—that the association had made arrangements with Mr. Burnam to collect this money as a matter of convenience for the railroad engineers; for the further reason that here is an open, notorious matter, and that it was known to these people, the method of doing business; it must be that way or they never could pay or receive the assessment unless it was done in that manner.

"The Court: Objection sustained."

The actual employment of Burnam to make these collections, that receipts were lodged with him for delivery, that this arrangement was generally understood among the members of the association, and that the payment of dues to him was an established custom, conclusively appears from the testimony. That all this took place with the knowledge and consent of the association and its chief officers is legitimately to be inferred. The objection quoted states that counsel for defendant, in his opening statement to the jury, admitted that the association had made this arrangement with Burnam for the convenience of the engineers. Counsel for defendant apparently acquiesced in the ruling of the court sustaining this objection, for no exception was taken. The exclusion of this testimony was not prejudicial, nor is the error assigned preserved for review.

[2] The second and third assignments involve the same matter of controversy, and will be considered together. The contention of plaintiff in error is that, in order to effect reinstatement and preserve the certificates in force, it was necessary, not only that the dues should be paid, but that dated and numbered receipts should be obtained, as provided by the by-laws. It is complained that the court submitted to the jury the single issue of whether payment was made in time to avert the forfeiture.

The certificates depend for their validity upon observance by their holders of all the substantial provisions of the by-laws affecting them. All members and certificate holders of this mutual association are presumed to have knowledge of the by-laws and regulations adopted for its government. This is not disputed. Is then the obtaining of a dated and numbered receipt, as a condition of reinstatement, a reasonable and substantial by-law provision? We think it is. It has a definite purpose—which is to minimize irregularities in the conduct of the agents and officers of the association, and to protect the society against imposition. Whether its value is great or small, it tends to

this end. Therefore the association has the right to establish, and to insist upon, this condition. It is particularly important in connection with collecting agents like Burnam, and it must be presumed that the arrangement in Denver was not unlike that in other places throughout the territory in which the association did business. Taking up the receipt would have presumably a wholesome, moral effect upon such agents, who are less likely to embezzle if they know that such receipts are outstanding, and that proof of irregularity may be forthcoming; not only so, but the same check would operate beneficially upon the regular secretaries of the association. They are more likely to keep faithful accounts, and make prompt and accurate reports and remittances, if formal receipts are delivered to the members when payments are made. Furthermore, a lax enforcement of this provision of the by-laws would tend to encourage corresponding laxness and neglect on the part of delinquents. The association, being organized not for profit, but for mutual benefit, depends entirely upon the collection of its dues for ability to meet its outstanding contracts. Upon the death of the holder of such a contract, an assessment to pay the same is made upon each assessable member, to be collected by the subdivision secretaries, and forwarded to the general secretary-treasurer. The certificates themselves provide that the benefits accruing under them cannot exceed the amount the association shall be able to pay from one assessment. It is therefore of the highest importance that all such assessments be promptly collected and faithfully remitted. That this provision was inserted with deliberation and design appears from a comparison of its language with that employed in section 27, providing for the payment of ordinary dues. There it is directed that:

"The secretary of each subdivision shall *give* each member a dated and numbered receipt for each assessment as it is paid."

When the member is delinquent, the duty is devolved upon him to *obtain* such a receipt, as one of the conditions of his reinstatement. The question here presented affects a course of dealing between the association, its officers, agents, and members, established for purposes of mutual protection. It does not involve the necessity of preserving and presenting such a receipt, once obtained, as a condition precedent to recovery on the policy. In such case the facts would be for the jury to determine. In this view, we are of opinion that this by-law provision is both reasonable and substantial. The membership of Thomas and the validity of his policies of insurance depended upon his making payment of assessments in the manner prescribed in the contract of membership, including the laws of the association which he was bound to know. Stringent as are the rules in ordinary life policies, they should be more rigidly applied in mutual associations. *Maderia v. Merchants' Exchange Mut. Ben. Soc. (C. C.)* 16 Fed. 749. Stipulations to insure the prompt payment of benefit assessments constitute the substance and the essence of insurance contracts of beneficial associations. *Modern Woodmen of America v. Tevis et al.*, 117 Fed. 369, 54 C. C. A. 293. Aside from the substantial reasons which support and justify this by-law provision, it will be noted that, upon failure to pay, the membership and all right to benefits or claims

are ipso facto forfeited. There remains only the conditional right to reinstatement. For this, as for original admission to membership, the association has power to impose such stringent terms as it may deem necessary and proper. The certificate holder accepts them as part of his contract of insurance.

This being so, was the defense that Thomas failed to obtain the required receipt sufficiently pleaded? The answer states that the holder of these certificates long prior to his death ceased to be a member of the association "for the reason that he failed to comply with the constitution and by-laws of said association, and neglected and refused to pay the assessments provided for in its certificates and policies and in the constitution and by-laws of the order, and that by reason thereof he forfeited his membership in said association, and said certificates and policies, if any he had, became void and of no force or effect." We think this allegation is sufficiently broad to include all the conditions essential to the validity of the policies, now presented for consideration.

The portions of the charge complained of are the following:

"Now, gentlemen, in this case, the sole and only question you have to determine is whether by the greater weight of all the credible testimony in this case it has been shown to you that the assured either direct, or through the agency of his brother, did pay to the representative of this defendant the assessments which had been levied for the months of August and September, 1907, as the by-laws provide. If so, the certificates and the contract between these parties was in full force and effect at the date of his decease, and the plaintiff is entitled to recover; if not, the plaintiff is not entitled to recover. * * *

"If the brother of the deceased did pay this money on the 27th day of September, as contended here by the plaintiff, making payment in full up to that date, then the plaintiff in this case is entitled to recover. If he did not, the plaintiff is not entitled to recover.

"That is the question submitted to you for your determination. Because, if the local secretary intrusted this man Burnam with the possession of those receipts, and with the duty of collecting this money, the payment made to this man Burnam was good payment. So, in the end, the question for you to determine is: Did the brother of the deceased make the payment of dues owed by deceased to this man Burnam in Denver on the 27th day of September, 1907, in the manner he testified? * * *

"If this defendant received this money at the hands of this man Burnam, it has no defense it can make in this matter, but should pay."

It would thus appear that the court submitted the case exclusively upon the issue of whether the money was paid to Burnam, ignoring the necessity of obtaining the receipt required by by-law; and we find nothing elsewhere in the charge to modify or change the intendment of the parts quoted. It is probable that the court below was of opinion that when David Thomas, in one and the same transaction, placed these receipts in Burnam's hands for transmission by mail to his brother John Thomas, he had fully satisfied this by-law provision. We cannot assent to this view. Such a course is in direct conflict with the spirit of the provision, and would render it practically inoperative. It invites fraud and leads to endless confusion. There can be no doubt that a certificate holder can pay his assessments through an agent as effectively as in any other manner; but the obligation to obtain the

receipt is still present, and is not satisfied by leaving it—although with directions—in the very hands from which the by-law demands that it should be removed.

To this feature of the court's charge the defendant duly excepted. An inspection of the record convinces us that this defense was constantly in the mind of counsel, and was aptly brought to the attention of the court in the course of the trial. Being of opinion that the defendant was not accorded the benefit of this substantial matter of defense, we think the judgment should be reversed for a new trial in accordance with the views herein expressed, and it is so ordered.

SMITH, Circuit Judge (dissenting). I cannot concur in the foregoing opinion. The by-laws of the defendant as quoted in the opinion provided:

"Sec. 26. * * * A member may be reinstated at any time before two assessments are past due by paying the current assessment and the preceding assessment he is reported forfeited on and obtaining a dated and numbered receipt for the same."

It is manifest that before the insured can obtain a dated and numbered receipt the same must be issued by the defendant company, and if the insured paid all money due and the company refused to issue the dated and numbered receipts it would not be held that the company by its own wrong could finally forfeit the certificates.

If the insured paid the assessments and the company left the date or number off the receipts, it could not afterwards say the certificates were forfeited thereby.

It is a matter of grave doubt whether anybody understood this question was in issue on the trial of this case and is, therefore, a matter of serious doubt whether the case should be reversed at all, but the ground upon which the reversal is put makes it the duty of the court upon a new trial to direct a verdict for the defendant.

Conceding everything that can possibly be claimed for the defendant, if the brother of the deceased paid the two assessments, and the agent Burnam then handed him dated and numbered receipts which he accepted, the certificates were instantly revived without any reference whatever to what the brother did with the receipts. Everything mentioned in the by-law had then been literally complied with, and if the brother threw them in the waste basket or upon the floor or handed them back to Burnam with the request that he mail them to his brother, or whatever he did with them, that would have no tendency to revoke the reinstatement which took place prior thereto.

FOSTER v. BUCKNALL S. S. LINES, Limited.

(Circuit Court of Appeals, Second Circuit. June 12, 1913.)

No. 208.

1. MASTER AND SERVANT (§ 124*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—DUTY OF MASTER.

A master is not only under obligation to exercise care and caution to provide safe, suitable, and sufficient machinery, means, and appliances for use of his servants, but is also bound to exercise reasonable care to inspect the appliances so furnished, discover defects, and remedy them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

2. SHIPPING (§ 84*)—SERVANT OF STEVEDORE—DEATH—SHIPPING TACKLE—LIABILITY OF VESSEL.

Where a stevedore's contract for loading a vessel provided that it should have the use of the cargo appliances on board, "including rope and steam, as customary," and a servant of the stevedore was killed by reason of defective rope furnished by the vessel, the owners of the vessel were liable, on proof of negligence of the master in furnishing the rope, or in failing to use reasonable care by inspection to ascertain whether it was defective.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349, 351; Dec. Dig. § 84.*]

3. SHIPPING (§ 84*)—STEVEDORES—DEATH OF SERVANT—DEFECTIVE APPLIANCES.

Where a stevedore's servant was killed by the breaking of a rope furnished by the vessel under the stevedore's contract entitling him to use of the vessel's cargo appliances, "including rope and steam," a conclusion of law by the court, trying the case without a jury, that the owners of the vessel could only be liable on proof of actual notice of a latent defect in the rope, rendering its further use after notice dangerous, was erroneous.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349-351; Dec. Dig. § 84.*]

Lacombe, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of New York.

Action by Isabella Foster, as administratrix of the goods, chattels, and credits of Albert J. Foster, deceased, against the Bucknall Steamship Lines, Limited, to recover damages for the death of plaintiff's intestate, who was killed while at work on defendant's steamship, the Amatonga. On writ of error to the District Court for the Eastern District of New York to review a judgment entered upon a decision of the court dismissing the complaint, the parties having stipulated to try the cause before the court without a jury. The action was brought by the plaintiff, as administratrix, to recover damages for the death of her husband, who was killed while at work on the defendant's steamship Amatonga. A prior suit upon the same cause of action was tried and a verdict of \$8,500 was rendered for the plaintiff. For reasons, which it is not necessary now to consider, this verdict was set aside and the prior suit was dismissed. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Alfred C. Cowan, of Brooklyn, and William C. Beecher and Avery F. Cushman, both of New York City, for plaintiff in error.

Convers & Kirlin, of New York City, and Charles T. Cowenhoven, Jr., of New Brunswick, N. J., for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. At the time of the accident which resulted in the death of the plaintiff's intestate the defendant's steamship *Amatonga* was lying at Pier 6, Jersey City, taking a cargo consisting, in part, of iron pipe. The work of loading was in the hands of M. P. Smith & Sons Company pursuant to a contract with the ship's owners, by which it was agreed that the stevedores should supply all necessary tackle and appliances, but should have the use of the cargo appliances on board "including rope and steam as customary." On the morning of September 29, 1909, the work of loading at hatch No. 1 commenced. The boom at this hatch had previously been set up by the ship's crew, but the tackle had not been adjusted. Between 2 and 3 o'clock in the afternoon, while a sling of iron pipe was being swung in, the hauling part of the after port guy rope broke and the load swung over and crushed the plaintiff's intestate against a ladder, causing his death. This rope had been purchased in London in May, 1909, and had been in actual use for 28 days. It had been in use on the day of the accident from the time the boom was put into action until it broke. The rope belonged to the ship and was furnished by the ship for use on the forward hatch. It broke while being subjected to the weight of an ordinary sling load of pipe. The trial judge found, *inter alia*, the following facts:

"Tenth. Before beginning work on the morning of the accident, the rope which broke had been inspected by Superintendent Foster in behalf of M. P. Smith & Sons Company, and by Chief Officer Jay, of the *Amatonga*. The rope was in apparent sound condition and reasonably fit for the service to which it was put.

"Eleventh. If there was any defect in the rope, it was a latent defect, of which the defendant did not have, and is not chargeable with, notice.

"Twelfth. The plaintiff offered testimony to prove, but failed to prove actual notice to the defendant of an alleged defect in the guy rope that broke.

"Thirteenth. The servants of the M. P. Smith & Sons Company who were using the ropes and guys in connection with the work of the loading of the ship, did not, at any time prior to the accident, report any defect or insufficiency in any of the ropes or guys that were in use, to their employer, nor did they make any request of their employer that other or different ropes be provided.

"Fourteenth. Neither the M. P. Smith & Sons Company nor any of its servants made any request of the defendant, its agents or representatives for other or different ropes for use in loading the vessel prior to the accident. The defendant had a sufficient supply of other ropes readily available on board the ship which would have been furnished by the ship's officers to the M. P. Smith & Sons Company on their request."

He also found the following conclusions of law:

"First. The plaintiff can recover in this action, if at all, only upon proof of actual notice to the defendant of a latent defect in the rope that broke, rendering its further use after such notice, dangerous.

"Second. The defendant did not have or receive, prior to the accident, notice of any latent defect in the rope which rendered its further use dangerous.

"Third. The accident which resulted in the death of the plaintiff's intestate was not due to the breach of any duty owed by the defendant to the plaintiff's intestate.

"Fourth. The defendant is entitled to judgment on the merits with costs."

If the action had been tried with a jury it would, in our opinion, have been the duty of the court to submit the question of the defendant's negligence to the jury. We do not understand that the master's duty to the servant is discharged when he purchases in the open market tackle upon the strength and soundness of which depend the safety of the lives and limbs of his servants and the servants of others rightfully working on the ship. The fact that the judge was the trier of the facts as well as the law presents an unusual and somewhat difficult problem. We think, however, that the proposition, as stated in the first conclusion of law quoted above, viz., that the master is only liable when he receives actual notice of the existence of latent defects in the appliances which he furnishes to his servants is not a complete and accurate statement of the law.

[1] We understand that the master is under obligation to use diligence, care and caution in providing safe, suitable and sufficient machinery, means and appliances for the use of his servants. His duty does not, however, end when this is done, for he is under an equal obligation to see that the appliances are kept in good condition while in actual use. If defects exist in the original construction of a given appliance, it is his duty to discover them or use due care to that end. If defects develop while in the master's use, he must discover them or at least make some effort to do so. The master cannot sit down in his office, fold his hands, close his eyes and ears and avoid responsibility by asserting that he did not know of the defect which resulted in the loss of a human life. It is his duty to know of it, if it can be discovered by the exercise of reasonable care and prudence. These propositions have been so frequently decided that it is not necessary to refer to the decisions in extenso. A few citations will suffice. *Lafayette Bridge Co. v. Olsen*, 108 Fed. 335, 47 C. C. A. 367, 54 L. R. A. 33; *Northern Pacific v. Altimus*, 179 Fed. 275, 102 C. C. A. 631; *Francis v. Cramp*, 200 Fed. 383, 118 C. C. A. 535. See also *Lehigh Valley Co. v. Shandalla*, 205 Fed. 715, decided by this court May 12, 1913.

[2] The rule is well stated in *The Phoenix* (D. C.) 34 Fed. 760, as follows:

"When a stevedore has full charge of the loading or unloading of a vessel, and one of his gang suffers injury by reason of defective tackle furnished by the vessel, she is responsible if there be absence of due care upon the part of her master in furnishing the tackle, or in maintaining it in a safe condition."

The fact that the plaintiff's intestate was employed by the contracting stevedores and not by the defendant does not alter the latter's obligation to furnish safe and suitable means and appliances. It agreed to furnish rope and did furnish it. In the case of *The Rheola* (C. C.) 19 Fed. 926, Judge Wallace says:

"The libelant was performing a service in which the shipowners had an interest, and which they contemplated would be performed by the use of appliances which they had agreed to provide. They were under the same obliga-

tion to him not to expose him to unnecessary danger, that they were under to the master stevedore, his employer. There was no express contract obligation on their part to either to provide safe and suitable appliances, but they were under an implied duty to each; and the measure of the duty towards each was the same. What would be negligence towards one would be towards the other. *Coughtry v. Globe Co.*, 56 N. Y. 124 [15 Am. Rep. 387]; *Mulchey v. Methodist Society*, 125 Mass. 487."

[3] The defendant having furnished the rope, the stevedores were entirely justified in using it and in assuming that it was a safe rope to use as a guy. There was testimony by those who saw the rope after the accident that it looked dark and frizzly, that it was torn like a sponge and was dusty and frizzled where it broke. One of the witnesses testified that:

"The inside looked kind of damp as if it had been lying in the rain. I smelled it and it smelled kind of sour like. The break was an uneven break."

We think it must be conceded that the rope was entirely insufficient to withstand the strain put upon it. The presumption is strong that this inherent weakness manifesting itself on the outside as testified to by the witnesses, would have been discovered if a proper inspection had been made before putting the rope to work. In other words, that the defendant's agents might have known, if they had taken reasonable care to find out. But this rule was ignored, and the defendant was relieved from liability because the plaintiff did not prove that it had actual notice of the defect although it could have been discovered if a careful inspection had been made. The proposition that such an inspection was made prior to its being put to use by the stevedores cannot be maintained. If an adequate inspection had been made, it is probable that the defect in the rope would have been discovered.

The error we find in the record is not one of fact, but of law. The situation may be illustrated by assuming that the case had been tried with a jury and the court had charged the law as it appears in the first conclusion quoted above. The jury under such a charge would have been compelled to find for the defendant, even though they were convinced that the defect would have been discovered by the exercise of reasonable care and that the defendant was guilty of negligence in not discovering it. If the next trial be without a jury the trial judge may find that, although the defect was to some extent hidden, a careful inspection might have discovered it. But irrespective of the result in this particular case, it is, in our judgment, of vast importance that the rule as stated above should be adhered to. The safety of the lives and limbs of a multitude of workmen depends upon its enforcement and it would be placing a premium upon recklessness to release the master in cases where the defect which causes the injury was not known to him, but could have been discovered had he exercised reasonable care. Human nature is such that in many cases the master will not be overzealous in seeking information when ignorance is an absolute shield. We think that if he could have known of the defect by the exercise of ordinary care and prudence, he should be held to the same responsibility as if he actually did know of it.

The judgment is reversed.

NOYES, Circuit Judge (concurring). I concur in the opinion of Judge COXE because I think that the conclusion of law stated by the trial judge that the liability of the defendant depended upon actual notice, was erroneous. I think that it owed a duty to inspect and that the findings are insufficient to show that it performed such duty. But I do not attempt to determine whether the rope was in fact defective. That, as I understand it, will be determined upon the new trial.

LACOMBE, Circuit Judge (dissenting). I am unable to concur with my Associates, not by reason of any difference of opinion as to the law, but because it seems to me that they are applying the law to a state of facts not found. The trial judge did not take the case from the jury and direct a verdict; in such a situation every proposition of fact about which the testimony is conflicting would be considered as found in favor of the party against whom verdict was directed. The cause was tried by the court, without a jury, and it is upon the findings of fact only that this court can review his conclusion that plaintiff was not entitled to recover. Upon the vital question of fact, viz., whether or not when the operation began the rope was defective or unfit to sustain the strain which it might be expected it would be subjected to, there is no finding at all, nor any request to find. The majority of the court reach the conclusion of fact that it was unfit to meet expected strain because they credit some witnesses and discredit others. But it seems to me that in a case tried as this was, such is not the function of an appellate court.

There was a sharp conflict of testimony as to the breaking of the rope and its condition. Witnesses for the plaintiff testified that the rope was $1\frac{1}{4}$ -inch (might have been originally $1\frac{1}{2}$ -inch, they grow smaller with use); that it looked dark and had the appearance of having been in use over a year; that it looked damp, as if it had been lying in the rain; that, upon opening the strands, it looked dark and smelled sour; that a new rope will break with a straight cut, while an old one will frazzle out; that this one broke when exposed to little strain, to the ordinary strain of a guy rope; that it broke uneven like a torn sponge, all frazzled and dusty like; that one of these witnesses before the accident reported to the mate of the steamship that the rope was no good, and was told to go on with it and that a pre-venter rope would be furnished.

On the other hand, witnesses for the ship testified that it was a $2\frac{1}{2}$ -inch rope (possibly $2\frac{1}{4}$ from use); that it was 3 months old, and had been used only 28 days; that it was examined before the accident by one of the ship's officers and by the superintendent of the stevedore, and was then in good condition; that it broke with a sharp, clean break, where it had been nipped by the chain sling; that those using it had been cautioned several times not to put extra strain on it by heaving in-board before the sling was clear of the truck, but repeatedly disobeyed these instructions; that when it broke it was jammed between two parts of the chain; that its condition was good; that there was new tackle on board ready to be furnished for this guy on request, but that no such request was made to any of the ship's officers, and no

one said to any of them that the rope was not in good condition or unfit for use.

The trial judge discredited the witnesses who testified that they called attention to the defect. These are the same witnesses who testified that the break was frazzled and that no undue strain was applied. He credited the witnesses who testified that no notification of unfit condition was given to the officers. These are the same witnesses who testified that the break was a clean one, where the chain had pinched the rope, and that, through improper handling, it was subjected to strains a guy was not expected to meet. Upon this state of the record, I am not satisfied that there was any *defect* in the rope which rendered it unfit for service as a guy rope.

That being so, I cannot vote to reverse.

DE VOE SNUFF CO. v. WOLFF.

(Circuit Court of Appeals, Sixth Circuit. June 3, 1913.)

No. 2,334.

1. TRADE-MARKS AND TRADE-NAMES (§ 28*)—INFRINGEMENT.

Complainant and its predecessors in business have for more than 70 years been continuously engaged in the manufacture of snuff, widely sold throughout many states and for some years largely advertised. During all that time its mills have been known as the "Eagle Mills" and it and its predecessors have used on their packages and stationery the picture of an eagle and the words "Eagle Mills" or "Eagle Snuff," so that its product has long been known to the trade and to users as "Eagle Snuff." *Held*, that it has a common-law trade-mark in the picture of an eagle and in the word "eagle" as applied to snuff, whether used in connection with other words or not, and that the use by defendant on its packages of snuff of the picture of an eagle and the name "White Eagle Snuff" was an infringement, although both picture and name differed materially in appearance from those used by complainant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 31; Dec. Dig. § 28.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 57*)—"INFRINGEMENT"—TEST OF INFRINGEMENT.

It is not necessary to constitute infringement that every element of a trade-mark be appropriated nor that it be completely copied, but a proper test is whether, taking into account the resemblances and differences, the former are so marked that the ordinary purchaser is likely to be deceived thereby.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 65; Dec. Dig. § 57.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3590-3594.]

3. TRADE-MARKS AND TRADE-NAMES (§ 65*)—INFRINGEMENT—EXTENT OF IMITATION.

The protection accorded to a trade-mark is not limited to such imitations as would deceive a cautious and discriminating customer, but include as well such as would be likely to deceive the ordinary or unwary purchaser.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 64; Dec. Dig. § 65.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. TRADE-MARKS AND TRADE-NAMES (55*)—SUIT FOR INFRINGEMENT—INJUNCTION.

That an infringer of a technical trade-mark did not know of its prior use by another is immaterial as respects the right of the owner to an injunction.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 63; Dec. Dig. § 55.*]

Appeal from the District Court of the United States for the Eastern District of Michigan; Alexis C. Angell, Judge.

Suit in equity by the De Voe Snuff Company against Jacob Wolff, executor of the estate of Ignatz Wolff, deceased. Decree for defendant, and complainant appeals. Reversed.

F. F. Reed and E. S. Rogers, both of Chicago, Ill. (A. H. Burroughs, of New York City, of counsel), for appellant.

August Cyrowski, of Detroit, Mich., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Complainant filed its bill to restrain infringement of an alleged common-law trade-mark, consisting of the word "Eagle" and the picture of an eagle as applied to snuff of its manufacture. There is no charge of unfair competition. On final hearing on pleadings and proofs the District Court dismissed the bill. From that dismissal this appeal is taken. Defendant appeared below, filed an answer, and (except as presently stated) was represented by counsel throughout, including final hearing. He, however, took no testimony, and was not represented at the taking of complainant's testimony. Nor was he represented on the argument in this court, by brief or otherwise.

[1] The testimony satisfactorily shows that the manufacture and sale of snuff was established at Spottswood, N. J., in 1835, by complainant's predecessors in ownership by direct and continuous line of succession; that such manufacture and sale has ever since been carried on by complainant's predecessors and by complainant; that from the beginning the manufacturing plant of complainant and its predecessors has been known in the trade and among the general public as "Eagle Mills"; that likewise from the beginning the product of complainant and its predecessors at Spottswood, N. J., and elsewhere, has been known to, ordered by, and spoken of generally in the trade as "Eagle Snuff" or "Eagle Mills Snuff" and sometimes as "De Voe's Eagle Snuff;" that the labels and packages of complainant and its predecessors have generally borne thereon, as identifying and characteristic features, the picture of an eagle and the title "Eagle Mills," although complainant did not, as a rule, name or label its product "Eagle Snuff," one exception, however, to this rule being shown in the case of a mark on the outside of a shipping package. Advertising was begun by complainant's predecessors "in the fifties," and has ever since been carried on by their successors in interest and ownership, including complainant. The words "Eagle Mills" were used in all this adver-

*For other cases see same topic & § NUMBER in Dec. & Ann. Digs. 1907 to date, & Rep'r Indexes

tising, which was done only through showcards or by circulars until about 1888, when general advertising was placed in the catalogues of wholesale druggists "all through the West, especially in Ohio, Illinois, Michigan, Wisconsin, Minnesota, Iowa and Missouri." Advertisements were also placed in Los Angeles, Cal., and Spokane, Wash. Complainant's snuff was exhibited at the World's Fair in 1893, and there received "the highest award." Complainant's predecessors have used the picture of an eagle on their stationery since about 1888 or 1889. Its snuff has been sold for apparently at least 40 years or more "throughout the Eastern States, New York State, Ohio, Michigan, Illinois, Indiana, Wisconsin, Minnesota, and in the South." As early as 1872 it was sold also in Pennsylvania, Missouri, and Nebraska. When the testimony was taken in 1908 complainant's sales were totaling about 300,000 pounds of snuff per year.

The deceased, Ignatz Wolff, began the manufacture of snuff in his tobacco factory, at Detroit, Mich., about the year 1886, and the business was carried on by him until his death in November, 1906. Since that time it has been carried on by the defendant executor. For several years at least before the death of Ignatz Wolff his factory was known and advertised as the "White Eagle Tobacco Factory." His letter heads contained that name, together with the picture of an eagle. His labels, so far as appears by the record, invariably contained the picture of an eagle; some of the labels containing the words "White Eagle Snuff," others the words "White Eagle" in connection with such words as "Polish Snuff" and "Holland Snuff." The defendant executor has used substantially the same names and representations upon letter heads and labels since the death of his decedent. The picture of the eagle as used by the latter and his executor differs from that used by complainant and its predecessors in this: That the picture used by complainant and its predecessors usually represented the eagle with wings outstretched, as in the act of flying or preparing to fly; while that used by Ignatz Wolff and his executor is, with one exception, a conventionalized representation, showing the eagle and the wings practically erect, and is said to be that used as the Polish National Emblem. (The eagles on the national coats of arms of Germany, Russia, and Austro-Hungary show generally similar positions of the wings.) The one exception referred to is on the label of "Polish-American Snuff," which shows the conventional American eagle as part of an elaborate coat of arms purporting to be a registered trademark; proof of such registration, however, under the federal laws not appearing. Decedent and defendant advertised this snuff in the Detroit City Directory as a product of the "White Eagle Tobacco Factory." One of decedent's advertisements used the term "White Eagle Snuff."

The district judge, in dismissing the bill, assumed, for the purposes of the case, that complainant had established a common-law trade-mark "in its representation of the eagle and the word Eagle or the words Eagle Mills in connection therewith upon packages of snuff," but was of opinion that no confusion could be caused to the dealers purchasing from manufacturers or to ultimate purchasers

using ordinary care, because of the difference in the appearance of the respective eagles and the dissimilarity of the labels, especially in that the word "Eagle" alone does not appear on complainant's label and the words "Eagle Mills" are not conspicuously placed; while on defendant's labels the words "White Eagle" form a prominent element.

We are clearly of opinion that the evidence establishes complainant's ownership of a technical trade-mark in the name "Eagle" and the picture of an eagle; and that complainant is entitled to protection in such ownership. The word and symbol in question are of a character to be appropriated. By long use they have become associated in the mind of the public with the goods of complainant and its predecessors, and so naturally indicate to the public complainant's product. As said by Judge Denison, speaking for this court, in *Merriam v. Saalfeld*, 198 Fed. 369, 372, 117 C. C. A. 245, 248: "A trade-mark is a trade-mark because it is indicative of the origin of the goods." The word and symbol being of a character to be appropriated, and having been duly appropriated as a trade-mark, the latter became property which competitors have no right to use, either alone or in connection with other matter to which complainant lays no claim. *Enoch Morgan's Sons Co. v. Ward* (C. C. A. 7th Cir.) 152 Fed. 690, 692, 81 C. C. A. 616, 12 L. R. A. (N. S.) 729; *American Tin Plate Co. v. Licking Roller Mill Co.* (C. C.) 158 Fed. 690, 693.

[2] Is complainant's trade-mark infringed by defendant's labels and advertising matter? It is true that the dress and appearance of defendant's designs differ materially from those of complainant. But it is not necessary, to constitute infringement, that every element of a trade-mark be appropriated, nor that the trade-mark be completely copied. A proper test is whether, taking into account the resemblances and differences, the former are so marked that the ordinary purchaser is likely to be deceived thereby. *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 33, 21 Sup. Ct. 7, 45 L. Ed. 60; *Johnson v. Bauer* (C. C. A. 7th Cir.) 82 Fed. 662, 663, 27 C. C. A. 374; *Enoch Morgan's Sons Co. v. Ward*, *supra*, 152 Fed. at page 692, 81 C. C. A. 616, 12 L. R. A. (N. S.) 729.

[3] Complainant's snuff, as a result of its markings, having become known in the market as "Eagle Snuff," defendant's adoption of a mark causing his goods to bear the same name in the market would invade complainant's rights. *Seixo v. Provezende*, L. R. 1 Ch. App. 192, 197; *Read v. Richardson*, 45 L. T. (N. S.) 54, 58. We think such is the result of the use of defendant's labels. It is doubtless true that the dealer accustomed to handling complainant's snuff would not be deceived by defendant's labels or advertising matter. But this is not, we think, true of the ultimate purchaser. If, as we have found to be the fact, the name "Eagle Snuff" has come to be associated in the minds of the public with and to represent complainant's product, we think it clear that the ordinary purchaser accustomed to buy and use Eagle Snuff, and not seeing the respective products side by side, could readily be deceived into purchasing defendant's product as that of complainant, presenting, as the former does, the idea of "Eagle" snuff as a prominent characteristic. It may be true that the cautious

and discriminating purchaser is not likely to be so misled; but the protection accorded to a trade-mark is not limited to the cautious and discriminating customer, but embraces the "ordinary" or "unwary" purchaser as well. *Ohio Baking Co. v. National Biscuit Co.* (C. C. A. 6th Cir.) 127 Fed. 116, 120, 62 C. C. A. 116; *Waterman Co. v. Drug Co.* (C. C. A. 6th Cir.) 202 Fed. 167, 171; *Florence Mfg. Co. v. Dowd* (C. C. A. 2d Cir.) 178 Fed. 73, 75, 101 C. C. A. 565; *Upper Assam Tea Co. v. Herbert*, 7 R. P. C., 183; *Seixo v. Provezende*, L. R. 1 Ch. App. 192, 196. It is significant that complainant's representative, applying to Detroit dealers (where defendant's product appears not to have been sold) for White Eagle Snuff, was tendered complainant's manufacture. The differences in the posture of the eagle, as represented in the labels and advertising matter of complainant and defendant, respectively, do not impress us as controlling. The picture of the eagle is prominently upon each label, and in many cases in connection with the word "Eagle." It is reasonable to expect that the unwary purchaser accustomed to the purchase and use of complainant's "Eagle" snuff would not be deterred from accepting defendant's product because of the differences in the appearance of the eagle.

We are of opinion that complainant's trade-mark is infringed by defendant's use of the word "Eagle" and its picture of an eagle, as applied to snuff. This conclusion is, we think, amply supported by well-considered precedents. See *Upper Assam Tea Co. v. Herbert*, supra (the "Elephant Tea" case); *Anglo-Swiss Condensed Milk Co. v. Metcalf*, 3 R. P. C. 28, 31 (the "Dairy Maid Brand" condensed milk case); *Ohio Baking Co. v. National Biscuit Co.*, supra (the "Iner-Seal" case).

[4] It is immaterial that defendant and his decedent are not shown to have known of complainant's trade-mark, and thus not shown to have intended to pirate it. This is not a case of unfair competition, but involves only a pure common-law trade-mark. In such case, defendant's good faith is immaterial, as respects the right to injunction. *Saxlehner v. Siegel-Cooper Co.*, 179 U. S. 42, 43, 21 Sup. Ct. 16, 45 L. Ed. 77.

Complainant is entitled to an injunction restraining the use of complainant's trade-mark, substantially according to the prayer of the bill. The record is not such as to justify an imperative order for accounting. The many years' failure to prosecute suggests laches. On the face of things, it would seem that complainant must have known, or should have known, of the infringement if substantial in character; and, if unsubstantial, no accounting is needed. See *National Distilling Co. v. Century Liquor, etc., Co.* (C. C. A. 6th Cir.) 183 Fed. 206, 211, 105 C. C. A. 638. It does not appear when complainant first knew of decedent's infringement. The bill, however, contains an allegation which may be treated as an admission, that such knowledge was had about two years before Ignatz Wolff's death. Suit was not begun until after the latter's lips were sealed, and, as we have said, no bad faith was shown. We shall not, however, foreclose the question of accounting, but shall allow the district judge to determine that ques-

tion on further application and showing by complainant, if it shall be so advised.

The decree of the District Court is reversed, with costs, with instructions to take further proceedings consistent with this opinion.

CHICAGO, B. & Q. R. CO. v. BLUNT.

(Circuit Court of Appeals, Eighth Circuit. June 30, 1913.)

No. 3,902.

1. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTION OF FACT.

Where evidence that one who was suing for personal injuries had made a false claim for a pension for injuries received while in the army, and an affidavit in support of the petition was admitted, but it did not conclusively appear in the testimony that the plaintiff had done anything more than write to the maker of the affidavit and request him to make an affidavit as to the facts, a requested instruction that the United States statute in force at the time the plaintiff procured the affidavit punished the procuring of a false affidavit was erroneous, as taking from the jury the right to determine whether the plaintiff did in fact procure the making of an affidavit, even though that clause was simply preliminary to the main part of the instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

2. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

Where the second part of the same instruction told the jury that, if they found that the plaintiff knowingly aided in making any false affidavit for the purpose of procuring a pension, they might consider that fact in determining his credibility, that part was erroneous, taken in connection with the first part, where there was no evidence that the plaintiff procured any other affidavit than that offered, and which the instruction told the jury he had procured.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

3. TRIAL (§ 252*)—INSTRUCTIONS—CREDIBILITY OF WITNESS.

The requested instruction was also erroneous, where there was no evidence that the affidavit was false, since Rev. St. § 4746 (U. S. Comp. St. 1901, p. 3279), punishes the procuring or making of a false affidavit, not the use of an affidavit which is not false in support of a false claim for pension.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action by Jesse F. Blunt against the Chicago, Burlington & Quincy Railroad Company. Judgment for the plaintiff, and defendant brings error. Affirmed.

Herman Aye, of Omaha, Neb. (Byron Clark and A. R. Wells, both of Omaha, Neb., on the brief), for plaintiff in error.

Matthew Gering, of Plattsmouth, Neb., for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and WIL-LARD, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CARLAND, Circuit Judge. Blunt sued the railroad company to recover damages for personal injuries received in March, 1908. At the trial it appeared that Blunt had, prior to his alleged injury, made two applications for a pension on account of disability resulting from injuries received in the line of duty as a soldier in the army of the United States. One application was made in 1905, and the other in 1907. At the trial there was evidence tending to show that the applications, in so far as they stated that Blunt was by reason of said injuries greatly disabled from obtaining his subsistence by manual labor, were false. In support of the application made in 1905 one Arthur Keyes made an affidavit in the following language:

"General Affidavit.

"State of Kansas, County of Wyandotte—ss.:

"In the matter of the pension claim of Jesse Blunt, who was hurt at Ft. Leavenworth in the year 1895 and 1896.

"On this 26th day of April, A. D. 1906, personally appeared before me, a notary public in and for the aforesaid county, duly authorized to administer oaths, Arthur Keyes, aged 29 years, whose post office address is 1110½ North Ninth street, Kansas City, Kan., well known to be reputable and entitled to credit, and who, being duly sworn, declares in relation to the aforesaid as follows: I was soldiering in same troop at Ft. Leavenworth, Kan., with said Blunt at same time he was hurt. On the day his eye was hurt he was chopping bales in the barn. I was stable orderly, was standing near, and saw the wire when it bursted and hit him in the eye. Also on the 20th day of January, 1896, he was cutting willows to make a hurdle for the riding hall, and the ax glanced and hit him on the knee, and split his knee cap, and left his knee stiff.

"I further declare that I have no interest in said case and am not concerned in its prosecution.

Arthur Keyes."

(Jurat omitted.)

Blunt's connection with the making of the affidavit by Keyes is shown by the following questions and answers appearing in the record:

"Q. Do you know Arthur Keyes? A. Yes, sir. Q. Did you request him to make an affidavit in support of your application for a pension? A. Yes, sir. Q. Did you cause it to be transmitted to the United States Commissioner of Pensions? A. I wrote and asked him if he would make an affidavit."

These questions were asked by his counsel. The following questions were asked by the court:

"Q. Do you know Arthur Keyes? A. Yes, sir. Q. Did you request him to make an affidavit in support of your application for a pension? A. Yes, sir. Q. Did you cause it to be transmitted to the United States Commissioner of Pensions? A. I wrote and asked him if he would make an affidavit. That is all there is of it."

Cross-examined by counsel for the railroad company, he testified as follows:

"Q. Who was Arthur Keyes? A. He was a private soldier in the same troop and regiment in the United States service. Q. One of your fellow troopers? A. Yes, sir. Q. Where did he live at the time you applied for a pension? A. I think in Kansas City. Q. You testified before you asked him to make an affidavit in support of your application for a pension? A. I asked him if he would make one, if he knew anything. I wrote that. Q. Did you write that personally? A. Yes; I will not be positive whether I did or not. It was done through me anyway. Q. Who was conducting the correspondence for you? A. Judge Archer was transacting the business for me. Q. Do you

know whether or not he wrote Mr. Keyes? A. Well, I or him, one did. I am not positive. Q. Did Judge Archer tell you he got Mr. Keyes' affidavit and forwarded it to the Pension Office? A. I think he did. Q. He was making whatever proof you could furnish and whatever the Pension Office was calling for, for the purpose of proving up your claim, was he? A. Just what he knew. Q. I mean Judge Archer was conducting the correspondence for you at Plattsmouth? A. Yes, sir. Q. Do you think he advised you that in your behalf he received the Keyes affidavit? A. I would not be positive, but I think he did. Q. Did you ever see the affidavit? A. I think not. I wouldn't be positive. Q. When you wrote to Mr. Keyes, requesting him to make the affidavit, did you suggest to him what disabilities you were relying on to get your pension? A. It seems as though I wrote and asked him if he remembered about the time that I fell on the hand ax and about the time I got the varicocoele and my eye hurt. Q. Did you receive a reply from him? A. I don't just remember. A reply came. I don't remember whether it came direct to me or to Judge Archer."

[1] On this state of the record, counsel for the railroad company requested, and the court refused to give, the following instruction:

"No. 4. You are further instructed that the laws of the United States which were in force during the years 1905, 1906, and 1907, when the plaintiff made the two declarations for the purpose of securing an invalid pension from the government of the United States, and when he made the affidavits in support of such declarations and which have been offered in evidence, and when he procured the making of an affidavit by one Arthur Keyes in support of his said applications for a pension, which affidavit is in evidence, provided that every person who knowingly or willfully makes or aids or assists in making, or in any wise procures the making or presentation, of any false or fraudulent affidavit or declaration concerning any claim for a pension, shall be punished by fine or by imprisonment. If you find from the evidence that the plaintiff knowingly or willfully made or aided or assisted in making any false or fraudulent affidavit or declaration for the purpose of procuring a pension, or that he in any wise procured the making or presentation to the United States Commissioner of pensions of a false or fraudulent affidavit by any other person, then you may consider such facts as bearing upon the credibility and weight to which the testimony of the plaintiff is entitled in this case."

We think this request was properly refused, for the following reasons: The first clause of the request is, for all practical purposes, an instruction that Blunt procured the making of a false and fraudulent affidavit by Keyes in support of his applications for a pension. We say this for the reason that the request states without qualification that Blunt procured the making of the Keyes affidavit, and then this language is followed by a statement that the law at the time that affidavit was made provided that every person who knowingly or willfully makes or aids or assists in making, or in any wise procures the making or presentation of, any false or fraudulent affidavit or declaration concerning any claim for a pension, shall be punished by fine and imprisonment. The first clause of the request is simply preliminary to the direct charge contained in the last clause, but whatever the court stated as a fact was just as prejudicial to the plaintiff as if it had been given in a direct charge to the jury. The request, therefore, if given, would have taken away from the jury the right to determine whether, upon the evidence as it then stood, Blunt could be said to have procured the making of the Keyes affidavit, within the meaning of section 4746, R. S. U. S. (U. S. Comp. St. 1901, p. 3279).

[2] We now come to the last clause of the request, where, if given, the jury would have been charged that, if they should find from the evidence that Blunt in any wise procured the making or presentation to the United States Commissioner of Pensions of a false or fraudulent affidavit by any other person, then they might consider such facts, etc. This language, in connection with the first clause of the request, would practically take from the jury the right of deciding on the evidence whether Blunt procured Keyes to make the affidavit set out in this opinion, for the reason that there was no other evidence that Blunt procured the making of an affidavit other than the one made by Keyes.

[3] The language quoted from the second clause of the request was also erroneous for the reason that there was nothing in Keyes affidavit, or in the record, for that matter, to show that it was either false or fraudulent, and therefore the language used in the last clause of the request was not applicable to any state of facts in the record.

Section 4746, R. S. U. S., which was the law in force at the time the Keyes affidavit was made, punishes the procuring of the making of any false or fraudulent affidavit. It does not punish the procuring of the making of an affidavit which is not false and fraudulent, although it may be used in support of a fraudulent pension claim. We think the request was wholly misleading, and would have been very prejudicial to the rights of the plaintiff.

The only other error assigned is that the court erred in refusing to direct a verdict for the defendant, but this assignment is not seriously urged.

The judgment below must be affirmed; and it is so ordered.

EIDMAN v. BALDWIN.

(Circuit Court of Appeals, Second Circuit. June 18, 1913.)

No. 254.

1 INTERNAL REVENUE (§ 8*)—"LEGACIES ARISING FROM PERSONAL PROPERTY."

The words "legacies * * * arising from personal property," in War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307), subjecting such legacies to a tax, mean only that the property passing by the bequest shall be personal.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 11, 12; Dec. Dig. § 8.*]

Internal revenue tax on legacies, inheritances, and transfers, see note to Ward v. Sage, 108 C. C. A. 417.]

2. INTERNAL REVENUE (§ 8*)—WAR REVENUE ACT—PERSONAL PROPERTY.

In the absence of a statutory definition, the term "personal property," in War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307), will be accorded its common-law meaning.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 11, 12; Dec. Dig. § 8.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PROPERTY (§ 4*)—PERSONAL PROPERTY—LEASEHOLDS.

At common law personal property includes leasehold interests in land.

[Ed. Note.—For other cases, see Property, Cent. Dig. §§ 4-6; Dec. Dig. § 4.*]

4. INTERNAL REVENUE (§ 8*)—WAR REVENUE ACT—"PERSONAL PROPERTY"—"REAL PROPERTY."

A statutory definition of "personal property," excluding leasehold interests in land, will not be read into War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307), merely because such act is modeled on Act June 30, 1864, c. 173, § 126, 13 Stat. 287, which defines real estate to "include all lands, tenements and hereditaments, corporeal and incorporeal," but does not define personal property; nor because the act of 1864 was to some extent taken from the earlier English Succession Duty Act, which defined "real property" as including, and "personal property" as excluding, leaseholds, such definitions not being adopted or referred to by the act of 1864.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 11, 12; Dec. Dig. § 8.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5939-5951.]

5. INTERNAL REVENUE (§ 8*)—WAR REVENUE ACT—PERSONAL PROPERTY.

There is no foundation for an assumption, relative to the question of the meaning of "personal property" in War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307), that there is a common acceptance of the term, distinguished from its technical meaning, as excluding leaseholds.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 11, 12; Dec. Dig. § 8.*]

In Error to the District Court of the United States for the Southern District of New York.

Action by Edwin Baldwin, executor, against Elizabeth Eidman, administratrix. Writ of error to review a judgment of the District Court, Southern District of New York (202 Fed. 968), entered upon a verdict directed in favor of the defendant in error, who was plaintiff below, against the plaintiff in error, who was the administratrix of a collector of internal revenue, in an action to recover moneys paid as an inheritance tax under the War Revenue Act of 1898 (Act June 13, 1898, c. 448, 30 Stat. 448 [U. S. Comp. St. 1901, p. 2286]). Reversed.

The relevant portions of the War Revenue Act are printed in the footnote.¹

The inheritance taxes which were paid by the defendant in error as executor of John Daniell and to recover which this action was

¹ "Section 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States. * * *

brought against the collector of internal revenue were assessed against certain leasehold interests—Sailors' Snug Harbor leases—belonging in his lifetime to said John Daniell and constituting a part of the residuary estate which passed under his will to his sons.

A. S. Pratt, Asst. U. S. Atty., of New York City, for plaintiff in error.

F. S. Fisher, of New York City (William H. Wadhams, of New York City, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. [1] The question in this case is whether the leasehold interests came within the phrase "legacies or distributive shares arising from personal property" in the provision of the War Revenue Act already quoted. And as we think that the words "legacies * * * arising from personal property" meant only that the property passing should be personal, the question may be narrowed to this: Were these leaseholds personal property within the act?²

[2] The War Revenue Act did not define the term "personal property" which it employed. It used, however, a term well known in the common law and which, in the absence of a statutory definition must be defined according to the common law. While there is no national common or customary law, still in interpreting acts of Congress as well as state statutes resort must be had for the definition of terms to the system from which our judicial ideas and legal definitions were derived. As said by the Supreme Court in *Keck v. United States*, 172 U. S. 434, 19 Sup. Ct. 254, 43 L. Ed. 505, in interpreting the terms of a federal statute:

"That term had a well understood import at common law, and in the absence of a particularized definition of its significance in the statute creating it, resort must be had to the common law for the purpose of arriving at the meaning of a word."

[3] Now it is elementary that at common law personal property included leasehold interests in land. Such interests were estates less than the freehold and passed to the executor. Consequently a statute taxing personal property passing by legacy, taxes leaseholds so passing and the taxes in question were properly collected unless there be something in the origin and history of this statute which may be said to read into it a statutory definition contrary to the common law.

[4] The War Revenue Act of 1898 was undoubtedly modeled upon the act of 1864 (*Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969) and if we could find in the latter statute a definition of the term "personal property" or a definition of the term "real estate" which would by exclusion define it, it would go a long way toward

² We are unable to adopt the conclusion of the trial judge that special significance should be attached to the words "arising from" as importing that the ultimate source of a legacy must be found in personal property. If that which constitutes the legacy or distributive share is personal property, we think that it comes within the act notwithstanding that such property may in a sense be said to grow out of real estate.

convincing us that a particularized definition of the term should be adopted. But the act of 1864 (Act June 30, 1864, c. 173, § 126, 13 Stat. 287) merely defines real estate as follows:

"The term 'real estate' shall include all lands, tenements, and hereditaments, corporeal and incorporeal."

This, however, is merely the bringing together of two common law phrases which are substantially co-extensive. If leaseholds are not "real estate" they are not "lands, tenements or hereditaments." And it is unquestionable that at common law they were neither. No light, then, is thrown upon the subject by the act of 1864 standing by itself. It is insisted, however, that a step further back should be made and that as the act of 1864 was to some extent taken from the earlier English Succession Duty Act and as that act does contain specific definitions resort should be had to them. And it is true that the English statute does define the term "real property" as including leaseholds and the term "personal property" as excluding them. But the difficulty is that while the act of 1864 undoubtedly borrowed some provisions from the English statute, it did not adopt or refer to these definitions. And it would only have been by adopting or referring to them that a statutory definition classifying leaseholds otherwise than at common law could have been brought into the act of 1864 and through it into the act of 1898. We find nothing in the origin or history of the statute to warrant us in holding that the term "personal property"—a technical term—does not include all that the language of the law places within it.

[5] The argument that Congress must have used the term "personal property" according to the common acceptance of its meaning and not technically, involves an assumption that there is a common acceptance as excluding leaseholds. This there is no foundation for making. So far as we can see Congress chose to employ in a statute without definition a well known common law phrase and there is no reason for avoiding, or right to avoid, the consequences.

The judgment of the District Court is reversed

UNITED STATES v. NIPISSING MINES CO.

(Circuit Court of Appeals, Second Circuit. June 18, 1913.)

No. 191.

1. INTERNAL REVENUE (§ 9*)—CORPORATION TAX—"DOING BUSINESS."

Corporation Tax Law (Act Aug. 5, 1909, c. 6) § 38, 36 Stat. 112, 117 (U. S. Comp. St. Supp. 1911, pp. 946-951), provides that every corporation, joint-stock company, or association organized for profit and having a capital stock represented by shares shall pay an annual excise tax with respect to the carrying on or doing business by such corporation, joint-stock company, or association. *Held* that, where defendant corporation was organized to own the stock of a mining company, and had no assets except such stock, a small amount in bank and office furniture, etc., and did nothing other than receive dividends from the operating company

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and distribute them as such among its own stockholders, it was not "doing business" within the act and was not subject to the tax.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2155-2160; vol. 8, pp. 7640, 7641.]

2. UNITED STATES (§ 130*)—SET-OFF—CLAIMS AGAINST GOVERNMENT—STATUTES.

Rev. St. § 951 (U. S. Comp. St. 1901, p. 695), allowing set-offs when claims have been presented to accounting officers against the United States, does not authorize a judgment for an excess against the government.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 118; Dec. Dig. § 130.*]

3. COURTS (§ 426*)—FEDERAL COURTS—JURISDICTION—COUNTERCLAIM AGAINST UNITED STATES.

Tucker Act March 3, 1887, c. 397, 24 Stat. 635 (U. S. Comp. St. 1901, p. 3635), giving to federal district courts jurisdiction over certain suits against the United States, refers to original suits, prescribing a procedure inconsistent with its use as the basis of a counterclaim, and does not permit a recovery of demands against the United States on counterclaims.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1131; Dec. Dig. § 426.*]

In Error to the District Court of the United States for the Southern District of New York.

Action by the United States against the Nipissing Mines Company to recover a corporation tax. Judgment (202 Fed. 803) dismissing the complaint on the merits and awarding the defendant an affirmative judgment upon a counter claim in an action brought to recover a tax assessed under the Corporation Tax Law (Act Aug. 5, 1909, c. 6, 36 Stat. 112-117 [U. S. Comp. St. Supp. 1911, pp. 946-951]) the particularly relevant provision of which follows:

"That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association. * * *" Section 38.

The defendant is a corporation organized under the laws of Maine and is the owner of all the shares of the capital stock of Nipissing Mining Company, Limited, a corporation under the laws of Canada. The defendant is called in the record the holding company and the Canadian corporation is called the operating company. The stock of the operating company constitutes "practically the sole assets of the holding company [the defendant] its only other assets being a small amount in bank, office furniture and trifling matters." The charter of the defendant is not printed in the record but there is nothing to show that it has ever done any other business than to receive dividends from the operating company and to distribute them as dividends among its own stockholders.

While the affairs of the defendant and the operating company are closely connected and they have officers in common there is nothing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the record to warrant the ignoring of the distinct corporate existence of each corporation or the treating of them as doing any other business than that which they are actually shown to do.

Judgment dismissing the action affirmed, and judgment for defendant on the counter claim reversed.

Henry A. Wise, U. S. Atty., and A. S. Pratt and Frank M. Roosa, Asst. U. S. Attys., of New York City.

Green, Hurd & Stowell, of New York City, for defendant in error.

Before COXE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). [1] The primary question in this case is whether the defendant corporation is "carrying on or doing business" within the meaning of the Corporation Tax Law. If it is not, it is not subject to the tax. In that case it is quite immaterial how its income should be determined. The judgment dismissing the complaint would be correct although the ground would be different.

In our opinion the very recent decision of the Supreme Court in *McCoach v. Minehill, etc., R. Co.*, 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. — (decided April 7, 1913), is decisive of this case. In that case it was held that a railroad company which had leased its road to another corporation was not "doing business" as a railroad company notwithstanding that it received and distributed the rentals from its lease, maintained its organization and held itself ready to exercise its powers and franchise and to resume possession when entitled thereto. Certainly the Minehill Company did as much corporate business in respect of its railroad interests as the defendant did in respect of its stockholding interests. But if there were nothing more to the Minehill Case than that which has been outlined it might be possible to distinguish it upon the ground that the Corporation Tax Law does not contemplate double taxation in regard to the same business; the lessee company there being really the one "doing business" with respect to the leased road and subject to the tax—a situation not analogous to that existing in the present case. But the Minehill decision goes further. The Minehill Company in addition to its leased railroad had a considerable amount of personal assets in the form of investments from which it derived an annual income. This it kept on deposit and distributed to its stockholders in the form of dividends. No other corporation did anything with respect to these transactions and the question was whether they constituted "doing business" within the statute. The Supreme Court held, after reviewing its earlier decisions that "the receipt of income from property or investments by a company that is not engaged in business except the business of owning the property, maintaining the investments, collecting the income and dividing it among its stockholders" did not constitute "doing business" within the meaning of the law. The substance of the decision was that the receipt of the ordinary fruits incident to the ownership of property is not the doing of a corporate business.

That which the Minehill Company did with respect to its investments

was what the defendant did. We are unable to see that it was engaged in any other business than that of owning property—shares in another corporation—collecting the dividends, and distributing its income among the stockholders. That is what the record shows and, as already stated, we see nothing to justify disregarding the distinct corporate existences. Nothing fraudulent is claimed and we see no distinction—so far as the purposes of this tax statute are concerned—between holding all the shares of one corporation and fewer shares of different corporations or between holding corporate shares and owning other personal property. If the operating company owes more taxes than it has paid presumably they can be collected from it.

[2, 3] For these reasons we are of the opinion that the complaint was properly dismissed upon the merits. The affirmative judgment against the United States upon the counter claim cannot, however, be permitted to stand. Section 951 of the Revised Statutes (U. S. Comp. St. 1901, p. 695) allows set-offs when claims have been presented to accounting officers, but this statute does not authorize a judgment for an excess against the government. *United States v. Eckford*, 6 Wall. 484, 18 L. Ed. 920. Moreover, in our opinion, the Tucker Act of 1887 which gives the District Courts jurisdiction over certain suits against the United States, is not broad enough to permit the recovery of demands upon counter claims. We think that that statute refers to original suits and prescribes procedure inconsistent with its use as the basis of a counter claim.

The judgment in so far as it directs a recovery against the United States is reversed; otherwise it is affirmed.

MOXIE CO. v. DAOUST.

(Circuit Court of Appeals, First Circuit. July 11, 1913.)

No. 1,006.

1. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNLAWFUL COMPETITION—MOXIE.

Complainant widely advertised and sold a beverage called "Moxie" in bottles of a distinctive size and shape. Defendant put out a competing beverage of a similar color, called "Bo-La," in a similar bottle; the resemblance of the bottles being so close that defendant's beverage would appear to the casual inspection of a customer to be a "Moxie" bottle, and the similarity being such as to facilitate its substitution for "Moxie" without detection by the customer. There was evidence that many retail dealers, when asked for "Moxie," had served "Bo-La" from "Bo-La" bottles, though defendant's bottles were differently stamped and labeled; the difference, however, being insufficient to destroy the general similarity of appearance. *Held*, that defendant's use of bottles in such close similarity to complainant's bottles assisted in the fraudulent use by unscrupulous dealers and constituted unlawful competition, which complainant was entitled to restrain.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 84*)—SIMILAR PACKAGES—DEFENSES.

Where defendant produced and sold a beverage of the same character and kind as complainant's beverage, and adopted a bottle of novel and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

distinctive shape, resembling complainant's bottles, so that defendant's beverage could be and was sold by unscrupulous dealers when complainant's was called for, it was no defense to a suit for unlawful competition that defendant, after adopting a similar bottle, had done all in his power to destroy the similarity, which he was unsuccessful in doing, since he had no right to do that which rendered the distinctions necessary, and which also rendered them futile.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 93, 97; Dec. Dig. § 84.*

Unfair competition in use of trade-mark or trade-name, see notes to Scheuer v. Miller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

Appeal from the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Suit by the Moxie Company against Daniel Daoust. From a judgment for defendant (197 Fed. 678), complainant appeals. Reversed and remanded, with directions.

Oliver Mitchell, of Boston, Mass., for appellant.

P. H. Sullivan and Branch & Branch, all of Manchester, N. H., for appellee.

Before DODGE, Circuit Judge, and BROWN and HALE, District Judges.

BROWN, District Judge. The Moxie Company makes and sells a beverage well known as "Moxie." Daoust is a manufacturer of beverages, at Manchester, N. H., and makes a beverage quite similar in color and taste, which he calls "Bo-La." This is put up in bottles which, in size and shape, closely resemble the Moxie bottle, which is of a distinctive shape for many years associated with the beverage "Moxie." These bottles were manufactured to order for Daoust. When used for dispensing the beverage over a counter, the resemblance of the bottles is so close that the Bo-La bottle would appear to the casual inspection of a customer to be a Moxie bottle.

The similarity of the beverages in color and in taste, together with the similarity of the bottles, facilitates the substitution of the Daoust beverage for Moxie without detection by the customer.

The Moxie Company has produced evidence to the effect that many retail dealers, when asked for Moxie, have served Bo-La from Bo-La bottles.

We think it clear from the record that the use of this bottle facilitates fraud by unscrupulous retail dealers, and that Daoust is deriving a profit from the fact that his beverage is in many instances fraudulently substituted for Moxie.

No satisfactory explanation is given by Daoust for ordering his bottles to be made in such close resemblance to the Moxie bottle, and we see no legitimate reason why Daoust, in marketing a beverage so similar to Moxie in color and taste, should choose also to adopt a container so closely resembling that of the Moxie Company, thus increasing the chance of deception.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] There is the usual stress placed upon points of difference in labels, blown into the glass and affixed thereto, in caps, etc.; but differences which do not destroy the general similarity of appearance to the ordinary purchaser are of no consequence and need not be dwelt upon. Unless the differences shown are such as to destroy the substantial similarity of the articles for the purposes of ordinary use, they fall short of a defense.

Both from our own inspection and from the evidence in the record we are satisfied that the resemblance is such as tends to mislead purchasers, and we find nothing in this record which justifies a dealer in putting forth a package which, under ordinary conditions of use, is so apt to deprive the Moxie Company of sales, and to induce sales of Daoust's beverage.

Counsel for Daoust insist that he is not responsible for the fact that tricky retailers represent his manufacture as that of the Moxie Company, provided he has done his legal duty in distinguishing his product. If, however, he chooses, without necessity, to imitate in general appearance the complainant's package, he does not perform his legal duty of distinguishing his product by making differences which leave unimpaired the general resemblance.

The question is of similarity in essentials. This similarity could easily have been avoided by ordering a bottle of size or shape different from the Moxie bottle, or by a change in color of the beverage. See *Coca-Cola Co. v. Gay-Ola Co.* (C. C. A.) 200 Fed. 720, 724, 725. It is suggested that the latter is impossible, but little weight can be given to such a suggestion or to Daoust's evidence as to the impossibility of doing so.

[2] If the confusion is caused by the general appearance, the burden is upon Daoust to see to it that ultimate fraud does not result. Though Daoust has a right to use a bottle like the Moxie bottle, and to make a beverage that resembles in taste or in color the complainant's beverage, he has no right to use these things in that special combination in which the complainant uses them, if that has become a distinctive combination distinguishing the complainant's article.

The whole argument that by labels in and upon the glass he has done all that he could do to distinguish the bottle rests upon a false assumption; i. e., that he had a right to adopt the same package, provided that, after adopting it, and while continuing to hold it in use, he did all in his power to destroy the similarity, though he was unsuccessful in doing so.

The complainant cuts under this by saying that the defendant had no right to do that which rendered these distinctions necessary, and which also rendered them futile.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to enter a decree for the complainant for an injunction and for further proceedings consistent with this opinion, and the appellant recovers its costs of appeal.

MOXIE CO. v. BAGOIAN.

(Circuit Court of Appeals, First Circuit. July 11, 1913.)

No. 1,007.

Appeal from the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Suit by the Moxie Company against Hachig John Bagoian. Decree for complainant for less than the relief demanded (197 Fed. 680), and it appeals. Affirmed.

Oliver Mitchell, of Boston, Mass., for appellant.

John M. Stark, of Concord, N. H., for appellee.

Before DODGE, Circuit Judge, and BROWN and HALE, District Judges.

PER CURIAM. The bill in this case charges that the defendant Bagoian—

"has fraudulently sold to ultimate consumers upon a call for Moxie a beverage not made by your orator, but having the distinctive peculiarities of color and flavor of Moxie, put up in bottles of exactly the same size and shape as your orator's Moxie bottles, branded and designed as to represent a visual appearance substantially identical with your orator's bottle of Moxie, and has displayed your orator's signs at his (the defendant's) place of business, bearing the word 'Moxie,' as a representation that your orator's beverage was on sale, when in fact it was not, thereby inducing the public to approach and enter the defendant's place of business in the expectancy of obtaining Moxie upon calling for it, all of which acts were false, and fraudulent, damaging to your orator's business and good will and the reputation of your orator's product."

The master to whom the case was referred reported:

"I find it is more probable than otherwise that neither the defendant nor his servants sold Bo-La to the complainant's witnesses, nor to any other member of the public, as and for Moxie, upon a call for Moxie."

We are of the opinion that, upon the present record, this finding of fact must stand, and that, in the absence of any showing of past fraudulent substitution, the complainant, under the present bill, is not entitled to any broader relief than was granted by the District Court.

The decree of the District Court is affirmed, and the appellee recovers his costs of appeal.

ALLEGAR v. AMERICAN CAR & FOUNDRY CO.

(Circuit Court of Appeals, Third Circuit. June 2, 1913. Rehearing Denied July 2, 1913.)

No. 1,706.

MASTER AND SERVANT (§ 92*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—NEGLIGENCE OF PHYSICIAN.

An employer cannot be held liable for an injury to an employé, alleged to have been caused by negligence of a physician in a public hos-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pital to which the employé was taken with a broken leg by other employés over his objection, where it is not shown that they were authorized to do so by the employer, or that it employed the physician who there treated him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 143; Dec. Dig. § 92.*]

Gray, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Action at law by David Allegar against the American Car & Foundry Company. Judgment for defendant, and plaintiff brings error. Affirmed.

For opinion below, see 198 Fed. 447.

Paul J. Sherwood, of Wilkes-Barre, Pa., for plaintiff in error.
Sprout & Cupp, of Williamsport, Pa., for defendant in error.

Before GRAY. BUFFINGTON. and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, David Allegar, a citizen of Pennsylvania, and an employé of the American Car & Foundry Company, a corporate citizen of New Jersey, brought suit against that company to recover damages sustained by him through its alleged negligence. At the conclusion of the plaintiff's testimony, the court gave binding instructions in defendant's favor. His reasons therefor the judge subsequently put of record in refusing a new trial, viz.:

"The plaintiff's leg was broken on August 20, 1911, about 3 o'clock in the morning, while engaged at work at the defendant's works at Berwick. The defendant's employés, immediately after the accident, took the plaintiff to the company's emergency hospital, and from thence to the public hospital of Berwick for medical and surgical aid. The plaintiff says that he protested against being so taken, and requested to be carried to his home, a quarter of a mile away, and there have the services of his own physician, living some 9 or 12 miles distant. His limb was set and treated at the public hospital by a physician, and, after remaining there a short time, he was taken to his home. The limb at present shows some deformity and occasions suffering. It appears that whatever was done at the time the plaintiff was taken to the public hospital was prompted by the purest motives of charity and intended for the plaintiff's own comfort and personal benefit. It has not been made to appear that there was negligence in the selection of the place and the means for treatment of the plaintiff. Nor is negligence to be inferred from the present condition of the plaintiff's leg. This may have resulted from the physician's negligence, even though due care was exercised in his selection. That it was the lack of due care in the employment of a prudent physician, occasioning the suffering, was not made to appear. Even where it is shown that an employer undertakes as a pure matter of charity to furnish medical treatment to sick or injured employés, due care need only be exercised in the employment of a prudent physician. The employer is not liable beyond this for the negligence of the physician employed. Then again there is no evidence warranting the jury in finding that the plaintiff was treated by the doctor in charge at the public hospital at the request or by consent of the defendant. Too much has been left for inference. Where the charge of negligence is relied on for recovery, as in this case, it must be clearly shown that the one called upon to answer has been at fault. In this the plaintiff has failed, and the motion for a new trial is denied."

On entry of judgment, plaintiff sued out this writ, assigning as error the giving of binding instructions by the court in defendant's favor.

Under the evidence and the pleadings in the case, we are of opinion the court committed no error. The statement of claim, after reciting plaintiff was rendered helpless by the breaking of his leg, that he requested to be taken to his own home for treatment by his own physician, and that his request was denied, then charges that he was taken forcibly and against his will and placed "under the medical care and treatment of a physician in the employ of said defendant." It then charges that, "defendant having so assumed and undertaken the care and treatment of said plaintiff against the will of said plaintiff as aforesaid, it then and there became and was the duty of said defendant to use due and reasonable care in the treatment and setting of said injured and broken limb," and avers that defendant negligently set the bones of the broken leg, causing permanent lameness.

After careful examination, we find the evidence was not such as to warrant the submission of the case to the jury on the issues thus made. The evidence fails in two regards: First, there was no sufficient evidence to make the defendant responsible for the plaintiff being taken to the public hospital; and, second, there was no sufficient evidence to show that the physician who treated the plaintiff in such public hospital was in defendant's employ. The facts shown are that the plaintiff's leg was broken in the middle of the night, and he was at once carried to the Emergency Hospital, which was on the defendant's premises. For his being taken there we may assume the defendant was responsible; the proof being that Patterson, the foreman, said "he would take me to the Emergency Hospital—that was the company's order." There was no physician in attendance at the Emergency Hospital, and the plaintiff's own physician lived some eight or nine miles away. The plaintiff then asked to be taken to his home and have his own physician treat him.

At this point it will be observed that, while the statement avers he was thereafter taken to the public hospital against his will, this taking to such public hospital is not the injury he complains of, and for which he seeks damages. The wrong he charges, and for which he seeks damage, is that when so taken to the public hospital he was taken charge of and treated by the defendant company in the person of its agent, Dr. Rutter. But the case is barren of any proof that the defendant company authorized or empowered any one to take him to the public hospital. It is true the company made, and very properly so, an order that all injured persons should be taken to its Emergency Hospital, but this humane and express authorization to its agents and employes did not carry with it an implied authority to carry an injured and conscious man elsewhere against his protest. The delegation of specific powers to agents does not imply or confer power to bind the principal generally (*Beal v. Express Co.*, 13 Pa. Super. Ct. 143), and especially so where the power alleged to be conferred by implication is tortious. The burden of proving the scope of an agency is on him who affirms it (*Beal v. Express Co.*, *supra*), and we are of opinion that this burden has not been met by the plaintiff's proof.

So, also, in regard to the agency of Dr. Rutter, for whose alleged negligent treatment at the hospital it is sought to hold the defendant responsible. It was not shown whether he was or was not one of the hospital's staff, nor did the proof establish any employment of such physician by the defendant. Beyond the suggestion implied in some witnesses referring to him as the "company doctor," there was no proof on that subject. It should also be noted that, while the injured man at first asked to be taken home and have his leg set by his own physician, there is no proof that, when Dr. Rutter subsequently treated him at the Bloomsburg Hospital, he called his attention to such desire. By his own account the plaintiff seems, after he reached that hospital, to have accepted Dr. Rutter's ministrations without objection or suggestion of either calling in his own physician or of being taken home.

In view of the proofs, or rather the lack of proofs, we find no error in the court below in giving binding instructions for the defendant.

GRAY, Circuit Judge, dissents.

UNITED STATES v. ATLANTIC FRUIT CO.

(Circuit Court of Appeals, Second Circuit. June 18, 1913.)

No. 230.

ALIENS (§ 58*)—IMMIGRATION—STATUTES—"FINE"—CIVIL ACTION—RECOVERY.

Act March 3, 1893, c. 206, § 8, 27 Stat. 570 (U. S. Comp. St. 1901, p. 1303), requires steamship transportation companies importing alien immigrants to keep posted in offices of foreign ticket agents a copy of the laws of the United States relevant to immigration, printed in the language of the country and exposed to view. It also requires agents selling tickets to persons contemplating entering the United States to call attention to such laws, and provides that for a violation of the act, or for failure to file a certificate of performance, or in case of filing a false certificate, the company shall pay a "fine," not exceeding \$500, to be recovered in a proper United States court, which fine shall be a lien on any vessel of said company or owner found in the United States. *Held*, that the word "fine," as so used, should be treated as the equivalent of the word "penalty," whether the amount be certain or uncertain, and that the fine or penalty imposed by the act was recoverable in a civil action by the United States; the government not being limited to the enforcement of the statute by criminal proceedings.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 113, 114; Dec. Dig. § 58.*

For other definitions, see Words and Phrases, vol. 3, pp. 2811-2813.]

Ward, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of New York.

Action by the United States against the Atlantic Fruit Company. From a judgment dismissing the complaint, the United States brings error. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Writ of error to review a judgment of the District Court, Southern District of New York, dismissing the complaint in a civil action brought by the government to recover the amount of fines alleged to have been incurred by the defendant for failing to comply with the provisions of section 8 of the act of March 3, 1893 (27 Stat. 570 [U. S. Comp. St. 1901, p. 1303]), which reads as follows:

"That all steamship or transportation companies, and other owners of vessels, regularly engaged in transporting alien immigrants to the United States, shall twice a year file a certificate with the [Secretary of Commerce and Labor] that they have furnished to be kept conspicuously exposed to view in the office of each of their agents in foreign countries authorized to sell immigrant tickets, a copy of the law of March third, eighteen hundred and ninety-one, and of all subsequent laws of this country relative to immigration, printed in large letters, in the language of the country where the copy of the law is to be exposed to view, and that they have instructed their agents to call the attention thereto of persons contemplating immigration before selling tickets to them; and in case of the failure for sixty days of any such company or any such owners to file such a certificate, or in case they file a false certificate, they shall pay a fine of not exceeding five hundred dollars, to be recovered in the proper United States court, and said fine shall also be a lien upon any vessel of said company or owners found within the United States."

The District Court dismissed the complaint upon the ground that a civil action does not lie for the recovery of the fines in question and the government has brought this writ of error.

Henry A. Wise, U. S. Atty., and A. S. Pratt, Asst. U. S. Atty., both of New York City.

R. J. M. Bullowa, of New York City (James A. Fechtig, Jr., of New York City, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The real question in this case is whether a civil action can be maintained for the recovery of the fines prescribed by this statute. It is not material whether a criminal prosecution could also be instituted. A civil remedy may exist without being exclusive.

There are two lines of authorities leading up to this question. One line holds that while the word "fine" ordinarily implies a criminal proceeding it may when the amount is fixed and definite be treated as an equivalent of the word "penalty" and afford the basis for a civil action. Another line supports the proposition that when a statute imposes a penalty indefinite in amount a civil suit may be brought for its recovery. But we are referred to no authority which goes quite to the question here and holds that a *fine* which is *uncertain* in amount may be sued for civilly.

But we think there is nothing in principle which prevents the step further. The word "fine" is not treated as the equivalent of the word "penalty" because the latter implies definiteness or certainty but because the courts find in particular cases that no distinction should be drawn between the words as describing a statutory pecuniary liability. So while there may be a doubt whether an action of debt will lie for the recovery of a penalty uncertain in amount there can be no question that a civil action of some kind will lie. And as it is unnecessary for this case to classify civil actions we are not required to determine

whether the particular one should be regarded as founded in contract or in tort.

We think it altogether the better view that the word "fine" may in some cases properly be treated as the equivalent of the word "penalty" whether the amount be certain or uncertain and that a civil action may be brought for the recovery. No reason is apparent why the government should always be compelled in such cases to resort to the comparatively harsh course of a criminal proceeding when the milder process of a civil suit may be adequate for the protection of all rights. The different degrees and methods of proof may in some cases require an interpretation that the criminal procedure is imperative, but it is our opinion that such interpretation is not always necessary and that the present case should be determined upon the particular provisions of the statute.

The act in question provides that steamship companies and other owners of vessels failing to comply with its provisions shall "pay a fine of not exceeding five hundred dollars to be recovered in the proper United States court and that said fine shall also be a lien upon any vessel of said company or owners found within the United States." It will be observed that the failure to obey the act is not described as an offense or misdemeanor. No reference is made to any criminal procedure. The statute does not even go so far as to provide that a violation shall be "punished" by a fine. It states that the fine shall be "recovered"—a term applicable rather to a civil than to a criminal action. The government does not recover fines in criminal proceedings. It procures their infliction as punishment. Moreover the provision that the fine shall constitute a lien on the vessel seems indicative of an intention to make the fine a civil rather than a criminal judgment. Upon the whole, we think that, in the absence of a specific statutory remedy, a civil action may properly be brought for the failure to comply with the provisions of the statute. Whether a criminal proceeding may also be instituted need not now be determined.

There is error and the judgment of the District Court is reversed.

WARD, Circuit Judge. (dissenting). The District Judge dismissed the complaint on the ground that a civil action does not lie to recover a fine. The act prescribes nothing as to the mode of procedure except that the fine is to "be recovered in the proper United States court, and said fine shall also be a lien upon any vessel of said company or owners found within the United States." The word "fine" is appropriate to a criminal proceeding. 19 Cyc. 544. The larger term "penalty" includes either a civil or a criminal liability. The foregoing section certainly imposes the performance of a public duty, the omission of which would constitute a public offense. If nothing more had been said, the party at fault would be indictable and indeed punishable in no other way. The additional provision of a fine seems to me to leave the offense indictable only. Sutherland on Statutory Construction, § 721; *U. S. v. Cobb* (D. C.) 163 Fed. 791, 793. This case arose under the Harter Act, which makes the fine a lien upon the vessel. At all events the provision ought to be construed either as civil or criminal. The

opinion of the court intimates that perhaps either course may be open to the government.

As the rights of the parties respectively would be very different, according as an action at law or a criminal prosecution were instituted, I think it would be unfair to the defendant to give the government the option of proceeding either way.

NEW YORK & P. R. S. S. CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 12, 1913.)

No. 246.

UNITED STATES (§ 65*)—CONTRACTS—FORM—VALIDITY—STATUTES—BREACH.

Rev. St. § 3744 (U. S. Comp. St. 1901, p. 2510), provides that it shall be the duty of the Secretary of War, the Secretary of the Navy, and the Secretary of the Interior to cause every contract made by them severally on behalf of the government, or by officers under them appointed to make such contracts, to reduce them to writing and have them signed by the contracting parties with their names at the end thereof. *Held*, that such provision was not merely for the benefit of the government, but was mandatory; and hence the United States could not recover damages for breach of a steamship company's parol contract to carry coal to Pacific ports in accordance with the steamship company's bid, where it refused to enter into a contract in writing when tendered.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 48; Dec. Dig. § 65.*]

In Error to the District Court of the United States for the Southern District of New York.

Action at law by the United States against the New York & Porto Rico Steamship Company. Judgment for the United States (197 Fed. 995) and defendant brings error. Reversed.

On writ of error to the United States District Court for the Southern District of New York to review a judgment for \$11,337.10 in favor of the United States, the plaintiff below. The action was tried by the court, a jury having been waived by written stipulation. The parties will be referred to as they appear in the court below, viz., as plaintiff and defendant.

James H. Hayden, of Washington, D. C., and Burlingham, Montgomery & Beecher and Ray Rood Allen, all of New York City, for plaintiff in error.

H. Snowden Marshall, U. S. Atty., and Addison S. Pratt and Isaac H. Levy, Asst. U. S. Attys., all of New York City.

Before LACOMBE, COXE, and WARD, Circuit Judges

COXE, Circuit Judge. This action was brought to recover \$10,-249.20 and interest as damages for the breach of an alleged contract by the terms of which the defendant agreed to furnish two steamers to transport, for the use of the plaintiff, not less than 8,000 tons of coal from Atlantic ports to San Francisco. It is unnecessary to re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

view the testimony in detail, for the reason that the principal question is one of law arising upon undisputed facts. The defendant contends that there can be no recovery by the plaintiff for the reason that no contract existed between them and that the papers relied on are nothing more than "the preliminary memoranda made by the parties." *South Boston Iron Co. v. U. S.*, 118 U. S. 37, 6 Sup. Ct. 728, 30 L. Ed. 69.

Section 3744 of the Revised Statutes provides as follows:

"It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof." U. S. Comp. St. 1901, p. 2510.

It is not pretended that the provisions of this law were complied with in the present case. The negotiations for transporting the coal in question were carried on by the Navy Department on one side and the defendant on the other. The agreement was not reduced to writing and, of course, it was not signed by the parties at the end thereof or anywhere else. The language of the statute is so clear and explicit that it is not easy to see how there can be any serious question as to its meaning. Assuming that it was the intention of the law makers that no oral agreement, no matter how clear the proof, should be recognized, it is difficult to perceive how they could have expressed themselves with greater clearness than by directing that every contract shall be reduced to writing and signed by both parties with their names at the end thereof. But if any doubt as to the interpretation of the law existed it was set at rest by the decision of the Supreme Court in *Clark v. U. S.*, 95 U. S. 539, 24 L. Ed. 518. Mr. Justice Bradley, in speaking of the law in question here, says:

"The Court of Claims has heretofore held that act to be mandatory, and as requiring all contracts made with the departments named to be in conformity with it. The arguments by which this view has been enforced by that court are of great weight, and, in our judgment, conclusive. * * * Perhaps the primary object of the statute was to impose a restraint upon the officers themselves, and prevent them from making reckless engagements for the government; but the considerations referred to make it manifest that there is no class of cases in which a statute for preventing frauds and perjuries is more needed than in this. And we think that the statute in question was intended to operate as such. It makes it unlawful for contracting officers to make such contracts in any other way than by writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law. We are of opinion, therefore, that the contract itself is affected, and must conform to the requirements of the statute until it passes from the observation and control of the party who enters into it."

See also *St. Louis Hay & Grain Co. v. U. S.*, 191 U. S. 159, 24 Sup. Ct. 47, 48 L. Ed. 130, in which Mr. Justice Holmes says:

"Although, no doubt, both parties supposed their agreement binding, the Court of Claims held, and it is not disputed, that the contract was within Rev. St. § 3744, and not having been 'reduced to writing, and signed by the

contracting parties with their names at the end thereof,' could not have been sued upon if it had not been performed."

The contention that the statute is made only for the protection of the government is, we think, contrary to good law and good morals as well. There is nothing in the language of the act to warrant such an interpretation. If it had been the intention of Congress to make the signature of one of the parties evidence of a contract, it surely would have so said. Instead of doing so, it says that the writing must be signed by the contracting parties with their *names* at the end thereof. We cannot believe that it was the purpose of Congress to permit the government to enforce, as against the citizen, an oral agreement or one partly evidenced by writing, but which violates all the requirements of the statute, and refuse all relief when a citizen seeks to enforce a similar contract against the government. It cannot be that the validity of a contract depends upon whether the party of the first part or the second part is seeking to enforce it. Such a construction would enable the government, in cases like the one at bar, to enforce an unsigned agreement if favorable to it and repudiate it if favorable to the other party. We have nothing to do with the policy of the law, whether wise or unwise, we take it as we find it and construe it according to the obvious meaning of the language employed. The question is not what the law should be, but what it is, and that question, in view of the interpretation of the Supreme Court, is not in our opinion open to doubt. If Congress wishes the agreements between the Navy Department and individuals to depend on oral testimony, it has only to repeal or modify the statute in question; this court can do neither.

The judgment is reversed.

DARNELL v. ILLINOIS CENT. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 3, 1913.)

No. 2,381.

APPEAL AND ERROR (§ 347*)—JURISDICTION OF CIRCUIT COURT OF APPEALS—TIME FOR TAKING PROCEEDINGS FOR REVIEW—COMPUTATION.

Under Circuit Court of Appeals Act March 3, 1891, c. 517, § 11, 26 Stat. 829 (U. S. Comp. St. 1901, p. 552), requiring an appeal to or writ of error from such court to be taken or sued out within six months after the entry of the judgment or decree sought to be reviewed, which requirement is jurisdictional, in computing such six months the time of the pendency of proceedings for review in the Supreme Court, which were dismissed for want of jurisdiction, cannot be excluded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1897–1899; Dec. Dig. § 347.*]

Jurisdiction of Circuit Courts of Appeals in general, see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action at law by R. J. Darnell against the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company. Judgment for defendants, and plaintiff brings error. On motion to dismiss for want of jurisdiction. Motion sustained.

H. D. Minor and C. N. Burch, both of Memphis, Tenn. (B. Lee and C. L. Sivley, both of Chicago, Ill., of counsel), for plaintiff in error.

T. K. Riddick, of Memphis, Tenn., for defendants in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Plaintiff in error brought an action in the District Court to recover alleged excessive freight charges. On June 30, 1911, the court sustained a demurrer to his declaration. Conceiving that the question involved was one of jurisdiction, plaintiff took a writ of error returnable to the Supreme Court. That court decided that the record did not present a question of the jurisdiction of the District Court as a federal court, and dismissed the writ of error. *Darnell v. Railroad*, 225 U. S. 243, 32 Sup. Ct. 760, 56 L. Ed. 1072. Plaintiff then, and on August 3, 1912, took a writ of error from this court. Excluding the time between the allowance and the dismissal of the writ of error from the Supreme Court, less than 6 months elapsed between the judgment below and the allowance of the present writ; including that time, the total interval was about 13 months. The matter is now before us on defendant's motion to dismiss this writ because not taken within the prescribed 6 months.

Inasmuch as it is clear under section 11 of the Court of Appeals Act (26 Stat. 829 [U. S. Comp. St. 1901, p. 552]) that we have no jurisdiction to entertain a writ of error unless it is sued out within 6 months after the entry of the judgment sought to be reviewed, the sole question here must be whether, in the computation of that 6 months, we may exclude the time during which plaintiff was attempting to pursue his mistaken remedy in the Supreme Court. To establish the right to this exclusion, plaintiff in error relies chiefly upon the decisions of the Supreme Court in *Ensminger v. Powers*, 108 U. S. 292, 2 Sup. Ct. 643, 27 L. Ed. 732, and *Pacific R. R. Co. v. Missouri Pacific R. R. Co.*, 111 U. S. 520, 4 Sup. Ct. 583, 28 L. Ed. 498. In *Ensminger v. Powers* it was held that, in computing the time limitation for filing in the Circuit Court a bill of review, that period should be excluded during which an appeal had been pending in the Supreme Court. The case is distinguishable from the present one in two respects: First, the rule with regard to filing bills of review was a self-imposed limitation, and not a fixed and necessary condition of the statute upon which alone jurisdiction rests; second, the appeal which had been taken was authorized, and, as matter of law, unquestionably operated to remove the entire case to the Supreme Court, and the case rightfully remained in the Supreme Court until dismissed therefrom for noncompliance with the Supreme Court rules. The jurisdiction of the Supreme Court was perfect, but it was defeated on condi-

tion subsequent; while in cases like the present the jurisdiction of the Supreme Court was always fatally defective because of a missing condition precedent. The same considerations apply to the holding in *Pacific R. R. v. Missouri Pacific R. R.* That was a case in equity involving the doctrine of laches, not a statutory jurisdictional condition, and the appeal, the effect of which was considered, had been subject to no jurisdictional defect.

These decisions do not justify us in departing from the strictness with which a statutory limit upon the right to review has always been enforced. *Credit Co. v. Arkansas Co.*, 128 U. S. 258, 9 Sup. Ct. 107, 32 L. Ed. 448; *Williams Co. v. U. S.*, 215 U. S. 541, 30 Sup. Ct. 221, 54 L. Ed. 318; *Green v. Lynn* (C. C. A. 1) 87 Fed. 839, 31 C. C. A. 248; *Coulliette v. Thomason* (C. C. A. 5) 50 Fed. 787, 1 C. C. A. 675; *Noonan v. Athletic Club Co.* (C. C. A. 6) 93 Fed. 576, 35 C. C. A. 457; *Stevens v. Clark* (C. C. A. 7) 62 Fed. 321, 10 C. C. A. 379; *U. P. R. R. v. Colo. E. R. Co.* (C. C. A. 8) 54 Fed. 22, 4 C. C. A. 161; *Connecticut Co. v. Oldendorff* (C. C. A. 9) 73 Fed. 88, 19 C. C. A. 379. The present case carries some aspects of hardship to plaintiff in error, but the latest utterance of the Supreme Court affirms the strict rule of limitation in a case of much greater hardship (In the Matter of William J. Dante, 228 U. S. 429, 33 Sup. Ct. 579, 57 L. Ed. —, decided April 28, 1913); and it may well be the better rule that a party, who is in doubt as to the proper court to which to apply for review, should make his decision at his peril, thereby occasionally preventing a review which it would be wise to permit, rather than that such a party should be allowed to experiment in every case and greatly prolong litigation. It would be difficult to classify the good faith and excusable mistake from the deliberately chosen expedient to postpone the end. At any rate, the statute is clear and subject to no exceptions; and we cannot make exceptions.

No satisfactory reason is pointed out why a party in such position may not protect himself by seeking review in both courts, and maintaining both proceedings until in one or the other the jurisdictional question is decided. The cases of *Columbus Co. v. Crane Co.*, 174 U. S. 600, 19 Sup. Ct. 721, 43 L. Ed. 1102; and *Railroad v. Thiebaud*, 177 U. S. 615, 20 Sup. Ct. 822, 44 L. Ed. 911, do not militate against this practice, because they only hold that a party, having the lawful right to a review in one court or in another court, cannot have both, but must stand upon his election. Where a party has no right of choice, his ineffective pursuit of the remedy in the wrong court is "not an election, but an hypothesis." *Northern Assurance Co. v. Building Association*, 203 U. S. 106, 108, 27 Sup. Ct. 27, 51 L. Ed. 109. But it is unnecessary to decide whether the mistaken and the true hypothesis may be resorted to simultaneously. The statute imperatively requires that the right remedy should be invoked within the time limited.

The motion must be granted, and the writ dismissed for lack of jurisdiction.

GATE CITY MALT CO. v. STEWART et al.

(Circuit Court of Appeals, Eighth Circuit. June 30, 1913.)

No. 3,885.

1. MECHANICS' LIENS (§ 93*)—ENFORCEMENT—DEFENSES.

Where a contract for the construction of a malting plant provided that the work should be done under the direction of the owners, and there was no evidence that they were prevented from having their wishes as to the depth of the foundation complied with, they cannot defend an action to foreclose a mechanic's lien on the ground that the walls had cracked by reason of the insufficient depth of the foundation.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 124; Dec. Dig. § 93.*]

2. MECHANICS' LIENS (§ 93*) — PERSONS ENTITLED — CONTRACTOR — PERFORMANCE OF CONTRACT.

Where the contractors for the construction of a building have substantially performed their contract, they are entitled to a mechanic's lien for the contract price, even though the building is defective.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 124; Dec. Dig. § 93.*]

Appeal from the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action by James C. Stewart and others against the Gate City Malt Company. Decree for the plaintiffs, and defendant appeals. Affirmed.

Frank H. Gaines, of Omaha, Neb. (McGilton, Gaines & Smith, of Omaha, Neb., on the brief), for appellant.

Seneca N. Taylor, of St. Louis, Mo. (S. C. Taylor, of St. Louis, Mo., on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and WIL-LARD, District Judge.

CARLAND, Circuit Judge. This action was brought to foreclose a mechanic's lien. A decree of foreclosure was granted, and defendant appeals. There are only two assignments of error argued in the brief. They are stated by counsel for appellant as follows:

"1. The evidence shows that the plaintiff and its agents did not locate and construct the pier holes upon which the iron pillars rest in accordance with the plans and specifications, but wrongly located the pier holes, and then enlarged the same beyond the size called for in the plans, with the result that the columns thus wrongly located settled unevenly, causing cracking of the floor of the attenuator room and uneven settlement of the piers with respect to each other and the walls of the building, and that such action was willful and deliberate upon the part of the plaintiff, to the great damage of the defendant.

"2. That plaintiff and its agents were directed in the location of the walls of the building to go to yellow clay or solid ground, but that instead of so doing the north walls of the building in controversy rest upon soft or yielding ground, whereby, in order to repair the damage, it is necessary to reconstruct the building."

[1] The claim for a lien arose out of the performance of a contract entered into August 27, 1906, whereby the appellees agreed with appel-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lant to furnish the materials and perform all the work for the erection and completion of a malting plant on a parcel of land situated in South Omaha, Neb. The malting plant was to be erected in accordance with plans and specifications prepared by the Saladin Pneumatic Malting Construction Company. Article 2 of the contract contained this provision:

"It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said owner."

Thomas Kimball, an architect, was superintendent of the construction of the malting plant and represented the owner and appellant. One Heckman, who was in immediate charge of the work, represented Kimball. Otto Luebker, who was in the employ of the malting construction company, prepared the plans for the malting plant, which plans were a retracing of plans prepared for a malting plant erected in Winnipeg for the Canada Malting Company. On account of the possible difference in soil between South Omaha and Winnipeg, the plans and specifications furnished for the malting plant at Omaha did not specify the depth to which the foundation walls should be placed below the surface of the ground. The depth to which said walls should be placed in the ground was left, according to the contract and evidence, to the owner, or its superintendent, Kimball. The malting plant was built upon ground which was higher at the south end of the building than it was at the north end. Yellow clay, which at the place in question was a proper foundation soil, was therefore reached at a less distance at the south than at the north end after the ground had been made level. The walls of the malting plant were not carried down to the yellow clay at the north end. Kimball says he told Seckner, who was in charge of construction for appellees, to go to yellow clay for the foundation for the walls. Seckner says Heckman, who represented Kimball, knew and approved of the depth to which the walls were placed in the ground at the north end. There was evidence, therefore, from which the trial court could have found that Seckner's testimony was true. But, independent of this consideration, we have carefully read all the evidence, and have arrived at the conclusion that under the contract and the evidence the responsibility for not putting the walls down to yellow clay at the north end of the building must be placed upon the owner. That is where the contract places it, and there is no evidence that the representatives of the owner were in any manner prevented from having their wishes complied with. We are also satisfied from the evidence that the cracking of the walls detailed in the evidence was due to the settling of the same, and that this undue settling was caused by not placing the footings for the walls at the north end upon a proper foundation.

[2] In regard to the enlargement of the piers, there is testimony in the record from which the trial court might justly find that such enlargement was made with Heckman's knowledge and consent; but, whatever the fact may be, we again agree with the trial court that the enlargement of the piers did not cause the settling of the walls, the chimney stack, or the boilers. It would serve no good purpose to de-

tail at length the evidence upon which our opinion is based. We are satisfied that there has been a substantial performance of the contract by appellees, and that they should recover. *Omaha Water Co. v. City of Omaha*, 156 Fed. 922, 85 C. C. A. 54; *City of St. Charles v. Stokely*, 154 Fed. 776, 85 C. C. A. 494. The above cases are decisions of this court and the last one cited contains a citation of many decisions supporting the rule there enunciated.

Decree affirmed.

UNITED STATES *ex rel.* MOORE *v.* SISSON, U. S. Chinese Inspector.

(Circuit Court of Appeals, Second Circuit. June 12, 1913.)

Nos. 270-274.

1. ALIENS (§ 32*)—DEPORTATIONS—CHINESE—IMMIGRATION ACT—COUNTRY OF RETURN.

Where the government instituted deportation proceedings against certain Chinese persons under Immigration Act Feb. 20, 1907, c. 1134, § 20, 34 Stat. 904 (U. S. Comp. St. Supp. 1911, p. 511), providing that an alien must be deported to the country from whence he came, and it appeared that the aliens came to the United States from Canada, and there was no proof that they were born in China, or had ever been there, the fact that they were Chinese was not evidence that China was the land of their nativity and citizenship, and hence the court was bound to require their return to Canada, instead of China.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*]

2. ALIENS (§ 32*)—DEPORTATION PROCEEDINGS—JUDGMENT—DEPORTATION TO WRONG COUNTRY.

Where certain Chinese were proceeded against under Immigration Act Feb. 20, 1907, c. 1134, § 20, 34 Stat. 904 (U. S. Comp. St. Supp. 1911, p. 511), requiring deportation to the country from whence the immigrant came, and were erroneously ordered deported to China, instead of Canada, from whence they came to the United States, such error was not ground for dismissal of the proceeding, but the order must be amended to require their return to Canada.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*]

What Chinese persons are excluded from the United States, see note to *Wong You v. United States*, 104 C. C. A. 538.]

Appeals from the District Court of the United States for the Southern District of New York.

Habeas corpus by the United States, on the relation of Robert M. Moore, on behalf of Moy Fee Ni and others, and on behalf of Moy Ging, and on the relation of Lee Wah and another, and on the relation of Leung Pak Lin and others, and on the relation of Ang Hung Jaing, against Harry R. Sisson, United States Chinese Inspector, to obtain release of certain Chinese from deportation warrants in proceedings under the Immigration Act of 1907. Judgment requiring amendment of orders of deportation, and orders as amended affirmed.

On appeal from orders of the United States District Court for the Southern District of New York dismissing writs of habeas corpus sued

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes.

out by a number of Chinese persons who had been ordered deported to China under the provisions of the Immigration Act of February 20, 1907.

Robert M. Moore, of New York City, for appellants.

H. Snowden Marshall, U. S. Atty., and John Neville Boyle, Asst. U. S. Atty., both of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. We think that three propositions are clearly deducible from the testimony as it appears upon the present record.

First. The relators are Chinese persons not permitted by law to remain in this country.

Second. "The country from whence they came" is Canada.

Third. There is no evidence that they came from China; the contention that they did do so is based solely upon conjecture and presumption.

[1] The officers of the government saw fit to bring the proceedings against these relators under the Immigration Act instead of the Chinese Exclusion Acts and must follow strictly the provisions of the former act; they cannot invoke the provisions of both.

Section 20 of the Immigration Act is explicit that the alien must be deported "to the country from whence he came." That country is Canada. There is nothing deserving the name of evidence to show that these aliens came from China or any other foreign country. The briefs presented by the government refer to these persons as having been born in China and speak of that country as the land of their "nativity and citizenship." We are unable to find anything in the record to support this statement. Most of them testify that they were born in this country, either in New York or San Francisco. Assuming that this testimony is entitled to little weight, it does not aid the government's contention. A finding that a Chinese person was not born in San Francisco does not prove that he was born in China. We can take judicial knowledge of the fact that there are Chinese persons in Canada and Mexico and, indeed, in almost all the countries of the world and that Chinese children are constantly being born in these countries. The mere fact that an alien is found to be a Chinese person does not prove that he came from China, or that he is a citizen of China or that he was ever within the bounds of the Chinese empire or republic. There are many Frenchmen here who were not born in France, many Englishmen who were not born in England, and many Germans who were not born in Germany. The deduction that a stranger of evident French nativity who is found in New York is a citizen of France and came here direct from that country would probably be thought absurd, but it is not easy to differentiate it from the assumption which we are asked to make in this case. In other words, evidence that a person in the United States is born of Chinese parents falls far short of proving that he is a citizen of China or came here from China.

[2] We think that we are not justified in discharging these relators, as they have no right to be here under our laws. The warrant of deportation should be amended by providing that the aliens shall be returned to Canada instead of China. Authority for such an amendment is found in *Wong Wing v. United States*, 163 U. S. 228, 238, 16 Sup. Ct. 977, 41 L. Ed. 140.

It is said that the Canadian authorities will not accept these aliens, but with this suggestion we have nothing to do. So long as the proceedings are under the Immigration Act, its provisions must be strictly followed. The country whence these aliens came is unquestionably Canada and there is no provision of that act which permits their deportation to China.

The orders of deportation should be amended as indicated.

RYAN v. MT. VERNON NAT. BANK et al.

(Circuit Court of Appeals, Second Circuit. June 14, 1913.)

No. 245.

BANKS AND BANKING (§ 287*)—PURCHASE OF STOCK—FALSE REPRESENTATIONS—RESCISSION—BILL.

Complainant alleged that in May, 1908, he bought certain shares in a national bank on representations made to him by its officers with reference to its financial condition, that the representations were known to be false by such officers when made, and that they were made with intent to deceive complainant and induce him to purchase, that he was ignorant of the bank's affairs, and bought the shares because he believed the representations and relied on them, and that the stock was represented to be stock not yet originally issued, but was in fact stock then owned by the vice president of the bank. The bank suspended in March, 1911, and, an assessment of \$100 a share having been levied by the Comptroller of the Currency, the receiver sued complainant for his proportion of the assessment, which action complainant sought to have perpetually enjoined. *Held*, that the bank's failure before complainant discovered the fraud was no reason why the suit to rescind could not be brought against the bank, though it made it necessary to add the receiver as a party defendant, and that the bill was not demurrable.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 1089-1104, 1126, 1127; Dec. Dig. § 287.*]

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, in favor of defendants, sustaining demurrers to a bill of complaint, as the same was amended, and dismissing the same. The suit is in equity, praying for the cancellation of a contract for the purchase of 50 shares of the capital stock of the bank, upon the ground of fraud practiced upon complainant by the bank inducing the making of such contract.

John C. Wait, of New York City (C. A. Winter, of New York City, of counsel), for appellant.

P. Tillinghast, of New York City, for appellee Mt. Vernon Nat. Bank.

B. Benjamin Schiff, of New York City, for appellee Tillinghast.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. Briefly stated the facts are these: In May, 1908, plaintiff bought these shares from the bank, upon representations made to him by its officers with reference to its financial condition, the amount of its surplus earnings, and other material matters concerning its affairs. It is averred that these representations were false, and known to be false by the bank officers when made; that they were made with intent to deceive complainant and to induce him to purchase; that he was ignorant of the affairs of the bank, and bought the shares because he believed the false representations and relied upon them; that the stock was represented to be stock not yet originally issued, but was in fact stock then owned by the vice president of the bank.

The bank suspended business in March, 1911, a receiver was appointed in April, 1911, and on September 11, 1911, an assessment of \$100 a share upon its capital stock was levied by the Comptroller of the Currency. The receiver brought an action against complainant to recover his proportion of such assessment. In that action the latter sought to raise the issues of fraud herein alleged as a defense; but, since the federal practice does not allow equitable defenses in actions at law, judgment was entered against him. One of the prayers for relief is that all further proceedings to collect said judgment be perpetually enjoined.

Since no opinion was filed in the District Court, we are unable to determine upon what theory it was that the demurrer to the whole bill was sustained and judgment thereon entered against complainant. So far as we can see, the allegations of the amended bill are sufficiently specific, positive, and clear to make out a case of sale induced by false representations of the agents of the bank to which complainant paid his money and from which he received the stock. Upon proof of the facts alleged he would ordinarily be entitled to rescind the contract of purchase, to return his stock, and demand the purchase price or actual damages. The circumstance that the bank failed and went into the hands of a receiver before complainant discovered the fraud is no reason why such suit may not be brought against the bank, although it makes it necessary to add the receiver as a party defendant. The Supreme Court has expressly held that the only way in which a person, situated as complainant is, "could effectually raise the question of liability as a shareholder, arising from frauds committed by the bank or its officers before its suspension whereby he was induced to become a shareholder, is by a suit in equity against the bank and the receiver." *Lantry v. Wallace*, 182 U. S. 549, 21 Sup. Ct. 883, 45 L. Ed. 1218.

Something is said in the appellee's brief about complainant's laches and estoppel, but those are matters which can best be considered when the facts are all proved. It seems to us, therefore, that the demurrer should have been overruled. In thus deciding, however, we are not to be understood as intimating any opinion as to whether complainant could be discharged from his liability as a shareholder if the facts stated in his bill were fully proved. The Supreme Court expressly reserv-

ed that question in the case above cited, and it should not be passed upon here until all the facts material to its determination are before the court, as they can be only after joinder of issue and the taking of proofs thereon.

The decree is reversed, with directions to overrule the demurrer with leave to answer.

CITY OF NEW YORK v. PENNSYLVANIA STEEL CO.

(Circuit Court of Appeals, Second Circuit. June 27, 1913.)

No. 263.

CONTRACTS (§ 205*)—WARRANTY—PURPOSE INTENDED.

Plaintiff contracted to furnish the steel work for a cantilever bridge across the East River in New York City at specified prices on poundage of steel furnished. The city furnished the plans and stress sheets for the bridge with the loads originally contemplated; also a loading key, by which the stresses on each truss by reason of the live loads could be computed per linear foot; the contract requiring that plaintiff should build, construct, finish, and complete the work according to the plans and specifications, numbered, etc., and in accordance with such further details and instructions as the engineer might from time to time furnish, approve, or issue to insure the thorough completion of the work in the most efficient manner. The specifications required that the steel work should be so apportioned as to carry, in addition to its own weight, certain specified loads of live weight. The city subsequently desiring to add two elevated railway tracks, a supplemental contract was entered into, by which plaintiff agreed to furnish the additional steel at the prices provided in the original contract. *Held* that, plaintiff having furnished the steel and constructed the bridge in strict conformity to the specifications, there was no guaranty on its part that the trusses would not be overstrained if subjected to the live loads provided for in the specifications, and it was therefore no defense to the city's liability for the balance of the price that such would be the fact.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 878, 905; Dec. Dig. § 205.*]

In Error to the District Court of the United States for the Southern District of New York.

Action by the Pennsylvania Steel Company against the City of New York. Judgment for plaintiff, and defendant brings error. Affirmed.

Archibald R. Watson, Corp. Counsel, of New York City (T. Farley and Francis Martin, both of New York City, of counsel), for plaintiff in error.

Curtis, Mallet-Prevost & Colt, of New York City (Howard Taylor, Wm. Edmond Curtis, and Henry A. Stickney, all of New York City, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. This case arises out of a contract between the city and the Pennsylvania Steel Company for the erection of the steel superstructure of the cantilever bridge across the East River at Blackwells Island, known as the Queensborough Bridge. The Steel

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Company, the contractor, was to be paid at various rates on poundage of steel furnished. The final certificate called for by the contract was filed with the comptroller, showing a balance due of \$183,464.41.

The original contract is dated November 20, 1903. The specifications, which are made a part of it, provide that the steel work shall be so proportioned as to carry, in addition to its own weight and the weight of the floor of the bridge, which together make the dead weight of the bridge, certain specified loads of live weight. Subsequently the city, desiring to add two elevated railway tracks on the second floor of the bridge, entered into a supplemental contract with the Steel Company, dated December 15, 1904, whereby the Steel Company agreed to furnish additional steel at the prices provided in the original contract. The bridge was completed to the satisfaction of the bridge commissioner and the city engineer and is now in use by the city. There is no question as to workmanship, material, and conformity to the working drawings.

The city refuses to pay the balance admitted in the final certificate, and pleads large counterclaims on the ground that certain members of the trusses will be overstrained if subjected to the live loads provided for in the specifications. The testimony of the experts on both sides indicates that this is so. The city contends that the Steel Company guaranteed these results. Judge Holt directed a verdict in favor of the Steel Company for the unpaid balance of the contract price, dismissed the city's counterclaims, and left the question of certain extra work to the jury. We think he was right. The Steel Company made no such guarantee. The city furnished the original plans and stress sheets for the bridge with the loads originally contemplated; also a loading key by which the stresses on each member of the trusses by reason of the live loads could be computed per linear foot. The contract provided:

"The contractor shall build, construct, finish, and fully complete the whole of the work in a manner described and shown in the specifications and by the accompanying plans and drawings, numbered 4347-4370, and in accordance with such further details and instructions as the engineer may from time to time furnish, approve, or issue for the purpose of insuring the thorough completion of the work in the most efficient manner."

This the Steel Company did. If the result did not accomplish the city's expectation as to the effect of certain loads upon the bridge members, it was through no fault of the Steel Company. The city had and exercised entire control of the subject, and the Steel Company has scrupulously conformed to its requirements. We think the case falls within *MacKnight Flintic Stone Co. v. City of New York*, 160 N. Y. 72, 54 N. E. 661, *MacRitchie v. City of Lake View*, 30 Ill. App. 393, and *Filbert v. City of Philadelphia*, 181 Pa. 530, 37 Atl. 545.

The judgment is affirmed, with costs.

MUNROE et al. v. TRENTON OIL CLOTH & LINOLEUM CO.

(Circuit Court of Appeals, Second Circuit. June 20, 1913.)

No. 153.

1. SALES (§ 89*)—CONTRACT—MODIFICATION.

Certain letters passing between buyer and seller, in which the buyer requested for its accommodation that the seller would increase the quantities of cork waste contracted for under a modified contract, and in which the seller expressed its willingness to comply so far as possible therewith, did not constitute an enforceable modification or amendment of the contract, which bound the seller to furnish the increased deliveries.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 251, 252, 259; Dec. Dig. § 89.*]

2. SALES (§ 98*)—CONTRACTS—BREACH—SHORT DELIVERIES.

Where a contract for the sale of cork waste required certain specified monthly deliveries, but the buyer accepted short deliveries without objection prior to September 2, 1909, and paid for cork previously delivered, but on that date defendant withheld payment for shipments then due, insisting on deliveries greater than the contracts required, and demanding a bond to secure future deliveries, such conduct amounted to a repudiation of the contract, and the sellers were justified in refusing to make further deliveries, and could recover the value of the cork delivered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 263; Dec. Dig. § 98;* Contracts, Cent. Dig. § 1178.]

In Error to the District Court of the United States for the Southern District of New York.

Action by Henry W. Munroe and others against the Trenton Oil Cloth & Linoleum Company. Judgment for defendant, and plaintiffs bring error. Reversed.

Writ of error to review a judgment of the District Court, Southern District of New York.

The action was brought by the plaintiffs as assignees of the Waeber & Lee Company to recover the agreed price of four shipments of imported cork waste alleged to have been sold and delivered by said company to the defendant. The defendant did not question the delivery and acceptance of the merchandise but averred by way of recoupment and set-off that it had been delivered only as a part of a large quantity which the Waeber & Lee Company had contracted, but had failed, to deliver, and the defendant claimed damages on account of such non-delivery in excess of the plaintiffs' demand.

The trial judge directed a verdict in favor of the defendant and the plaintiffs bring this writ of error.

The facts were not disputed.

Stroock & Stroock, of New York City (S. M. Stroock, Charles Levy, and E. F. Spitz, all of New York City, of counsel), for plaintiffs in error.

R. L. Tarbox, of New York City, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges

NOYES, Circuit Judge (after stating the facts as above). [1] The first contract between the parties called for the delivery of 150 tons monthly. The second contract, as interpreted by them, called

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for the delivery of 83 tons monthly. Thus for the period before the contentions arose deliveries of 233 tons per month were required by the contracts as originally made. The defendant claims, however, that the contracts were modified by the parties so as to require the delivery of 325 tons monthly. This contention is based upon three letters which passed between the parties. But in our opinion these letters should be interpreted as requests for accommodation on the one side and an expression of willingness to comply therewith so far as possible on the other. In view of the situation we think that they fell short of constituting a permanent modification or amendment of the contracts which bound the plaintiffs' assignors to make, and gave the defendant the right to require, increased deliveries.

[2] The contracts, then, standing without modification the defendant was, in our opinion, guilty of the first actionable breach by failing to pay for the shipment due September 2, 1909. It is true that short deliveries had been made before that time but they had been accepted without objection and payment had been made for all amounts falling due. Besides the defendant shortly before this time had itself requested the plaintiffs' assignors to curtail a shipment. The defendant thus waived any right to complain of the short deliveries, and its position taken after September 2d would undoubtedly have justified the plaintiffs' assignors in declining to make further shipments. But they were not bound to stop then and were entitled to payment for deliveries made afterwards. The defendant's subsequent position in wrongfully insisting upon 325 tons a month, in continuing to withhold payments and in demanding a bond amounted to a repudiation of the contract which we think justified the Waeber & Lee Company in declining to carry it out further on its part. It was not itself in default, and the acts of the defendant amounted to an absolute refusal to perform.

It follows, for these reasons, that the plaintiffs were entitled to recover for the merchandise delivered and not paid for, and that the defendant failed to establish any claim for damages as an offset thereto. Consequently there was error in directing a verdict for the defendant instead of for the plaintiff for the purchase price of the unpaid deliveries less the conceded allowances.

The judgment of the District Court is reversed.

IN RE COHEN.

(Circuit Court of Appeals, Second Circuit. June 14, 1913.)

No. 268.

1. BANKRUPTCY (§ 414*)—DISCHARGE—CONCEALED ASSETS—EVIDENCE.

Evidence on objection to discharge of a bankrupt, on the ground that he had concealed property belonging to his estate, *held* insufficient to show concealment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 720-722; Dec. Dig. § 414.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. BANKRUPTCY (§ 414*)—DISCHARGE—CONCEALED ASSETS—BURDEN OF PROOF.

A creditor, objecting to discharge of a bankrupt on the ground that he had concealed property belonging to his estate, has the burden of proof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 720-722; Dec. Dig. § 414.*]

Appeal from the District Court of the United States for the Eastern District of New York.

In the matter of Irving Cohen, bankrupt. This cause comes here upon appeal from an order of the District Court, Eastern District of New York (201 Fed. 188), denying the bankrupt's application for a discharge. Reversed.

J. J. Lesser, of New York City, for appellant.

A. A. Silberberg, of New York City, for appellee.

Benjamin Rich, of New York City, for bankrupt.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The objecting creditor filed several specifications of objection to discharge. The special commissioner, as it seems to us quite properly, overruled all of them, except the single one now before us, viz., that the bankrupt had knowingly and fraudulently concealed property belonging to his estate. The property in question is a stock of tinware, etc., of the value of about \$2,000 in a store on Staten Island, where the bankrupt has recently been conducting business, as he alleges for his elder brother, who has several similar stores on the Island. Prior to 1908, the bankrupt, then 22 years of age, was in partnership with one Phillips, six years older, in a retail shoe business. It is the theory of the objecting creditor that, when the firm of Phillips & Cohen went out of existence in 1908, the bankrupt put the proceeds of its stock, or part thereof, into this tinware and crockery business, which he has since been engaged in.

[4] The special commissioner reached this conclusion, although the most he finds is that he has a "strong presumption" that the bankrupt has an interest in that business. The evidence is the other way. The bankrupt and his brother Samuel both testify that, after the failure of the shoe business, Samuel put his brother into the store which he (Samuel) had already established in order to give him something to do and a chance to make enough out of it to support bankrupt and his wife. There is no evidence to the contrary. The special commissioner finds the story of the bankrupt and his brother "inherently improbable." We see nothing improbable in the circumstance that his partner, Phillips, with whom he had disagreed and had had controversies, should, when it was evident the business was going to pieces and without the knowledge of his younger partner, sell the entire stock to an auctioneer and disappear with the proceeds. Nor is there any improbability in the circumstance that Phillips' whereabouts is not known to his family and that they think he is dead; nor in the further circumstance that the bankrupt himself—without money and with a brother

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

willing to take him into his store and let him earn a living out of it, if he could—failed to “pursue” his disappearing partner. Still less do we see any improbability in the bankrupt’s elder brother doing this much for him after his shoe business went to smash. Other brothers have sometimes acted the same way under similar circumstances.

As to the statement of the bankrupt, so much relied on, made to one Cooper when bankrupt bought some crockery from him, viz., that the business was his: He was making the purchase from Cooper, not to replenish his brother’s stock, which was mainly agate ware, but for himself, to do a little peddling of crockery on the side as an independent speculation. It is certainly not improbable that, in order to get it on his own credit, he told Cooper that the store was his. The evidence warrants the conclusion that he lied to Cooper to get credit, but certainly falls far short of proof that he did in fact own the business.

There may be some features of the transactions between the brothers difficult to understand, and perhaps open to suspicion; but they are both entirely uneducated, doing business on a very small scale, principally in the way of peddling, and the bankrupt is very young. No attempt was made by the trustee to get this property for the estate, and so establish the ownership one way or the other, and the estate has since been wound up.

[2] The burden of proof of his objection lies upon the creditor, and he has failed to sustain it.

The order should be reversed.

CHAMBERLAIN v. THROCKMORTON.

(Circuit Court of Appeals, Eighth Circuit. June 24, 1913.)

No. 3,806.

1. SALES (§ 437*) — REMEDIES OF BUYER — BREACH OF WARRANTY — ADMISSIBILITY OF EVIDENCE.

In an action to recover damages for the alleged breach of warranty in the sale of a jack for breeding, where it was uncertain from the petition whether the plaintiff was relying upon the breach of an express or implied warranty, or upon a rescission of the contract, the defendant could introduce evidence that the jack handled himself all right the season preceding the sale, which took place in February, even though the answer denied any warranty, since under the petition he was justified in meeting the different issues presented to the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1248-1257; Dec. Dig. § 437.*]

2. EVIDENCE (§ 17*)—JUDICIAL NOTICE—COURSE OF THE SEASONS.

The trial court takes judicial notice of the course of the seasons, and would thereby know that the season of 1909 was as near to February, 1910, the time of the sale, as any information concerning the breeding qualities of the jack could be secured.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 21; Dec. Dig. § 17.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Louis W. Chamberlain against J. E. Throckmorton. Judgment for defendant, and plaintiff brings error. Affirmed.

George A. Mahan, of Hannibal, Mo. (William Mumford, of Pittsfield, Ill., and A. R. Smith and Dulany Mahan, both of Hannibal, Mo., on the brief), for plaintiff in error.

Noah U. Simpson, of La Belle, Mo., for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and WIL-LARD, District Judge.

PER CURIAM. This action was brought to recover damages for the alleged breach of a warranty in the sale of a jack for breeding purposes. The only errors properly assigned are as to the admission in evidence of the testimony of certain witnesses for the defense which tended to show that the jack handled himself all right during the season of 1909. The sale took place in February, 1910.

[1] The testimony was objected to for the reason that the defendant by his answer denied that there was any warranty of the jack, either express or implied, and that therefore he could not introduce evidence to show that the jack was a good animal for the purpose for which he was purchased. The evidence was also objected to for the reason that the season of 1909 was too remote. We think, in view of the fact that it is difficult to determine from the petition whether the plaintiff was relying for a recovery upon the breach of an express or implied warranty, or a rescission of the contract, that the defendant was justified in meeting the issues as they might be and were submitted to the jury.

[2] The trial court could, of course, take judicial notice of the course of the seasons, and, thus informed, would know that the season of 1909 was as near to 1910 as any information as to the jack's qualities could naturally be furnished.

Judgment affirmed.

WILLIAMS, Immigration Com'r, v. UNITED STATES ex rel. KLEIN.

(Circuit Court of Appeals, Second Circuit. June 12, 1913.)

No. 248.

ALIENS (§ 49*)—EXCLUSION—PAUPER.

Where an alien actress came to the United States with her husband, who was an engineer, and at the time of the first hearing they had property valued at more than \$600, and relator had gowns valued at \$1,200, a finding that she was not entitled to enter, because she was likely to become a public charge, was unsustainable.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 107; Dec. Dig. § 49.*]

Appeal from the District Court of the United States for the Southern District of New York.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Habeas corpus by the United States, on the relation of Karola Klein, to obtain her release from the custody of William Williams, Commissioner of Immigration, under a deportation warrant. From an order directing relator's discharge (189 Fed. 915), the Commissioner appeals. Affirmed.

Henry A. Wise, U. S. Atty., and Kenneth M. Spence, Asst. U. S. Atty., of New York City, for appellant.

Benjamin Levinson, of New York City, for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. The only charge against Karola Klein is that she has no means of support and is liable to become a public charge. This question was considered and decided by Judge Holt when she and Isidor Klein were first arrested in 1911 and he pronounced the assertion that they were likely to become public charges "strained, far-fetched and almost fantastical." (C. C.) 189 Fed. 915. We have carefully examined the testimony and are not disposed to disagree with this characterization. There is nothing to show that Karola Klein is an immoral person or a pauper.

At the time of the first hearing there was testimony that the aliens had property valued at more than \$600. Karola is an actress and came here with gowns valued at \$1,200. In the face of this testimony we cannot assume that Karola is unable to support herself. She has been in this country for two years and there is not a particle of proof that she has been supported by charity or at the expense of the public.

We cannot assume a proposition which has no evidence to sustain it and which is contrary to the proof and all the presumptions to be drawn therefrom.

The order sustaining the writ as to Karola Klein is affirmed.

BROWN et al. v. FLETCHER.

(Circuit Court of Appeals, Second Circuit. June 27, 1913.)

No. 227.

1 EQUITY (§ 46*)—JURISDICTION—ADEQUATE REMEDY AT LAW.

Under Rev. St. § 723 (U. S. Comp. St. 1901, p. 583), providing that suits in equity shall not be sustained in the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law, a bill cannot be maintained in a federal court to recover payment of a sum of money concededly in defendant's hands, which complainants allege has been assigned to them, without any allegation of a ground of equitable jurisdiction or prayer for equitable relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 151, 152, 157, 159-160; Dec. Dig. § 46.*]

2. JURY (§ 14*)—RIGHT TO JURY TRIAL.

Const. U. S. Amend. 7, provides that in suits at common law, where the value in controversy exceeds \$20, the right of trial by jury shall be preserved, etc., and Rev. St. § 648 (U. S. Comp. St. 1901, p. 525), declares that the trial of issues of fact in Circuit Courts shall be by jury

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexe

except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy and by the succeeding section. *Held* that, where complainant sued as assignee to recover an interest of a beneficiary under a testamentary trust from the trustees, defendant was entitled to a trial by jury unless waived.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 40-60, 66-83; Dec. Dig. § 14.*]

3. APPEAL AND ERROR (§ 184*)—JURISDICTION—EQUITY.

Where want of jurisdiction in equity appears on the face of the bill, it may be considered on appeal on the court's own motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1150, 1179-1183; Dec. Dig. § 184.*]

4. APPEARANCE (§ 9*)—GENERAL APPEARANCE—SURROGATE'S COURT—PETITION FOR REMOVAL.

Where, after suit by certain assignees to recover the proceeds of the beneficiary's interest in a trust estate, the trustee instituted proceedings in the Surrogate's Court to settle his accounts, complainants' application to remove the proceeding to the federal court did not constitute a general appearance by complainants before the surrogate.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. § 9.*]

5. EQUITY (§ 94*)—NECESSARY PARTIES—TESTAMENTARY TRUST—BENEFICIARY'S INTEREST—ASSIGNMENT—ACTION BY ASSIGNEE—PARTIES.

In a suit by an assignee of a beneficiary of an interest in a testamentary trust to recover the amount of such interest from the trustee, the beneficiary is a necessary party.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 246, 252; Dec. Dig. § 94.*]

6. COURTS (§ 312*)—FEDERAL COURTS—JURISDICTION—CITIZENSHIP—ASSIGNEES.

Where complainants, citizens of Pennsylvania, filed a bill against defendant, a citizen of New York, to recover an interest in a trust estate assigned to complainants by assignors not alleged to be citizens of states other than New York, federal jurisdiction on the ground of diversity of citizenship did not appear, under the rule that an assignee cannot maintain an action in a federal District Court, where his assignors could not have done so, as provided by Act March 3, 1875, c. 137, § 1, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508).

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 865-875; Dec. Dig. § 312.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

7. REMOVAL OF CAUSES (§ 107*)—REMAND—PROCEDURE.

Where a suit in a federal court is remanded to a state court, the better practice is to enter an order of remand, with the proceedings in the case taken in the federal court annexed thereto, leaving to the state court the determination of further proceedings with reference to the pleadings filed and steps taken during the pendency of the suit in the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225-232, 234; Dec. Dig. § 107.*]

Appeal from the District Court of the United States for the Southern District of New York.

Bill by John A. Brown and another against Austin B. Fletcher, as trustee of the testamentary estate of Conrad Braker, Jr. From a decree dismissing the bill (203 Fed. 70), complainants appeal. Modified and affirmed.

Fredric W. Frost, of New York City (Charles H. Burr, of Philadelphia, Pa., of counsel), for appellants.

W. P. S. Melvin, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The complainants, citizens of Pennsylvania, filed this bill against the defendant, a citizen of New York, who had been appointed by the Surrogate's Court for the county of New York to succeed the trustee appointed in the will of Conrad Braker, Jr., deceased. It alleges that by virtue of an assignment from Conrad M. Braker and various mesne assignments the complainants are entitled to receive the sum of \$10,000 in the hands of the defendant, as testamentary trustee, which he neglects and refuses to pay. The prayer for relief is that the defendant may be decreed to pay the said sum over to the complainants.

The defendant admits that he has received from the estate of Conrad Braker, Jr., deceased, and now has, the sum of \$10,000 in trust to pay the same over to Conrad M. Braker, the decedent's son. He demurred to the bill upon the ground, among others, that the complainant had a full, adequate, and complete remedy at law. Judge Hand overruled the demurrer.

[1] The defendant, having raised this question of jurisdiction in limine, and it having been decided against him, properly answered on the merits, without waiving it. We think the objection good. Section 723 of the U. S. Rev. Stat. (U. S. Comp. St. 1901, p. 583) provides:

"723. Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

[2] The complainants ask for the payment of a sum of money concededly in the defendant's hands, which they allege has been duly assigned to them. There is no ground whatever of equitable jurisdiction stated in the bill, nor any equitable relief prayed for. The right asserted is completely cognizable and enforceable at law and the defendant has a right to a trial by jury.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." Seventh amendment to the Constitution of the United States.

"Sec. 648. The trial of issues of fact in the Circuit Courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and by the next section." U. S. Comp. St. 1901, p. 525.

[3] The defendant might have waived this right by not taking the objection; but, even if he had done so, the want of jurisdiction being plain on the face of the bill, an appellate court has the right to take it sua sponte. *Lewis v. Cocks*, 23 Wall. 466, 470, 23 L. Ed. 70; *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451; *Indian Land & Trust Co. v. Shoenfelt*, 135 Fed. 484, 68 C. C. A. 196; *Robinson v. Mutual Reserve Life Ins. Co.*, 193 Fed. 399, 113 C. C. A. 395.

[4] Judge Holt, however, who decided the case at final hearing, treated all questions raised on the demurrer as closed to inquiry before him and disposed of the case upon a defense set up in the answer as follows: After this suit had been instituted the defendant began proceedings to settle his account as testamentary trustee in the Surrogate's Court for the county of New York, making the claimants parties and serving them extraterritorially. Thereupon the complainants removed the proceeding from the Surrogate's Court into the District Court. Subsequently the proceeding was remanded by order of Judge Lacombe. Thereupon the defendant took a decree in the Surrogate's Court against the complainants for want of an appearance and directing the defendant to pay the fund to Conrad M. Braker. Judge Holt dismissed the bill on the ground that this decree was *res adjudicata*: First, because the petition filed for removal constituted a general appearance of the complainants in the Surrogate's Court and they were therefore parties to the proceeding and bound by the decree; second, because the decree in the Surrogate's Court was in a proceeding in rem and the complainants were bound by it, having been duly cited, although served extraterritorially. The removal of the case did not constitute a general appearance of the complainants in the Surrogate's Court. *Wabash Western Ry. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431. As to the second ground, we need not inquire whether, under *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, *Waterman v. Bank*, 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80, and *McClellan v. Carland*, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. Ed. 762, the District Court, if it had jurisdiction of the cause, was not authorized to determine the rights of the parties, although not authorized to interfere with the possession of the Surrogate's Court, because the bill will be dismissed without prejudice for reasons now to be considered.

[5] Treating the action as one in equity, we think the objection that Conrad M. Braker ought to have been made a party was good. He was within the jurisdiction of the court, and a decree in favor of the complainants would have affected his interests most injuriously. Therefore the bill should have been dismissed, because he was not brought in as a party. *Waterman v. Bank*, 215 U. S. 33, 48, 30 Sup. Ct. 10, 54 L. Ed. 80.

[6] Moreover, we think the Circuit Court had no jurisdiction on the ground of citizenship, because at least two of the assignors under whom the complainants claim, viz., Conrad M. Braker and the New York Finance Company, were citizens of the state of New York, or at least were not stated to be citizens of any other state, as the complainants were bound to do. The complainants are not asserting a lien in their own right upon Braker's interest in the decedent's estate, as was the case in *Ingersoll v. Coram*, 211 U. S. 336,¹ but are asserting Braker's title to the sum of \$10,000 to which they say they have succeeded. This is clearly a chose in action; that is, a claim not in possession, but which must be enforced by an action against the trustee. *Sheldon v. Sill*, 49 U. S. (8 How.) 441, 12 L. Ed. 1147. As their assignors could not maintain an action in the District Court,

¹ 29 Sup. Ct. 92, 53 L. Ed. 208.

the complainants cannot. Act March 3, 1875, c. 137, § 1, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508).

[7] The complainants contend that their general appearance in the District Court after removal of the proceedings from the Surrogate's Court and their answer filed became a part of the case and should have been returned to the Surrogate's Court when the proceeding was remanded. At all events, they complain that these facts should have been called to the attention of that court. It is quite probable, if they had been, no judgment for want of an appearance would have been entered against them. But their relief must be in that court, or by appeal from it. The practice in this district upon remanding cases has been simply to enter an order to that effect, without returning proceedings in the case taken in the District Court to the state court. While what the District Court might do in a removed case subsequently remanded would be invalid, as without jurisdiction, it might well be otherwise as to what the parties themselves did. In the case of *Ayres v. Wiswall*, 112 U. S. 187, at page 190, 5 Sup. Ct. 90, at page 92 (28 L. Ed. 693), an answer had been filed in the Circuit Court and the case was subsequently remanded. Chief Justice Waite said:

"The fact that Ebenezer R. Ayres had filed his answer in the United States court is a matter of no importance. That fact did not of itself confer jurisdiction if there had been none before. It will be for the state court, when the case gets back there, to determine what shall be done with pleadings filed and testimony taken during the pendency of the suit in the other jurisdiction."

This language seems to show that the Chief Justice contemplated that proceedings taken in the case in the Circuit Court should be remanded to the state court, and this was the construction of the language taken in *Broadway Ins. Co. v. Chicago* (C. C.) 101 Fed. 507, 510. We incline to regard it as the proper practice.

The decree is modified, by directing the court below to dismiss the bill, but not upon the merits.

MURRAY v. DETROIT WIRE SPRING CO.

(Circuit Court of Appeals, Sixth Circuit. June 3, 1913.)

No. 2,341.

1. PATENTS (§ 327*)—SUIT FOR INFRINGEMENT—EFFECT OF PREVIOUS ADJUDICATIONS.

A decision sustaining the validity of a patent is conclusive in the same court in a subsequent case, unless there is materially different evidence.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620-625; Dec. Dig. § 327.*]

2. PATENTS (§ 312*)—INFRINGEMENT—EVIDENCE.

That an alleged infringing device is covered by a later patent than the one in suit does not raise a presumption that it does not infringe, but only that there is a patentable difference between the two structures.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544-549; Dec. Dig. § 312.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
206 F.—30

3. PATENTS (§ 328*)—INFRINGEMENT—SPRING SEAT.

The Murray patent, No. 692,535, for a spring seat, *held* infringed by the structure of the O'Brien patent, No. 954,331.

4. PATENTS (§§ 234, 239*)—INFRINGEMENT.

Infringement is not avoided by impairment of the functions of an element of a patented device in degree, if the distinguishing function is retained, nor by adding elements to the completed structure of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 370, 377, 378, 381; Dec. Dig. §§ 234, 239.*]

Appeal from the District Court of the United States for the Eastern District of Michigan; Alexis C. Angell, Judge.

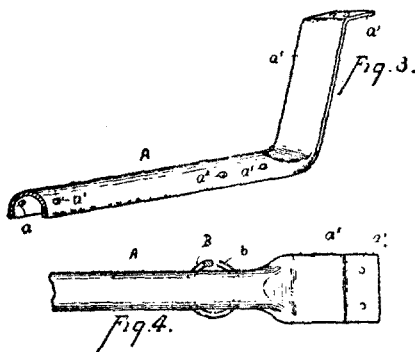
(Suit in equity by William A. Murray against the Detroit Wire Spring Company. Decree (195 Fed. 774) for defendant, and complainant appeals. Reversed.

Murray brought the usual form of infringement suit, based on his patent No. 692,535, issued February 4, 1902, for a spring seat. The patent was considered by this court, and held valid, but not infringed, in an opinion by Judge Severens. *Murray v. D'Arcy*, 161 Fed. 352, 88 C. C. A. 364. The patent was there sufficiently described and typical claims are recited.

The defendant, in the present case, is manufacturing a form of spring seat structure shown by patent to O'Brien, No. 954,331, dated April 5, 1910. For purposes of intelligent comparison to determine infringement, we here reproduce Figures 3 and 4, Murray, and 3 and 4 of O'Brien.

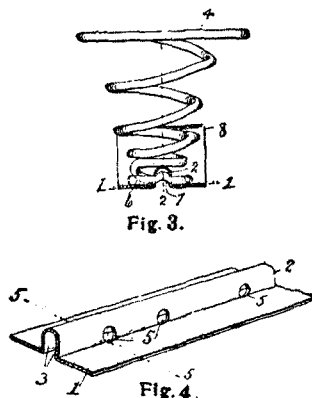
W. A. Murray

No. 692,535.



T. O'Brien

954,331.



The District Court thought there was no infringement, and dismissed the bill. Murray appeals.

Murray & McCallester, of Cincinnati, Ohio (W. F. Murray, of Cincinnati, Ohio, of counsel), for appellant.

Barthel & Barthel, of Detroit, Mich. (C. R. Stickney and Otto F. Barthel, both of Detroit, Mich., of counsel), for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DENISON, Circuit Judge (after stating the facts as above). [1] In the former case, it was decided that the patent was valid, but was not entitled to a broad range of equivalents. The record in the present case contains several earlier patents not before considered, but nothing of strikingly different character or effect, or which ought to lead us to a different conclusion from that before reached. As was said by this court under similar circumstances in *Dowagiac Mfg. Co. v. Brennan*, 127 Fed. 145, 62 C. C. A. 259:

"The validity of the patent is a thing which must be regarded as adjudged, and must be accepted as the starting point for discussion."

[2] The fact that defendant's structure is covered by a patent later than complainant's we lay out of consideration, for the reasons stated in *Herman v. Youngstown Co.*, 191 Fed. 579, 112 C. C. A. 185. See, also, *Ries v. Barth* (C. C. A. 7) 136 Fed. 850, 854, 69 C. C. A. 528, and *Ryder v. Schlichter* (C. C. A. 3) 126 Fed. 487, 490, 61 C. C. A. 469.

[3] Adopting that view of the Murray structure which was taken by this court in the other case, and in which we are confirmed by this record, his patentable novelty consisted in that support against lateral bending in any direction and that vertical maintaining of the spring, which support and maintenance were given by the four perforations in the arched strip. Having thus four bearing points in the same horizontal plane, the rise in the spiral between bearing points caused, at these four points, top and bottom friction, which, when the lower coil was screwed in through the holes, would tend to prevent it from unscrewing and to hold it rigidly with reference to the spring's vertical axis. This top and bottom friction, due to the rise of the spiral, being characteristic of the Murray invention, and not being found in the D'Arcy structure, the latter was determined to be noninfringing.

We are satisfied that the O'Brien device does embody the elements of the Murray invention and claims, and in particular that it has the characteristic action and effect which were found not present in D'Arcy. O'Brien has the arched strip. The exhibits show that his arch is somewhat narrower than Murray's, but this difference must be a mere matter of degree, unless and until the walls of the arch approach so near together that they operate as a single vertical strip rather than as an arch, and do not, by their lateral spacing, give support to the spring at two points far enough apart to prevent tilting of the spring laterally of the strip. O'Brien also provides for the spring four perforations in the walls or edges of the arched strip. These perforations, as in Murray, are in the same horizontal plane, and, as in Murray, are in pairs. O'Brien has made additions to Murray. He has added horizontal flanges at the bottom of the arch, and has struck up or offset the bottom spring coil between the arch walls, so that the spring cannot unscrew. As O'Brien's side walls are closer together than Murray's, and as O'Brien has made his perforations larger to give more play to the spring, his perforations do not support the spring against bending laterally of the strip as well as do Murray's; and so his side flanges, which additionally prevent the bottom coils

from tilting, and his offset, which forces the coil into closer contact with the flange, undoubtedly do co-operate with the four perforations in keeping the spring upright, and get a better and more efficient result in this respect than would be accomplished by his arch walls and perforations alone. However, this is addition, not substitution. We find by experiment, as seems apparent from observation, that if O'Brien's flanges are bent down into the same plane as the side walls, so that he has nothing except the arch with four perforations, the spring will be maintained, not perfectly, but moderately well, in vertical position, and this result is, at least in part, due to the top and bottom friction at the four perforations or bearings, and caused by the rise in the spiral. What O'Brien did was not to abandon the characteristic function of Murray, but to impair this function by slightly narrowing the arch and enlarging the perforations. He then neutralized this impairment by adding the horizontal flanges and the offset.

[4] We think O'Brien's structure comes within the settled rule that infringement is not avoided by impairment in degree so long as the distinguishing function is retained (*Penfield v. Chambers* [C. C. A. 6] 92 Fed. 630, 653, 34 C. C. A. 579; *King v. Hubbard* [C. C. A. 6] 97 Fed. 795, 803, 38 C. C. A. 423), and within the principle that infringement is not avoided by adding elements to the complete structure of the patent claim (*Macomber's Fixed Law of Patents*, §§ 447, 448).

The defendant is not manufacturing the complete spring seat with the frame, but the exhibit, "Defendant's Manufacture No. 1," is clearly intended for attachment to a frame, and can have no other use. Under the familiar rule of contributory infringement (*Thomson-Houston Co. v. Ohio Co.* [C. C. A. 6] 80 Fed. 712, 26 C. C. A. 107) it infringes claims 1, 2, and 3. Exhibit, "Defendant's Manufacture No. 2," embodies a frame and infringes claim 5.

The decree will be reversed, with costs, and the record remanded, with instructions to enter a decree for complainant on claims 1, 2, 3, and 5, and for further proceedings not inconsistent with this opinion.

BRUNSWICK-BALKE-COLLENDER CO. v. CHARLES PASSOW & SONS.

(District Court, W. D. Missouri. July 25, 1913.)

No. 3,480.

PATENTS (§ 328*)—INVENTION—POOL TABLES.

The Cunningham patents, Nos. 553,185 and 559,790, each for improvements in billiard or pool table pockets, and No. 556,532, for improvement in return conduits for balls, connected with the pockets of such tables, are each void for lack of patentable invention.

In Equity. Suit by the Brunswick-Balke-Collender Company against Charles Passow & Sons, a corporation. On final hearing. Decree for defendant.

F. V. Kander, of Kansas City, Mo., and Philipp, Sawyer, Rice & Kennedy, of New York City, for complainant.

John H. Whipple, of Chicago, Ill., for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

VAN VALKENBURGH, District Judge. Complainant, organized under the laws of the state of Delaware, and the owner of letters patent Nos. 553,185, 556,532, and 559,790, as assignor of the inventor, Patrick M. Cunningham, brings its bill of complaint against Charles Passow & Sons, a corporation organized under the laws of the state of Illinois, and doing business in Kansas City, Jackson county, Mo. It charges said defendant with infringement of these patents, and prays injunction, accounting, and damages. The defendant moves the court to dismiss the bill for want of equity on the alleged ground that complainant has failed to prove infringement after complainant acquired title to the patents in suit. It also asserts that said patents are void for want of novelty and invention, and denies infringement.

The motion to dismiss must be denied. A stipulation on file admits that:

"The complainant acquired title to the patents in suit and all claims and demands, both at law and in equity, for damages and profits accrued or to accrue on account of the infringement of said letters patent, or any of them, as alleged in the bill of complaint, by virtue of an assignment dated March 30, 1908, from the Brunswick-Balke-Collender Company, of Ohio, to complainant, which assignment was duly recorded in the Patent Office April 10, 1908."

The bill in this case was filed March 30, 1909. The defendant was incorporated July 16, 1904. It is stipulated that the defendant sold a pool table embodying the alleged infringing devices at Kansas City, in this district, prior to the commencement of this suit. It sufficiently appears, therefore, that the sale was made after July 16, 1904, and within six years prior to the filing of the bill; also that complainant then had title to all claims and demands for damages and profits on account of infringements committed prior to the date of the assignment, and within the statutory period antedating the filing of the bill; that the assignment to complainant expressly transferred such rights of action to the assignee.

The patents are susceptible of conjoint use, as will hereafter more clearly appear. Defendant objects to certain testimony and evidence tendered by complainant, and asks that the same be excluded. In the view I take of this case, however, it will be unnecessary to determine this and other questions raised, and we may pass at once to a consideration of the validity of the patents.

The first patent in suit, No. 553,185, relates to pool tables which are provided with pockets and with a device for conducting the balls from the pockets to a large pouch or pocket at the foot of the table without necessitating the removal and collection of said balls by the players or by an attendant. This device, which was originally one embodying marked invention and a distinct advance in the art, was concededly old. The object of this patent is thus stated in the specification:

"I propose to provide for use metallic ball receptacles for pool tables, which not only will not impair the exterior appearance and design of the table, but which, furthermore, shall be capable of securement to the woodwork of the table without any exposure to sight of the means of securement, and shall possess the capacity to fit equally well to tables of various shapes or designs of body. To this main end and object my invention may be said to consist in a metallic ball receptacle for billiard or pool tables adapted to extend

inwardly from the locality at which the pocketed ball is received in said receptacle, and to be fastened to the woodwork of the table without fitting to the exterior surface of the table body."

In other words, having given in the prior art pool tables with metallic pockets attached at the corners and sides of the table and outwardly visible, also a device in such tables for conducting the balls from such pockets to a common receptacle, which said device must of necessity have connected with said pockets, the patentee undertakes to conceal such pockets within the structure of the table, so that they may not detract from its otherwise attractive appearance. Passing by the question raised of whether such an improvement must not be limited to a specific construction, it becomes pertinent to inquire whether the mechanical expedient of inclosing the pockets within the structure of the table, thereby partly or wholly concealing them from sight, can be called invention? So far as appears from this record, this so-called invention involved no more ingenuity than might be expected of any competent workman engaged in the manufacture of tables of this character and possessed of the necessary skill which might reasonably be expected of him to adapt his construction to mere change in location of parts. I do not think the essential elements of patentability are here present.

The third patent in suit, No. 559,790, also concerns the pockets of such a billiard or pool table. These two patents were pending in the Patent Office at the same time, the former being granted January 14, 1896, and the latter May 5, 1896. This specification advises us that a construction used almost wholly up to the present time—

"is that in which metallic gutter irons of approximately hemispherical form are secured to the exterior of the table body, so as to form cup-shaped extensions outwardly of the conduits, and in which the usual pocket netting which depends from the ordinary 'pocket iron' has its lower edge securely fastened to the upper semicircular edge of said gutter iron, all in a manner well understood by those familiar with the manufacture and use of pool tables. This last-mentioned and almost universally employed construction, while it is comparatively strong and durable (the metallic gutter irons being usually able to bear the strain and shocks of forcibly holed balls), is objectionable in some particulars, chief among which are, first, that of a great liability of injury to the ivory balls by contact with the upper edge of the gutter iron; second, that of a liability of a forcibly holed ball to rebound or jump back onto the table; and, third, that of a tendency of the hard knocks and jars to which the gutter iron is subjected to loosen the connections between the gutter iron and the table body."

To remedy these objectionable features is stated to be the main end and object of the invention. It consists of a curved and gutter-shaped leather shoe inserted in the pocket and communicating with the conduits for assembling the balls heretofore referred to. In other words, it is a leather lining and cover for the pocket and gutter iron theretofore existing, so shaped as to conform itself, for a brief space, to the conduit communicating with the pocket. It also, in some cases, supplied the place of the familiar pocket netting depending from the pocket iron. It seeks to obviate the chipping of the balls by contact with the iron and the liability of a forcibly holed ball to rebound upon the table, by covering the iron with the softer and more yielding

leather material. The cup and trough shape into which the latter is molded is dictated largely by that of the parts to which it is applied, developed, perhaps, by requirements perfectly obvious to the unskilled, and susceptible of ready construction by the skilled, workman. In the patent to Jefferson, dated March 29, 1891, a cruder device having the same general character and objective is shown. This device, of necessity, conformed in some degree to the shape of the pocket and gutter in which it was placed. In any event, I do not think the mere molding of the Cunningham device into the shape shown in the patent in suit involved invention; nor do I think it requires inventive genius to perceive the desirability of covering the hard pocket and gutter irons with leather or other softer substance to prevent injury to balls and to remedy the other obvious inherent defects named.

The second patent in suit, No. 556,532—

“relates to the conduits or ball troughs of that species of pool table in which the balls holed descend through bottomless pockets into the upper end portions of downwardly inclined wooden conduits or troughs, by which they are conducted to a receptacle located beneath the bed of the table at the foot of the latter in a manner and for the purposes well known to the makers and users of this kind of pool tables. Previous to my invention this conduit has been made in the form of a rectangular trough with an oblong opening in its bottom, and lined with cloth to prevent much of the noise or racket that would otherwise be made by the tumbling about and rolling along of the balls within the troughs. Such conduits or ball troughs have, however, been found to be defective or objectionable in practice mainly in these particulars, viz.: First, that considerable noise is made by the passage of the balls through them; and, second, the cloth linings very soon wear out or get worn into such a condition that they require repairing, which involves considerable trouble and expense. I propose by an improvement to provide for use a ball conduit which, while it will be less expensive of manufacture to start with than the cloth-lined troughs, will be more noiseless and more durable than any heretofore made that I know of. To these main ends and objects my invention consists in a ball conduit or conductor provided with two ways composed of strips of vulcanized rubber or other suitable comparatively soft, but durable, material, the wooden portion of the conduit being so made and the said ways so combined therewith that the ball will travel wholly on the angular parts of the said noiseless ways and out of contact with the wooden surfaces of the trough.”

The original claims tendered were the following:

“First. A ball conduit, for pool tables comprised of a trough-like device, having, as usual, a bottom opening for the escape of chalk, and provided with parallel ways, or skids, on which the balls travel wholly in their passage from the pockets to the receptacle for holed balls, substantially as hereinbefore set forth.

“Second. A conduit for pool tables composed of an open bottomed trough; and two parallel ways *c, c*, of soft rubber, or other suitably noiseless material, the whole constructed and operating so that the balls passing through the conduit travel wholly on said noiseless ways, all substantially in the manner and for the purpose set forth.”

Presumably because of rejection this substitute was proposed:

“In a ball trough, or conduit, for pool tables, the combination, with the trough-like device, having, as usual, a bottom opening for the escape of chalk, of the ways *c, c*, of some suitable soft and noiseless material, arranged so that the ball must travel on the angular portions, or edges thereof, in the manner and for the purposes set forth.”

Although the file wrapper exhibited does not disclose the views of the examiner, this substitute must have proved unsatisfactory, because a second substitution was made, which embodied the two final claims of this patent. They read as follows:

"(1) The wooden ball trough for pool tables, provided with rabbets, *e*, and with strips, *C*, *C*, of elastic material, such as is described, secured in the rabbets so that the ball will travel only on their upper and inner edges, as and for the purpose set forth.

"(2) The wooden ball trough for pool tables, comprising the pieces, *A*, *A*, and, *b*, *b*, provided with rabbets, *e*, in the pieces, *A*, *A*, and with the strips, *C*, *C*, of elastic material, such as is described, secured in the rabbets so that the ball will travel along their upper and inner edges, as and for the purpose set forth."

Now, it will be observed that the idea of the invention was to escape the noise produced by the rolling along of the balls within troughs lined with cloth, which was not entirely satisfactory as a noise absorber and which soon wore out. For this was substituted parallel ways or skids on which the balls "travel wholly"; these ways being of soft rubber or other suitably noiseless material. The next step in the first substitute was to prescribe ways of some suitable soft and noiseless material, arranged so that the ball must travel on the angular portions or edges thereof. The final claims differ only in that they specify rabbets in which the strips or ways of elastic material are set, the ball traveling as before on their upper and inner edges.

The use of skids or ways upon which spherical bodies may be rolled is old in all arts to which such a use is pertinent. Furthermore, the Augustin patent, No. 472,423, granted April 5, 1892, discloses a track with parallel skids or ways upon which the balls roll. This track was covered with leather or other so-called suitable material. In the Goss patent, No. 507,900, granted October 31, 1893, the conduit was composed of several parallel wires or rods covered with soft rubber to prevent injuring the balls and to deaden the noise. It is plain that the use of ways or skids was obvious as well as old, and the substitution of rubber as a material could scarcely involve invention. Under these conditions the patentee apparently was compelled to narrow his invention to the employment of rabbets in which these rubber strips were set. The rabbet is an old and well-known form of construction within which to anchor some other element to add steadiness. Its employment in this structure required no exercise of the inventive faculties, nor did the resulting combination.

It is contended that the requirement that the ball should travel upon the inner and upper—that is to say, the angular—edges of the strips, was novel; but if a sphere be made to travel upon ways of any description placed far enough apart so as to retain that sphere wholly upon them, it will be seen that no other result is possible. A portion of the ball will inevitably sink below the angular corner and the movement will be along those corners. This is equally true of all other ways or skids that have been used. Rubber is, of course, more noiseless than cloth or leather, but that is a matter of common knowledge. It is now also urged that the speed of the ball is thus retarded. The inventor apparently had no conception of this, for he does not mention

it. From any point of view I am unable to discover either novelty or invention in the claims of this patent in suit.

For the sake of completeness it may be well to add that, if complainant's devices were patentable, defendant's structure is a plain infringement, but from the preceding discussion this consideration becomes immaterial. As was said at the outset, the device for conducting the balls from the pockets beneath the table to a common receptacle was a valuable improvement, involving novelty and invention; but that device is not presented by the patents in suit. We have here only the gradual and obvious betterments involving only such incidental improvements as would naturally suggest themselves to the skilled mechanic or workman in the manufacture of pool tables having the prior art before him.

In *Brunswick-Balke-Collender Co. v. Wagner & Adler Co.* (C. C.) 155 Fed. 120, these same patents were before Judge Platt of the Southern district of New York. His decision was based upon different references and a distinct alleged infringing device. He found for the defendant, partly upon the ground of lack of invention and partly upon that of noninfringement. Nevertheless, his conclusions as to the patents involved coincide practically with those herein expressed. I am aware that Judge Morris, in the district of Maryland, entertained a contrary view; nevertheless, each case must be decided upon the record as presented and upon the independent judgment of the chancellor.

It follows that the bill cannot be maintained as to any of the patents in suit, and must be dismissed.

CROWN CORK & SEAL CO. OF BALTIMORE CITY v. BROOKLYN
BOTTLE STOPPER CO. et al.

SAME v. AMERICAN CORK SPECIALTY CO. et al.

(District Court, E. D. New York. July 29, 1913.)

PATENTS (§ 326*)—IMPROVEMENT OF MACHINE—DECREE RESTRAINING INFRINGEMENT—NEW COMBINATION—CONTEMPT.

Bogdanffy's patents, Nos. 1,053,565 and 1,053,898, issued February 18, 1913, covering a machine for the manufacture of bottle closures, *held* merely a new combination and new form of device, dependent on the methods covered by the prior Painter and Wheeler patents, only changing the order of the steps in the attachment of the cork seal or gasket to the closure, and therefore a mere colorable change, not amounting to a new discovery, so that defendants' use thereof after issue pending appeals from decrees entered December 7, 1912, restraining defendants from infringing the Painter and Wheeler patents, constituted a contempt, punishable by motion for attachment.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613-619; Dec. Dig. § 326.*]

In Equity. Suit by the Crown Cork & Seal Company of Baltimore City against the Brooklyn Bottle Stopper Company and another. Applications for attachment of defendants for contempt in violating de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

crees restraining the infringement of the Painter and Wheeler patents covering a machine for the manufacture of bottle closures. Granted.

Philipp, Sawyer, Rice & Kennedy, of New York City (James Q. Rice, of New York City, of counsel), for complainant.

Livingston Gifford, of New York City (Robert B. Killgore, of New York City, of counsel), for defendants.

CHATFIELD, District Judge. Applications for attachment of the defendants in the above-entitled actions for contempt by violation of the injunctions issued herein, pursuant to decrees of December 7, 1912, have been considered upon affidavits, as well as the record in the cases themselves, and have been elaborately argued and briefed. Appeals from the decrees have been taken, but not yet heard, and it appears that the defendants have, since the entry of those decrees, been using machines which they allege are constructed and operated in accordance with a method patent issued to one A. Bogdanffy, under No. 1,053,898, on the 18th day of February, 1913, and a machine patent to Bogdanffy, issued on the 18th day of February, 1913, No. 1,053,565.

Bogdanffy is a mechanic in the employment of a company in Brooklyn, whose interests are allied with those of the defendants in these actions. Prior to the actual issuance of his patent, the defendants used his form of appliance, with his permission, and knew during the trial of this action of the Bogdanffy suggested changes.

The affidavits in opposition show that the solicitor for the defendants, as well as the solicitor engaged in obtaining Bogdanffy's patents, and other solicitors of great reputation in New York and other places, rendered opinions, prior to the decree in this action, to the effect that the device shown in the Bogdanffy patents was not an infringement of the Painter and Wheeler patents, unless those patents be construed so broadly as to render them invalid. Again, after the decree was rendered herein, other solicitors of like standing expressed to the defendants the opinion that the use of the Bogdanffy device and method would not render the defendants liable for contempt.

Attention has been called by the defendants to the decision in this district in the case of *Onderdonk v. Fanning* (C. C.) 2 Fed. 568, in which the court said, upon motion to punish for contempt, that issuance of a patent since the decree covering the alterations complained of indicated that the changes were not so plainly colorable as to entitle the plaintiff to an attachment, and that the questions should not be disposed of upon motion.

In *Wirt v. Brown* (C. C.) 30 Fed. 187, this court again held that a change of construction, with the obtaining of a patent for the changed form, made it necessary to bring an independent suit.

In *Bonsack Mach. Co. v. National Cigarette Co.* (C. C.) 64 Fed. 858, Judge Lacombe held that the weight of authority was clearly against the proposition that where a machine differed in some respects from that passed upon in the case, and was made under a patent issued subsequent to the decree, the question of infringement should not be settled upon motion to punish for contempt.

On the other hand, the complainant cites the cases of *Blair v. Jean-*

nette-McKee Glass Works (C. C.) 161 Fed. 355, *Queen v. Green* (C. C.) 170 Fed. 611, *Lepper v. Randall*, 113 Fed. 627, 51 C. C. A. 337, and *Norton v. Jensen*, 49 Fed. 859, 1 C. C. A. 452, as authority for the proposition that where a change is merely colorable, or where the variation is not such as to constitute new discovery, or where the party is merely making use of the doctrine of equivalents, or of immaterial changes, without other purpose than to evade the injunction, the questions raised by such acts should be passed upon in connection with the interpretation of the decree in the original action, and that the complainant should not be put to the expense of an independent suit.

The present case would fall plainly under the decision of *Onderdonk v. Fanning*, supra, and *National Harrow Co. v. Hanby* (C. C.) 54 Fed. 493, which held that the granting of a patent is prima facie proof that the machine covered by the patent does not infringe any other patent within the knowledge of the Patent Office, if it were not for the fact that the Bogdanffy patents are upon their face a claim for improvements over the art which the record makes plain was embodied in the Wheeler and Painter patents considered in this action, and if Bogdanffy's machine patent were not merely a new combination, or a new form of device, dependent upon the methods and the right to use a combination of this nature covered by Painter and Wheeler.

Bogdanffy's method patent presents a somewhat broader question, for it is difficult to see how a new combination of parts, or an improvement in a machine, even if patentable, can of itself furnish a new method, and be more than mere description of the functions performed by the machine in doing work in the new way.

Bogdanffy's method is a claim that he secures better results by changing the order of certain steps and processes, and for the purpose of this motion we need not consider whether he thereby shows sufficient patentable novelty to obtain a patent as for an improved process or method.

The real question is that suggested in *Hardwick v. Masland* (C. C.) 71 Fed. 887, and *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017, in which case the Supreme Court said:

"Two patents may both be valid, when the second is an improvement on the first, in which event, if the second includes the first, neither of the two patentees can lawfully use the invention of the other without the other's consent"—citing *Star Salt Caster Co. v. Crossman*, 4 Cliff. 568, Fed. Cas. No. 13,321.

See, also, *Eldred v. Kirkland*, 130 Fed. 342, 64 C. C. A. 588; *Ryder v. Schlichter*, 126 Fed. 487, 61 C. C. A. 469.

This makes it necessary to determine upon this motion whether the Bogdanffy patents are prima facie evidence of an independent invention, or whether they are merely prima facie evidence that the Patent Office found a patentable improvement or a patentable new combination available to those who had the right to use the Painter and Wheeler method and machines.

The various experts for the defendants upon this motion have given testimony as to the advantages which they consider are obtained by applying the cork seal or gasket to the closure after the melting of the

adhesive has been secured. Demonstration was offered upon the argument to indicate that the cork was livelier, or not so brittle, when not subjected to the greater degree of heat. One of the experts for the defendants has testified that the defendants' cork is cold when made to adhere; and all of these experts, as well as the counsel whose opinions have been presented in the case, base their conclusions upon the proposition that in the Bogdanffy machine the closure is not heated after the parts of this closure are assembled.

The differences between the complainant and the defendants can be summed up in one question, as to whether Bogdanffy gets away from the Painter and Wheeler patents by heating a closure, made and treated like the Painter and Wheeler closures with the cork omitted, and immediately (as a subsequent step) inserting a cold gasket of cork into the heated closure, and then subjecting these then assembled and heated parts under pressure, in the way in which a carpenter allows glue to set when applied in liquid form.

The machines now in use by the defendants are similar in structure and function to those which were enjoined under the decree, except with respect to the apparatus and arrangement for inserting the cork in the closures.

In the machines enjoined by the decree the cork was inserted while the closure was being assembled; that is, before it was fed into the machine, and before it was subjected to any heat, while progressing under the influence of the star ring. In the defendants' present machine, the closure is assembled without the cork, moved forward under the influence of the star ring, through the zone in which heat is applied directly from the burners, and then, while the holding parts of the machine are still in their heated condition, and while the tin, gum, and paper of the closure are in heated condition, the cork is added. The closure is then beyond the burners, and no new heat is added thereto. The plunger pressure is applied as before, and the closure, when released, is discharged, with the parts in exactly the same relation and form as when made by the machines enjoined under the decree.

The complainant contends that the process of subjecting the closure to heat while it is being assembled is an equivalent for subjecting the closure to heat after it has been assembled, and it also contends that the application of heat, through the plates of the machine, the tin material of the cap, and the adhesive, to the surface of the cork which is to be adhered, is "an application of heat to the entirely assembled closure before it is subjected to pressure."

The complainant therefore alleges that the variations in the process are merely the use of equivalent steps, or, at most, of an improved step, in carrying out the process covered by the patents whose validity has been sustained.

In these respects it must be held that the complainant is correct, and that the defendants' experts, as well as the counsel whose opinions have been introduced in this matter, have erroneously based their conclusions upon the assumption that the application of heat to the assembled closure must be confined to an application which does not

start until after the closure has been entirely assembled, and which ceases when the direct contact of the gas burners is removed.

But it was held on the trial of the case that the application of heat through an oven or plate, under which the gas burners were set, was the equivalent of heating the closures directly, and the court is unable to see why any other than mechanical change is shown by applying some of the heat before the last part—that is, the cork—is inserted, and then continuing the supply of heat from radiation, instead of direct contact with the flame.

As a matter of fact, the record shows that the closures in the process of assembling had some preparatory heating before the insertion of the cork, under the old oven and Painter methods, and this Painter 1892 patent, No. 468,226, discloses the idea of heating the tin cap and adhesive, and then inserting the cork by means of a plunger. This would defeat the Bogdanffy patent, and show that it was not patentable invention, if, as claimed by the defendants, the Painter 1892 patent has disclosed the precise methods which the defendants are now following.

The decree and the record herein show that the Painter 1892 patent did not employ the elements of time and pressure in the way that these functions are used under any of the patents now being discussed. The claim that the Wheeler and Painter patents would be invalid, if construed broad enough to include the defendants' methods and machines, was disposed of upon the decision of the case, except in so far as the defendants seek to avoid that result by claiming that their present structure and method is that of the old Painter patent.

It is evident that, according to the findings in the case, this claim cannot be substantiated, or that it would render their present patent invalid. If the Bogdanffy patents are not valid, or if the defendants do not operate thereunder, then this court is bound to determine whether or not the defendants' structures infringe, and to decide this motion accordingly.

For these reasons it would seem that the doctrine of *Onderdonk v. Fanning*, supra, cannot apply, and that the court should determine whether the change in the structure and method used by the defendants is merely colorable, and whether they should be prevented from using the changed machines so long as the decree which has been entered is in force.

Upon the record it must be held that the defendants' structure is covered by the claims of the Painter and Wheeler patents held valid in this action, and that they therefore are infringing those patents, and are technically in contempt of court therefor. The advice of counsel is not a defense against acts which of themselves are contempt of a court's decree. Such advice may free the party disobeying the decree from further punitive action by the court beyond the necessary enforcement of strict compliance with the injunction. But this must be compelled, and the motion for attachment will be granted.

ACME STEEL GOODS CO. v. AMERICAN METAL FASTENERS CO.
(District Court, N. D. Illinois, E. D. July 18, 1913.)

No. 30,766.

1. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—PLEADING.

In a suit for infringement of a patent for an improvement in the manufacture of metal fasteners, evidence is admissible to show that there was a demand for such fasteners, that they had not gone into commercial use because of their cost, and that such cost had been so reduced by the patented machine that they at once came into general use, and under the new equity rules such facts should be pleaded.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. § 310.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PROCESS AND MACHINE FOR MAKING METAL FASTENERS.

The Norton patents, No. 859,686, for a process of making corrugated metal fasteners, and No. 956,540, for a machine for practicing such process, *held* infringed by a machine which embodies the essence of the invention and differs from that of the patent only in increasing the number of parts and using three operations to accomplish what is done by the patented process and machine in one.

In Equity. Suit by the Acme Steel Goods Company against the American Metal Fasteners Company, impleaded as the Wolf-Craig Company. On final hearing. Decree for complainant.

Rector, Hibben, Davis & Macauley, of Chicago, Ill. (Frank Parker Davis, of Chicago, Ill., of counsel), for complainant.

Harry P. Simonton and William R. Rummier, both of Chicago, Ill., for defendant.

SANBORN, District Judge. Bill for infringement of two patents, one covering a corrugated metal fastener, called a "saw-tooth" fastener, the patent having been issued to Elliott S. Norton, and assigned to complainant, dated July 9, 1907, and numbered 859,686, the other on a machine for making the fasteners, issued to the same person, and so assigned, dated May 3, 1910, and numbered 956,540. Certain questions are raised as to the allegations of the bill, and want of novelty and infringement are set up as defenses.

The bill and answer are in the usual conventional form in use before the new rules took effect. When the case was first heard complainant offered evidence tending to show a prior want of such a device, unsuccessful experiments to meet it, and complainant's success. As none of these things are expressly pleaded, an objection to the proposed evidence was sustained, but complainant was given time to amend. Accordingly an amendment was filed, alleging in substance as follows: (1) That prior to the patent, the fastener in question had not gone into commercial use. (2) That efforts to produce it by various processes had been unsuccessful. (3) That the demand for it had remained unfulfilled. That upon the marketing of complainant's fasteners, an industry of large proportions grew as a result of the method of manufacture. (4) That an allied industry also grew up, to wit, the industry of manufacturing and selling automatic machines for driving the fasteners.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] Defendant filed a motion to strike out the amendment as immaterial and impertinent; also to strike out a clause of the original bill alleging public acquiescence in complainant's patent rights. The motion was made on the ground that the only relevant issues were validity and infringement, and that it is inadmissible to broaden a patent, or fix the range of equivalents, by offering any evidence whatsoever. The motion was heard with the merits, and the whole taken under advisement. The evidence sustains these allegations.

As to the question of pleading: The United States courts have generally given consideration, as well as much weight, to matters like those so pleaded and proved. They seek to get behind the mere paper of the patent and ascertain what the actual industrial conditions were, what demand there was for the patented invention, and what effect it had upon the progress of the art. For this reason it is common practice to overrule demurrers to patent bills. *Bottle Seal Co. v. De La Vergne Bottle Seal Co.* (C. C.) 47 Fed. 59; *Krick v. Jansen* (C. C.) 52 Fed. 823; *Amer. Fiber-Chamois Co. v. Buckskin-Fiber Co.*, 72 Fed. 508, 18 C. C. A. 662; *Neideck v. Fosbenner et al.* (C. C.) 108 Fed. 266; *Stillwell v. McPherson* (C. C.) 172 Fed. 151; *Adrian Wire Fence Co. v. Jackson Fence Co.* (C. C.) 190 Fed. 195.

Such testimony does not broaden the patent, although the actual result may be otherwise. It enables the court to give the invention its proper place in the development of the art. Satisfactory evidence of a long-felt want will go far to indicate patentable invention. *Pieper v. Electro Dental Mfg. Co.*, 160 Fed. 932, 88 C. C. A. 112.

Now that trials in patent cases are in open court, and the taking of depositions or oral testimony out of court is made the exception by the new rules, the bill should plead matters of the kind referred to, so that defendant may have opportunity to meet the issue, and not be taken by surprise. No change in the rule of admissibility, however, has been made. And such evidence is material where, as in this case, the patents are for an improvement in manufacture, rather than in the quality of the devices themselves. The old method of making these fasteners was just as good, if not better, than the new; but by the old method each fastener had to be sharpened by hand. For this reason they could not be made cheaply; the production cost being prohibitive. The old fastener would break down the grain of the wood into which it was driven, but by sharpening with a file it could be used with success. By complainant's machine they can now be made by the ton with small expense, thereby bringing into use for box making, etc., large quantities of useless lumber. The old process of grinding the fasteners invariably formed burrs in the throats or spaces between the points of the teeth. By the new the fasteners are cut so as to avoid this defect, grinding being used only as a slight finishing treatment, and only by way of economy in manufacture. Partly in view of the result the patentee's discovery rises to the dignity of invention, and the class of evidence in question is just as much admissible to show the relation of the discovery to the art, and its proper place therein, if not more so, than in case of a new product or device.

[2] The question of novelty: Claim 1 of the method patent reads thus:

"An improved process of producing sharpened corrugated metal fasteners, the same consisting in bringing one longitudinal edge of a cross-corrugated metal strip to a series of short sharpened edges or points with intervening U-edges by a single operation on each side of the strip, removing at one diagonal cut the metal of the strip between the ridge of each corrugation and a median line of the same and the neighboring reverse corrugation."

The description of the machine patent follows quite closely the method patent. It covers a machine for rapidly turning out the corrugated fastener in a long strip, by a single cutting operation on each side of the strip.

There are two main differences between complainant's and defendant's process. Complainant cuts the metal at the middle line of the strip by a single operation, leaving a sharp cutting edge, needing no further sharpening; but a light grinding operation is practiced to save knife sharpening, and which is a matter of economy. Defendant makes the same kind of a cut by two operations, with knives operating in the same plane, but operating not on the middle line of the strip, but slightly back of it, so that the fasteners are not sharp enough for use without the additional grinding of the strip along the edge to sharpen the points. In this way defendant uses three operations, instead of the single one described in the quoted claim; or, assumed that the two cuts of the knives in the same plane to be the equivalent of complainant's single cut, defendant uses two operations to complainant's one. So the question is whether the rule of equivalents can apply.

There is no doubt that defendant has appropriated the essence of the Norton patents by dividing up operation or doubling the operative parts. Defendant's machine was devised by a former employé of complainant, whose work was to look after the fastener machines.

Instead of cutting the strip away on its middle longitudinal line, so as to leave the edges sharp, defendant cuts a little outside of such line, thus leaving a more blunt point, which is then sharpened by grinding. It also makes two slices of the material instead of one, by knives operating exactly in the same plane. The wording of the Norton claims, which require the cutting to be on the median longitudinal line of the strip, is thus avoided. In other words, defendant took a patent limited more than the prior art required, and, while appropriating the very essence of the real invention, after it had become successful in a marked degree, escaped the literal meaning of the claims by broadening the cutting line, and using three operations to sharpen the fasteners instead of one. In *Oval Wood Dish Co. v. Sandy Creek Co.* (C. C.) 60 Fed. 285, the infringing machine used two knives to do the work of one in the patented machine. Judge Coxe held this to be immaterial, saying that plaintiff's claim might have been broader, and that the court should not permit unnecessary limitations to destroy the benefit of the invention.

The situation presented is not an unfamiliar one. After a useful

product had been known from 15 to 20 years, and its advantages appreciated, and unsuccessful attempts made to commercially produce it in order to fill an insistent demand for it, Norton, the inventor of the patents in suit, made a discovery. After he, too, had labored for a long time to solve the problem that had baffled the trade, he hit upon the way to do the thing practically and commercially. His company saw, when Norton put the thing in practice, that it was a solution of the problem, and promptly brought it to commercial form. As soon as the article produced by the Norton process was put upon the market, it was immediately seized upon by the trade which had so long demanded it. The demand was large and constantly increased, so that complainant found it necessary to repeatedly duplicate its machinery for producing the article. An enormous business grew up as a direct result of this discovery of Norton's. An allied industry sprung from it, that of manufacture of box nailing or corrugated joint fastener driving machines. The article not only sold by the carton or box, such as found on the shelves of hardware stores, but in bulk, by weight, and in large coils or continuous strips, for use in the automatic driving machines. It sold by the barrel, and even by the car load. Naturally this thing was coveted by competitors, but the merits of it appear to have been so far realized that most of the competitors have respected the patent rights of the complainant.

At this point there enters the field a competitor, officered by a former employé of the complainant company, and having associated with it another former employé, who had been employed in the complainant's factory to look after the very machines which complainant was using to turn out this product. The machine is so changed as to multiply the necessary steps, and thus escape infringement if possible.

Under these circumstances complainant is entitled to liberal treatment. *Oval Wood Dish Co. v. Sandy Creek Co.*, supra.

Infringement of a useful invention cannot ordinarily be escaped by a mere multiplication of operative parts. *Bonnette Sprinkler Co. v. Koehler*, 82 Fed. 428, 27 C. C. A. 200; *Standard Caster & Wheel Co. v. Caster Socket Co.*, 113 Fed. 162, 51 C. C. A. 109.

A meritorious invention should not be evaded for any but substantial reasons. The question is whether the substance of the invention has been taken. *Cimiotti Unhairing Co. v. American, etc., Co.*, 115 Fed. 498, 53 C. C. A. 230.

"If the patentee's ideas are found in the construction and arrangement of the subsequent device, no matter what may be its form, shape, or appearance, the parties making or using it are deemed appropriators of the patented invention, and are infringers. An infringement takes place whenever a party avails himself of the invention of a patentee without such a variation as constitutes a new discovery." *Norton v. Jensen*, 49 Fed. 859, 1 C. C. A. 452.

Defendant uses three operations to perform what the complainant does in one, but this increase of motion is merely for the purpose of avoiding the patent claims. There would not seem to be any invention in taking two strokes where one would do the same work, or in so setting the knives as to leave an edge to be afterwards sharpened, which might as well be sharpened by the first stroke. Defendant has not

made any new discovery, or apparently used any invention, merely ingenuity in trying to escape infringement of a meritorious patent. Ingenuity has been displayed, but apparently nothing more. The rights of the public are not so precious as to justify piracy. It is as important to protect the inventor against piracy as the public against unauthorized monopoly. *Brammer v. Schroeder*, 106 Fed. 918-920, 46 C. C. A. 41.

A decree should be entered for injunction and accounting as prayed.

TOD v. KUYKENDALL

(District Court, D. Colorado. July 21, 1913.)

No. 6,103.

1. JUDGMENT (§ 934*)—ACTION ON FOREIGN JUDGMENT—LIMITATION—EFFECT OF REVIVOR.

Statutory proceedings to revive a judgment which has become dormant constitute in substance a new action, and the judgment rendered therein is a new judgment, from the date of which only limitation begins to run against an action thereon in another jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1764, 1766-1768; Dec. Dig. § 934.*]

2. JUDGMENT (§ 934*)—VALIDITY OF STATUTE—ACTIONS ON FOREIGN JUDGMENTS.

The provision of Rev. St. Colo. 1908, § 4076, fixing a limitation of three months for actions on foreign judgments which were rendered on causes of action accruing more than six years prior to the commencement of the action in Colorado, is void as fixing the time unreasonably short.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1764, 1766-1768; Dec. Dig. § 934.*]

At Law. Action by William Stewart Tod against John M. Kuykendall. On demurrer to complaint. Overruled.

Chas. W. Burdick, of Cheyenne, Wyo., and Edmund J. Churchill, of Denver, Colo., for plaintiff.

J. J. Laton, Wm. V. Hodges, and Mason A. Lewis, all of Denver, Colo., for defendant.

LEWIS, District Judge. This is an action on a foreign judgment, commenced March 17, 1913. It is alleged that the plaintiff, on August 19, 1895, recovered a judgment against the defendant in the District Court, a court of general jurisdiction, sitting within and for the County of Laramie, in the State of Wyoming, in the sum of six thousand and eighteen dollars and fifty-eight cents (\$6,018.58), together with costs.

Thereafter, and on April 17, 1912, in said District Court, the plaintiff obtained, and there was entered pursuant to statutory provisions in said State, a judgment of revivor of the said judgment entered in August, 1895, for and in the amount of fourteen thousand and forty dollars and sixty-five cents (\$14,040.65), together with costs; and for said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

last-named sum, with interest thereon, and costs, plaintiff seeks judgment against the defendant here.

We find in the Wyoming Compiled Statutes, 1910, the following in force during all of said proceedings in the Court of that State: (Sec. 4689) If execution be not issued within five years a judgment becomes dormant; (Sec. 4664) No action shall be brought to revive the judgment after twenty-one years after it becomes dormant; (Sec. 4663) "When a judgment * * * becomes dormant, it may be revived in the same manner as prescribed for reviving actions before judgment; * * * if sufficient cause be not shown to the contrary, the judgment shall stand revived for the amount which the Court finds to be due and unsatisfied thereon."

To the complaint the defendant has interposed a demurrer. And as grounds therefor, claimed on argument, the protection of the statute of limitations (Sec. 4076, R. S. Colo., 1908),—both the six-year and the three-months' periods therein given. That section reads thus:

"4076. Cause of action without the state—Six years—Sec. 16. It shall be lawful for any person against whom an action shall be commenced in any court of this state, wherein the cause of action accrued without this state, upon a contract or agreement expressed or implied, or upon a sealed instrument in writing, or upon a judgment or decree rendered in any court without this state, more than six years before the commencement of the action in this state, to plead the same in bar of the action in this state; Provided, That if said judgment or decree rendered without this state be based upon a cause of action which had accrued more than six years prior to the commencement of the action on such judgment or decree in this state, and the said judgment or decree had been rendered without this state more than three months prior to the bringing of such action thereon in this state, it shall be lawful for any person against whom any action or (on) such judgment or decree shall be brought, to plead the same in bar thereof."

It is contended by the defendant that the action here is on the judgment of August, 1895, that the proceedings in revival of that judgment were only in the nature of an order "that the plaintiff have execution for the judgment mentioned in the said scire facias, and costs," and that the court was without power to enter a judgment on those proceedings in the nature of an original judgment. 2 Freeman on Judgments, 4th Ed., §§ 442, 447; 1 Black on Judgments, § 498; 18 Encyclo. Pl. & Pr., p. 1061. And that in applying the six-year limitation, the date of the revival of said judgment (April, 1912) must be ignored.

[1] 1. The argument is plausible, and sustained by *Meek v. Meek*, 45 Iowa, 294; but in view of what is said in *Lafayette County v. Wonderly*, 92 Fed. 313, 34 C. C. A. 360, it can not be accepted as the rule here. In considering the effect and results of a proceeding by writ of scire facias, it is there said:

(Page 314) "Its purpose is not to raise the issue of the validity of the original judgment, but to offer the debtor an opportunity to show, if he can, that the former judgment has been paid, satisfied, or released, and, if he can not, to avoid the statute of limitations against the judgment and its lien, if it have one, and to give the creditor a new right of enforcement from the date of the judgment of revival. Its effect, when it results in a new judgment, is to avoid the statute of limitations, to set it running again from the date of the judgment of revival, and to reinstate the old judgment." (Page 316)

"One of the objects and effects of a revival is to avoid the statute of limitations, to give the creditor a new right to enforce his judgment from the date of the judgment of revival, and to set the statute of limitations to running from the date of the latter judgment. The creditor is entitled to pursue this purpose and to accomplish this result by the use of this writ, both under the express provisions of the statute of Missouri, and under the general rules of law which govern the use of the writ."

There is other authority sustaining the claim that scire facias is in substance a new action, tendering an issue for adjudication, rather than a mere continuation of the former suit; and that it creates a new right which the Court must finally adjudicate, as shown by the record of revivor. *Browne v. Chavez*, 181 U. S. 68, 71, 21 Sup. Ct. 514, 45 L. Ed. 752; *Brown v. Wygant et al.*, 163 U. S. 618, 623, 16 Sup. Ct. 1159, 41 L. Ed. 284; *La Fitte v. Salisbury*, 43 Colo. 252, 95 Pac. 1065; *Walsh v. Bosse*, 16 Mo. App. 231.

It is claimed by defendant that the Wyoming statute was taken from Ohio and that before its adoption in Wyoming the Supreme Court of Ohio, in *Misner v. Misner*, 41 Ohio St. 678, held that the writ of scire facias to revive a judgment was not a new action, but additional proceedings in the original suit, merely to obtain execution on the original judgment, and that therefore the revival proceedings in the Wyoming Court should not be viewed as a judgment, but merely as an order. But nothing is discovered in the Wyoming statute, taken from Ohio, different from like statutes in other states providing for the revival of judgments. The Missouri statute, considered in *Lafayette County v. Wonderly*, supra, is substantially like the Wyoming statute. The principle involved is a general principle in law and we feel that the opinion in the Lafayette County case controls here, notwithstanding the *Misner* case.

[2] 2. The three-months' period of limitation, found in the above statute, was held void on account of fixing the time unreasonably short for the commencement of this character of action in *Lamb v. Powder, etc., Co.*, 132 Fed. 434, 65 C. C. A. 570, 67 L. R. A. 558.

It is therefore ordered that the demurrer be overruled, and the defendant may have twenty days to answer.

UNITED STATES v. HALL et al

(District Court, S. D. Georgia, E. D. August 4, 1913.)

1. CRIMINAL LAW (§ 314*)—PRESUMPTIONS—PUBLIC KNOWLEDGE.

Every person is charged with knowledge that all railways in the United States are mail routes, and that all passenger trains on such railways ordinarily carry United States mail.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 747; Dec. Dig. § 314.*]

2. POST OFFICE (§ 48*)—UNITED STATES MAILS—OBSTRUCTION—INDICTMENT.

Where an indictment charged that accused unlawfully, knowingly, and willfully obstructed and retarded the United States mails and a certain car carrying the same, by unlawfully, etc., beating the engineer and fireman, without whose services the train could not be moved, it sufficiently

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

charged that defendant knew that there was a mail car in the train, and that in obstructing the train he was obstructing the United States mails.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. § 48.*]

Clint Hall and others were indicted for retarding the mails. On demurrer to indictment. Overruled.

Alexander Akerman, U. S. Atty., of Macon, Ga.

A. Pratt Adams, of Savannah, Ga., for defendants.

SPEER, District Judge. This is a demurrer to two indictments, both against Clint Hall, Mac Davis, Harry Collins, Luther Dent, Cleve McElmore, and E. C. Brown, and No. 545 against Tom McLeod also. The indictments charge that the persons named—

“did unlawfully, knowingly, and willfully obstruct and retard the passage of the United States mail and of a certain car carrying the same.”

In one indictment it is charged that the train was proceeding from Augusta, in the state of Georgia, to Madison in the state of Florida, and was carrying the mail between Augusta and Madison aforesaid and intermediate points. In that indictment it is charged that the persons named did—

“unlawfully, knowingly, and willfully by threats of personal violence compel the fireman, who was engaged in firing the engine pulling said train, * * * to desert said engine, and by threats of personal violence did prevent P. C. Newsome, the engineer who was engaged in running the engine pulling said train, who had temporarily left said engine in the discharge of his duties as such engineer, returning to said engine, it being necessary to have a fireman and an engineer on said engine in order to fire and operate the same, and did thereby prevent said train carrying United States mail, and said mail car carrying United States mail, from proceeding from Vidalia aforesaid to Madison aforesaid.”

In the other indictment it is charged that the train on the Georgia & Florida Railway was carrying a mail car, in which car was a large quantity of United States mail, and was then and there being prepared to run from Vidalia to Millen, in the county of Jenkins, and the persons named did—

“unlawfully, knowingly, and willfully assault and beat one Sam Watson, who was then and there engaged in firing the engine which was prepared to pull said train, it being then and there necessary to have a fireman on said train to keep up the fire in the engine in order for it to pull said train, and by threats and violence did compel the said Sam Watson to leave said engine and desist from his duties as fireman of said engine, and did thereby prevent said train carrying United States mail, and said mail car carrying United States mail, from running from Vidalia aforesaid to Millen aforesaid.”

The demurrers in both cases are practically identical, and, after the general objection that the indictment does not charge any offense, both contain that objection most material, viz., because the said indictment fails to set forth that the said defendants knew that there was a mail car on said train, or that there was United States mail in the car, or knew that the said train was carrying the mail.

[1, 2] It is probably true that these indictments will not be gen-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

erally cited as precedents of precise and careful language or of accurate criminal pleading; but it is also true as matter of law that every one is charged with knowledge that all railways in the United States are mail routes and that all passenger trains on such railways ordinarily carry the United States mail. Persons, therefore, who by violence, or otherwise, unlawfully stop the operations and movements of such trains on the railways, are as a matter of law charged with knowledge that they may and are likely to arrest the operations of the Post Office Department of the United States which this criminal statute is intended to protect.

The law is a progressive science. Nothing is more important to commerce and intercourse between the people of the country, and, indeed, between our country and other lands, than the safe and certain transmission of the mails. The niceties of criminal pleading with regard to the scienter and guilty knowledge at the time when Chitty compiled and Archbold expounded have little importance to cases of this sort in a period when the mail is hourly distributed in centers of population and when the rural mail carrier daily transports it to the rude, humble, and well-nigh inaccessible homes, where other visitors are perhaps rarely seen. The operation of the mail is matter of common knowledge. It is known to the most ignorant.

It is true that the accused is entitled to be fully informed of the nature of the accusation against him, in order that he may make his defense; but when an indictment presents the charge that the accused unlawfully, knowingly, and willfully obstructs and retards the passage of the United States mail, and a certain car carrying the same, by unlawfully, knowingly, and willfully assaulting and beating the engineer and fireman, without whom it is also common knowledge that the train cannot move, he is sufficiently apprised of the charge against him to meet the constitutional requirement. This is all that the law demands. Had the pleader charged that the accused knew there was mail on the particular train, it would, perhaps, have been better, because it would have avoided the demurrer and consequent delay. I hold the indictment sufficient. It will be for the jury to determine whether the accused in fact acted unlawfully, knowingly, and willfully as charged.

For these reasons, the demurrers are overruled

JOHNSON v SOUTHWESTERN SURETY INS CO.

(District Court, D. Oregon. July 21, 1913.)

No. 5,923.

PRINCIPAL AND SURETY (§ 81*)—SURETY BOND—PENALTY.

The sum mentioned in the surety bond given to secure performance of an improvement contract will be regarded as a penalty, and not liquidated damages, the plaintiff in an action thereon being entitled to recover for breach only actual compensation, when capable of ascertainment; and where there is nothing in the record to indicate that it would be either

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

difficult or impossible to assess actual damages from testimony, there being no evidence as to the actual damage suffered, plaintiff's recovery will be limited to nominal damages.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 126; Dec. Dig. § 81.*]

At Law. Action by Lee A. Johnson against the Southwestern Surety Insurance Company. Judgment for plaintiff.

William C. Bristol, of Portland, Or., for plaintiff.

Chester V. Dolph, of Portland, Or., for defendant.

BEAN, District Judge. This is an action on a bond executed by one E. T. Allen as principal and the defendant company as surety, by the terms of which they acknowledged themselves bound to one Swartz, the plaintiff's assignor, in the sum of \$5,000, the conditions being:

"Whereas, the above principal has contracted to plant to commercial orchard of standard apples certain tracts of land covered by mortgages for the unpaid purchase price, and the planting has not been completed on all of the tracts: The conditions of this obligation are such that, should said principal complete the planting of [certain described real property] to commercial orchard, in a scientific manner and method, then this obligation shall be null and void; but otherwise to remain in full force and effect."

The plaintiff in his complaint alleges the necessary jurisdictional facts, the incorporation of the defendant, the execution of the bond, its assignment to the plaintiff with the consent of the surety, the failure of Allen to plant the orchard as agreed, notice thereof to the surety, the demand on the surety for the payment of the penalty named in the bond, and its refusal, and demands judgment for the full penal sum stated in the bond. The case was tried before the court upon stipulation of the parties without the intervention of a jury.

The evidence fully sustains the allegations of the complaint. Indeed, there is no controversy but what the bond was executed as alleged, that it has been assigned to plaintiff, and that Allen failed to comply with its conditions. The defendant contends, however, that the plaintiff is entitled to nominal damages only, because there is no averment that he suffered any actual damages by the breach of the bond, and there was no proof offered from which such damages can be ascertained. The object of the bond was to secure the performance of Allen's contract to plant the orchard. It was therefore conditioned for the performance of a collateral agreement, and the presumption is that it was intended to cover any actual damages that might be sustained by the breach of such agreement.

The great principle underlying actions for breach of contract is compensation or reimbursement for the loss sustained. The courts, therefore, are always disposed to adopt the construction that the sum mentioned in an instrument of the kind now under consideration is a penalty, and not liquidated damages, and to confine the recovery for a breach to actual compensation, when it is capable of being ascer-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tained, rather than to adopt the construction which, without reference to the actual damages, fixes the amount of recovery before a breach. 19 Enc. of Law, 402. 13 Cyc. 95; *O'Keefe v. Dyer*, 20 Mont. 477, 52 Pac. 196; *Chicago House Wrecking Co. v. U. S.*, 106 Fed. 385, 45 C. C. A. 343, 53 L. R. A. 122; *Johnson v. Cook*, 24 Wash. 474, 64 Pac. 729. When there is no adequate means of ascertaining the damages from a breach of a contract, the parties may, perhaps, by apt language, fix in advance the amount payable in that event, and, where the actual damages are necessarily so speculative and uncertain as to be incapable of definite ascertainment, the sum stipulated in the bond will be regarded as liquidated damages, and may be recovered without proof of actual damages, unless it is so manifestly so disproportionate to the injury as to be unconscionable. *Salem v. Anson*, 40 Or. 339, 67 Pac. 190, 56 L. R. A. 169, 91 Am. St. Rep. 485; *Harris v. Miller* (C. C.) 11 Fed. 118; *Hull v. Angus*, 60 Or. 95, 118 Pac. 284.

But the bond in suit does not come within this rule. There is nothing in the instrument itself to evidence an intention of the parties that the sum stated therein should be considered as liquidated damages, even if such a stipulation would be enforced. *Chicago House Wrecking Co. v. U. S.*, supra. And there is nothing in the record to indicate that it would be either difficult or impossible to assess the actual damages from testimony. Indeed, it is not apparent that any particular difficulty will be encountered in showing the damages resulting from the breach of the condition of the bond. Upon the pleadings and evidence as they now stand, the plaintiff is limited to a recovery of nominal damages only. 2 Page, Contracts, 170; *Johnson v. Cook*, supra. But, since it is probable that he has in fact suffered actual damages, he ought not to be dismissed from court without relief.

The entry of judgment will be deferred for 10 days to give time for the consideration of the authority and advisability of permitting the complaint to be amended, if the plaintiff, within the time stated, applies for leave to do so.

INVESTMENT REGISTRY, Limited, v. CHICAGO & M. ELECTRIC R.
CO. et al.

(District Court, N. D. Illinois, E. D. January 2, 1913.)

No. 29,281.

1. JUDICIAL SALES (§ 19*)—MISCONDUCT AFFECTING VALIDITY—AGREEMENTS TO PREVENT BIDDING—"GENERAL PUBLIC."

The general rule is that the public shall be free to bid for property offered at a judicial sale, and the law prohibits the making of any bargain or the doing of any thing which takes from the public this liberty of action; but the term "general public" as used in this connection does not include persons who, by virtue of lien, or ownership, or otherwise, have an existing interest in the property to be sold. Such persons may combine together for the protection of their interests, and may even expressly agree not to bid against each other, in furtherance of a plan mutually agreed upon as calculated to conserve their rights, but in so doing their

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

activities must not operate to exclude any part of the general public as purchasers at the sale.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 41–43, 45, 46; Dec. Dig. § 19.*]

2. RAILROADS (§ 192*)—FORECLOSURE SALE—VALIDITY—COMBINATION IN RESTRAINT OF BIDDING.

A contract and agreement between prospective bidders for the property of an electric railroad company at foreclosure sale, by which bonds of the company, all of which had been bought up by the interests controlling a street railroad company, with the intention of buying the property and using the bonds in payment, were sold to another syndicate of bondholders, with the consent and assistance of a third group of bondholders, at a large advance over their cost to the sellers and above their market value, with an agreement that the sellers and their agents should, "to the extent of their power and influence, * * * in every reasonable way, aid and assist the purchasers in becoming the purchasers" of the property, *held* to constitute a combination in restraint of bidding which required the sale at which the property was bought for less than its fair value by the assignee with notice of the purchasing syndicate to be set aside on the objection of a nonassenting bondholder.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634–642; Dec. Dig. § 192.*]

3. RAILROADS (§ 192*)—FORECLOSURE SALE—VALIDITY—COMBINATION IN RESTRAINT OF BIDDING.

The sellers of the bonds in such case having had no interest in the property prior to the foreclosure suit, nor except as acquired for the express purpose of becoming bidders at the sale, the burden rested on the purchasers to show clearly that the sellers had altogether lost interest as intending purchasers of the property prior to the beginning of the negotiations resulting in their elimination.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634–642; Dec. Dig. § 192.*]

4. RAILROADS (§ 192*)—FORECLOSURE SALE—VALIDITY—COMBINATION IN RESTRAINT OF BIDDING—KNOWLEDGE AFFECTING PURCHASER.

The purchasing syndicate, subsequent to its purchase of the bonds, entered into a contract by which it transferred its interests to a reorganization committee, which later became the purchaser at the sale. By such contract the committee expressly assumed the obligations of the syndicate under its contract for purchase of the bonds including liability for a deferred payment thereon of over \$800,000. *Held*, that the committee was charged with notice of and affected by the illegality of such contract.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634–642; Dec. Dig. § 192.*]

5. CORPORATIONS (§ 482*)—SALE OF PROPERTY UNDER MORTGAGE—CONFIRMATION—MATTERS CONSIDERED.

If it comes to the actual notice of the court on the hearing of a motion to confirm a foreclosure sale of the property of a public service corporation that the intending purchasers have conceived a definite program, through a reorganization plan, to use such property when acquired in a way, or to effect a purpose, forbidden by the Constitution or public policy of the state, the court may properly take such fact into consideration.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877–1888; Dec. Dig. § 482.*]

In Equity. Suit by the Investment Registry, Limited, against the Chicago & Milwaukee Electric Railroad Company. On motion to confirm sale by special master and objections of Matilda W. Moses thereto. Objections sustained, sale set aside, and resale ordered.

Moses, Rosenthal & Kennedy, of Chicago, Ill. (Joseph W. Moses, of Chicago, Ill., of counsel), for objector.

Mayer, Meyer, Austrian & Platt, of Chicago, Ill., for Smith and Ford and Reorganization Committee.

McCulloch & McCulloch, of Chicago, Ill., for Merchants' Loan & Trust Co.

Rosenthal & Hamill, of Chicago, Ill., for Western Trust & Savings Bank and Willoughby G. Walling.

LANDIS, District Judge. The matter before the court is an application to confirm the sale of the property of the Chicago & Milwaukee Electric Railroad Company. To the entry of this order objections have been filed by a bondholder. The reasons urged by the objector are that the price bid for the property is inadequate, and that the purchaser suppressed competition at the sale. Although a vast amount of contradictory testimony was heard on these issues and certain other matters conceived to have a bearing upon them, the court is of opinion that the real questions presented are rather free from difficulty.

There are two Chicago & Milwaukee Electric Railroad Companies organized under the laws of the states of Illinois and Wisconsin, respectively. Each company constructed an electric interurban railroad in the state of its organization. These two railroads were in reality one continuous line of track, extending from Evanston, Ill., to Milwaukee, Wis., with a branch in Illinois. In 1902, the Illinois company executed a mortgage covering all of its property to secure the payment of \$5,000,000 of bonds, of which \$4,000,000 were issued and are now outstanding. In 1905, the Wisconsin company executed a mortgage covering all of its property to secure the payment of an issue of \$10,000,000 of bonds, all of which were issued and remain unpaid.

In January, 1908, proceedings by creditor's bill were started in the Circuit Court here and at Milwaukee, in the Eastern District of Wisconsin. In these proceedings receivers were appointed here and there. Subsequently bills were filed in the two jurisdictions to foreclose the mortgages mentioned, and these proceedings were consolidated with the original proceedings; the receivership having been continued to the present time. During the year 1912, decrees of sale were rendered here and at Milwaukee covering the property, respectively, of the two companies. The sales took place at Waukegan, Ill., and Racine, Wis., on September 25th, last. For the Illinois property \$1,650,000 was offered and for the Wisconsin property \$1,600,000. These bids were made by agents representing a Reorganization Committee, with which committee there had been deposited approximately 95 per cent. of each issue of bonds under foreclosure. There being no other bids, the master has recommended their acceptance. The objection comes from a holder of 12 Illinois bonds which the owner refused to deposit under the proposed plan of reorganization, and, of course, attacks here only the Illinois sale.

To get an understanding of the questions presented by the objections, it is necessary to go back to the early days of the receivership.

In 1908, what was called the "Illinois Committee" was formed. Its declared purpose was the protection of the interests of holders of Illinois bonds. Other committees of Illinois bondholders were also formed for the assertion of the rights of their members. At about the same time there came into existence the Wisconsin committee for the protection of the interests of holders of Wisconsin bonds. With these various committees bonds of the respective issues were deposited. In addition to these committees, there was organized what was called the "Assisting Syndicate," which was an association of individuals, banks, and other financial institutions in Canada, where there were heavy holdings of Chicago & Milwaukee Electric stock and bonds. The securities in the hands of the Canadians were in the main the issue of the Wisconsin company, although to a slight extent they held obligations of the Illinois corporation. There was also in Holland what has been referred to in these proceedings as the "Dutch Syndicate," which held 1,647 of the Illinois bonds under foreclosure.

After the appointment of the receivers, and in 1908, the local street railway interests in the city of Milwaukee conceived the idea of acquiring the Illinois property. They already owned or controlled an electric road extending from Milwaukee south to Kenosha, and their purpose in seeking the Illinois division of the Chicago & Milwaukee Electric was in furtherance of their plan to acquire a through line from Milwaukee to Chicago. It was their program, if they got the Illinois division, to extend it north to a connection with their road at Kenosha, and to build south from Evanston, which extensions, with trackage rights into Chicago to be negotiated with one of the elevated companies, would accomplish their purpose. As a means to this end, these Milwaukee interests set out to acquire Illinois bonds. The purchases were made through attorneys George P. Miller and Francis Bloodgood, of Milwaukee, and William W. Gurley, of Chicago. They endeavored to acquire the Dutch holdings and sent a representative to Holland for that purpose, but their efforts in that direction were frustrated by the activities of the Canadian Assisting Syndicate, which organization obtained control of those bonds under an agreement with the Dutch, which agreement was followed, in March, 1911, by the purchase by the Canadians of the 1,647 Dutch bonds, at 65 cents on the dollar. Shortly after this purchase, the interest of the Milwaukee street railway people was bought by the Assisting Syndicate and finally, by an agreement entered into in January, 1912, the Reorganization Committee, which was the purchaser at the judicial sale under examination here, succeeded to the rights and liabilities of the Assisting Syndicate. It is these transactions between the Milwaukee street railway interests and the Assisting Syndicate, and between the Assisting Syndicate and the Reorganization Committee, taken in connection with what is claimed to be an inadequate bid for the property, upon which the objector bases the charge of suppression of competition.

The contract between the Milwaukee interests and the Assisting Syndicate was executed April 21, 1911, with the advice and approval of the committee of Wisconsin bondholders. By its terms the syn-

dicade acquired from the Milwaukee interests what those interests had purchased, namely, 530 bonds of an underlying issue of \$1,080,000 and 401 bonds of the issue under foreclosure. For these bonds the syndicate agreed to pay \$1,122,636.25. Of this amount \$300,000 was to be paid not later than June 1, 1911. The remaining \$822,636.25 was to be paid within 30 days after the sale of the Illinois property under the decree of this court. The agreement further contained the following provision:

"It is further agreed that the vendors (the Milwaukee interests) and their associates, including George P. Miller and Francis Bloodgood, shall, to the extent of their power and influence and information, in every reasonable way aid and assist the purchasers in becoming the purchasers of the Chicago & Milwaukee Electric Railroad property (both divisions), and in making effective their plan of reorganization thereof."

This contract, which was executed by Charles F. Pfister and John I. Beggs, as the Milwaukee interests, and H. S. Osler, an attorney of Toronto, Canada, for the Assisting Syndicate, contained other provisions, and there were other agreements entered into between the parties at about the same time; but the provisions pertinent here have been mentioned.

It is the position of the objector that this contract amounted to a buying off of an intending bidder. This is controverted by the Reorganization Committee, whose contention it is that what happened was merely a coming together of bondholders for harmonious cooperation, with a view to conserving their respective interests. Furthermore, they deny that the Reorganization Committee is chargeable, even though the transaction between the Milwaukee interests and the Assisting Syndicate is to be condemned.

[1] The general rule is that the public shall be free to bid for property offered at a judicial sale, and the law prohibits the making of any bargain or the doing of any thing which takes from any part of the public this liberty of action. The term "general public," however, as used in this connection, does not include "persons who, by virtue of lien or ownership or otherwise, have an existing interest in the property to be sold." Such persons may combine together for the protection of their interests. They may even expressly agree not to bid against each other, in furtherance of a plan mutually agreed upon as calculated to conserve their rights. But in so doing, their activities must not operate to exclude any part of the general public as purchasers at the sale.

[2] Therefore the first question here is whether or not the agreements mentioned amounted, in fact, only to a combination between bondholders for the mere protection of their interests, as such, or whether those agreements kept away from the sale persons who, while they did have an existing interest in the property as holders of bonds, were in reality so circumstanced that they must be classed with the general public.

[3] Prior to the collapse of the Chicago & Milwaukee Electric enterprise, the Milwaukee street railway people had no investment in this property. They did not hold a dollar's worth of bonds or stock. Their purchases began only after the receivers were appointed. And

their sole purpose in buying the bonds was to use them as an instrumentality in acquiring the property; that is to say, to turn them in as part satisfaction of a bid to be made by them at the judicial sale. Their relation to the property was therefore that of a prospective bidder. This attitude made it hazardous for other persons seeking the property to bargain with the Milwaukee interests for their elimination. In such case there is a burden on the beneficiaries to show clearly that the parties selling out had altogether lost interest as intending purchasers of the property *prior to the beginning of the negotiations resulting in their elimination.*

And so in this proceeding it was sought to be established that the Milwaukee people had abandoned their original purpose; the contention being that they lost interest and changed their attitude when the Assisting Syndicate got in ahead of them and bought the Dutch bonds, which took place March 10, 1911. But this claim is not justified by the evidence. George P. Miller, of counsel for the Milwaukee people, testified that the negotiations by his clients for an entrance into Chicago over the elevated road continued uninterruptedly after the Assisting Syndicate bought the Dutch bonds, and indeed (as he expressed it) "were not abandoned until we sold out," which was on April 21, 1911. As exhibiting the real attitude of the Milwaukee people at the time of the sale, the following is quoted from the witness Miller's testimony:

"We had a large interest in this line, having acquired those bonds. Now, the Assisting Syndicate had a large interest. We had to go ahead and protect our interest, and we tried to protect our interest by getting an entrance into Chicago, * * * and we offered to buy out the Assisting Syndicate, and said, 'We will pay you all your bonds cost and all your expense, and give you an attorney's fee—all the special expense.' And they refused that, and thereupon they agreed to do the same for us."

And so the contract of April 21st was made, by which the Assisting Syndicate bought out the Milwaukee interests, paying for their bonds over and above the cost to the Milwaukee interests, \$300,000, as an item of expense, and taking from them, as has been shown, a covenant that they would use all reasonable means to aid the Assisting Syndicate in becoming the purchaser of the property at the sale. There has been considerable controversy as to why this covenant was inserted in the agreement and why the \$300,000 exaction was acceded to by the Assisting Syndicate. All the lawyers that had to do with that transaction on either side testified that the purpose was most emphatically not to get rid of a possible competing bidder. And, although it figures out that the Canadians paid about 120 for bonds that were a drug on the market at 65, it never occurred to any of these gentlemen that the arrangement might even possibly have the effect of getting rid of a competing bidder. So at least they testified here as witnesses in this proceeding. Of course, there is a remote, very remote, possibility that this is true. But the court finds it to be the fact that, when the Canadians bargained to pay this money in excess of the bond value, it was to get something besides bonds, and the only other thing that was worth their while to pay the Milwaukee people this excess money for, was noninterference by the Milwaukee people

with the syndicate's reorganization plan. This they were not at liberty to do, as against the protest of a nondepositing, nonassenting holder of Illinois bonds.

[4] The question remains, on this branch of the subject: "Was the Reorganization Committee afflicted with the taint of this transaction?" The answer is found in certain documentary evidence. On the 1st of May, 1911, the committee of Wisconsin bondholders, which it will be recalled had assented to the policy of the purchase of the interests of the Milwaukee people by the Assisting Syndicate ten days before, made an agreement with that syndicate by which it was declared to be the intention of the parties that the only liability which was to be assumed by the syndicate under its contract with the Milwaukee people was the purchase of the block of 401 Illinois bonds under foreclosure, and that the balance of the amount by that contract agreed to be paid the Milwaukee interests was to be paid by the reorganized company which, after foreclosure and sale of both the Illinois and Wisconsin properties, should purchase and own the railroad. And to secure the syndicate against its liability to pay the balance of \$822,000 (as by its contract with the Milwaukee people the syndicate had agreed to do), the Wisconsin Committee pledged all the Wisconsin bonds that had been deposited with that committee. Following this, and on January 26, 1912, the Assisting Syndicate made a contract with the Reorganization Committee (which purchased the property on September 25th). And this contract expressly provided that the agreement between the Assisting Syndicate and the Wisconsin Committee, just referred to, should be assumed and discharged by the Reorganization Committee. In other words, the purchaser at the judicial sale undertook the payment of the balance of \$822,000 due the Milwaukee people under their agreement with the Assisting Syndicate, which payment, as has been observed, had been agreed to be made to the Milwaukee interests as part consideration for their elimination. When the Reorganization Committee thus deliberately agreed to step into the shoes of its predecessor, it could not acquire and enjoy the rights and benefits, shorn of the liabilities. The legal effect of its undertaking is just the same as if (instead of the transactions having occurred as narrated) the Milwaukee street railway people had gone to Waukegan on the day of the sale and appeared there in the attitude of a bidder, and had been induced to abandon that attitude by the promise of the Reorganization Committee, then and there made, to pay them the money which, in April, 1911, the Assisting Syndicate had agreed to pay.

[5] On the question of value of the property, the court heard evidence as to physical conditions, earnings (past, present, and prospective), franchise conditions, and other matters, fairly entitled to be considered under this head. It is my opinion, on the showing made, the Illinois property is reasonably worth approximately \$4,500,000. The bid of the committee and the obligations which the purchaser must assume aggregate in the neighborhood of \$2,800,000 as the cost of the Illinois property to the committee. The bids on both divisions, as has been seen, total \$3,250,000. Add to this the amount of the

underlying bonds and all other expenses estimated by H. M. Byllesby & Co., on behalf of the Reorganization Committee, as necessary to be incurred in adjusting and discharging liens and rehabilitating the property, including extensions and betterments, and the total cost to the committee of the entire line in Illinois and Wisconsin, including a connection with the elevated road in Chicago, approximates \$6,700,000. Now, it is the declared purpose of the Reorganization Committee, if it gets this property, to turn it over to a new company which the Reorganization Committee proposes to organize. And it is the committee's plan that this new company shall then be authorized to issue securities as follows:

First mortgage bonds.....	\$10,000,000 00
Second mortgage bonds.....	4,500,000 00
Third mortgage bonds.....	6,000,000 00
Capital stock.....	6,000,000 00
Total	\$26,500,000 00

Of this total of \$26,500,000, it is the committee's purpose that the new company shall put out \$21,000,000, to be used in putting through this reorganization. This appears from the Reorganization Committee's plan which they have distributed to bondholders and which bears the approval of Attorneys Newman, Northrup, Levinson and Becker, of Chicago, Attorneys Lash and Osler, of Toronto, Canada, and Attorney John P. Wilson, of Chicago. It is very plain, from these figures, that a great mass of these securities, if issued, will really represent no investment whatever by anybody at any time. And this is proposed to be done in the teeth of the Public Utility Law of Wisconsin and the Constitution of Illinois. Our fundamental law contains the following provision:

"No railroad corporation shall issue any stock or bonds except for money, labor, or property actually received and applied to the purposes for which such corporation was created."

Even if this prohibition in our Constitution should be held to apply only to steam railroads, the prohibition would still remain as the deliberately declared public policy of the state of Illinois, and as such entitled to respect and obedience. And while doubtless it is true that a court is under no obligation, of his own motion, as a volunteer, to go outside and institute an inquiry into the plans and purposes of persons offering themselves as purchasers of property at a judicial sale, I take it as being rather plain that if it comes to the actual notice of the court in a regular judicial proceeding that such intending purchasers have conceived a definite program to use such property, when acquired, in a way, or to effect a purpose, forbidden by the Constitution or public policy of the state, the court should at least pause and hesitate before turning the property over. In the present case this course will enable the members of the committee and their counsel to consider, before the property shall again be offered for sale, whether it would not be well to adopt a program authorized by law.

There will be another sale, at which time there will have to be a higher bid.

PRICE v. SOUTHERN POWER CO. et al.

(District Court, W. D. South Carolina. July 21, 1913.)

1. REMOVAL OF CAUSES (§ 36*)—TRIAL IN FEDERAL COURT—RIGHTS OF NON-RESIDENT PARTY—REMOVAL OF CAUSE.

The right of a citizen of another state, when sued in a state court by a citizen of the state in which the suit is brought, to have the controversy heard and determined in a federal court of the district, is constitutional, and cannot be defeated by fraudulent joinder as a codefendant of a citizen of the state for the purpose of defeating a removal of the cause.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

2. REMOVAL OF CAUSES (§ 36*)—CITIZENSHIP OF PARTIES—JOINDER OF CITIZEN DEFENDANT—JOINT CAUSE OF ACTION.

Where plaintiff sues a citizen, and a noncitizen defendant in a state court on an alleged joint cause of action, plaintiff's right to a trial in the state court as against a petition by the noncitizen defendant to remove the cause depends on whether the action alleged is really a joint one, or whether there is sufficient uncertainty to preclude an inference that the allegation of a joint liability is merely colorable or pretensive.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

3. REMOVAL OF CAUSES (§ 36*)—JOINDER OF CITIZEN DEFENDANT.

Plaintiff is entitled to make a charge against a citizen and a noncitizen defendant jointly, if he so elects, and the fact that he may be mistaken, and misconceive his rights, and that his claim might ultimately turn out to be only against the noncitizen defendant, does not affect his right to a hearing in the state court, providing his joinder is in good faith, and not to prevent a removal by a pretensive and fraudulent joinder.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

4. REMOVAL OF CAUSES (§ 36*)—PARTIES—CITIZEN AND NONCITIZEN DEFENDANTS—JOINDER—FRAUD.

Since fraudulent joinder of a citizen with a noncitizen defendant in order to prevent a removal of the cause may be established by circumstances, the court will find a fraudulent joinder, if it is clear that the citizen defendant can be held liable to plaintiff on no reasonable legal ground on the cause of action alleged in the complaint, and that plaintiff knew or must be presumed to have known such to be the case when the suit was brought.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

5. CORPORATIONS (§ 494*)—LEASED PROPERTY—OPERATION BY LESSEE—INJURIES TO INDIVIDUALS—LIABILITY.

Under the South Carolina law, where a public service corporation leases its property to an operating company, the lessor remains liable, together with the lessee, for injuries to third persons through the operation of the property by the lessee.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1905; Dec. Dig. § 494.*]

6. REMOVAL OF CAUSES (§ 36*)—CITIZEN AND NONCITIZEN DEFENDANTS—JOINDER—FRAUD.

Where plaintiff's decedent was killed by electricity alleged to have been negligently permitted to escape from the wires of the C. Power Co., a resident corporation, while the lines and property of that company were being operated by the S. Power Co., a nonresident corporation, and there

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was no recorded transfer of such property by the C. Co., nor had there been any such notorious transfer of such property to the S. Co. as would have been sufficient to charge plaintiff with notice that the C. Co. had no longer any interest in the ownership or operation of the property, plaintiff's joinder of the latter with the S. Co. in a suit for damages was not fraudulent, so as to entitle the S. Co. to remove the cause to a federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

At Law. Action by Edward B. Price, as administrator of the estate of Edward B. Price, Jr., against the Southern Power Company and the Catawba Power Company. On motion of plaintiff to remand the cause to the state court. Granted.

Thomas F. McDow and J. S. Brice, both of Yorkville, S. C., for plaintiff.

McDonald & McDonald, of Winnsboro, S. C., and Osborne, Cocke & Robinson, of Charlotte, N. C., for defendants.

SMITH, District Judge. This cause came on to be heard on a motion to remand the same to the court of common pleas for the county of York, and having been heard on the pleadings and the affidavits submitted by each side, and counsel on both sides having been heard. It is ordered and adjudged as follows:

The petition for removal sets up as ground for removal: That the entire controversy in the cause is between the plaintiff and the defendant seeking to remove the action, viz., the Southern Power Company, and that the defendant the Southern Power Company is a citizen of the state of New Jersey and the plaintiff a citizen of South Carolina. That the other defendant, the Catawba Power Company, is a citizen of the state of South Carolina, but is a wholly unnecessary party, and has been by the plaintiff joined as a codefendant for the purpose of fraudulently preventing a removal of the cause to this court; the plaintiff well knowing at the time of the institution of the action that the Catawba Power Company was not a necessary or proper party. The removal is not sought on the ground that in the proceeding instituted by the plaintiff there is involved a controversy or cause of action separate and distinct from other controversies in the cause, and which separate controversy can be wholly determined between the plaintiff and the Southern Power Company without the presence of the other defendant, but it is sought on the ground that the only cause of action set up by the plaintiff is one between the plaintiff and the Southern Power Company, and that the joinder of the Catawba Power Company has been fraudulently made in order to prevent a removal.

Inasmuch as, if the Catawba Power Company was not a defendant, there would, under the complaint and the allegations of the petition for removal, be no question as to the right of the defendant the Southern Power Company to remove, the question is limited to whether there has been a fraudulent joinder of the Catawba Power Company as a defendant for the purpose of preventing a removal. The plaintiff insists in the affidavits filed that the joinder of the Catawba Power

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
206 F.—32

Company was made in the utmost good faith; that the record had been diligently searched, and that it showed the Catawba Power Company to be the party owning the power plant and the main line transmitting the electric power which caused the injury; that there was nothing on the record to show any transfer of any kind to the Southern Power Company, which presumptively was operating the lines, both main and spur, as the lessee or agent of the Catawba Power Company; that the plaintiff had no knowledge of anything to the contrary, and that under these circumstances the plaintiff was entitled to hold both defendants responsible.

To support its position the defendant seeking the removal has filed affidavits to the effect that the Catawba Power Company had, some time prior to the injury complained of, transferred to the Southern Power Company its entire interest in the main transmission line by which the electric power was transmitted from the point of production to the spur line on which the injury complained of was inflicted, and that the spur line never had been owned by the Catawba Power Company, but had been constructed by the Southern Power Company, by which last company both the spur line as well as the main transmission line were exclusively operated at the time of the injury, and that the Catawba Power Company had no connection with the lines or their operation and could be in no wise responsible for the injury alleged in the complaint.

[1] The right of a citizen of another state, when sued in the state court of South Carolina by a citizen of South Carolina, to have the controversy heard and determined in this court is constitutional, and under the statute passed in pursuance of the Constitution for the removal of such actions to this court that right cannot be defeated by the fraudulent joinder as a codefendant of a citizen of South Carolina for the purpose of defeating a removal to this court and the trial in the proper jurisdiction. The rule on the subject has been laid down by the Supreme Court of the United States in the following cases: *Wecker v. National Enameling Co.*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757; *Chicago, B. & Q. Ry. Co. v. Willard*, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521; *Chicago, R. I. & Pac. Ry. Co. v. Schwyhart*, 227 U. S. 184, 33 Sup. Ct. 250, 57 L. Ed. —.

[2] The plaintiff may in good faith proceed in the state courts in such cases upon an action which he alleges to be joint, if it be so really, or if it is sufficiently uncertain as not to justify the inference that the allegation that the liability is a joint one is merely colorable or pretentive. But it is the duty of the federal courts not to sanction devices intended to prevent removals to the federal courts where one has that right, and to be equally vigilant to protect the right to proceed in the federal court as to permit the state courts in proper cases to retain their own jurisdiction. And where the claim is made in the petition for removal that the joinder has been fraudulently made for the purpose of preventing a removal, the question of fraud in the joinder must be tried and determined in the federal court. *Wecker v. National Enameling Co.*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757. When the plaintiff alleges a cause of action as existing

against defendants jointly charged by him, and one of them is a citizen of a different state, the fact that ultimately the claim may be adjudged a several one, existing only against the citizen of the other state, does not necessarily give to that party a right to remove.

[3] The plaintiff has a right to make his charge a joint one if he sees fit, and that he may be mistaken and misconceive his rights, and that his claim might be only against the citizen of a different state, does not affect his right to sue the defendants as jointly liable, providing it is done in good faith and not for the purpose of preventing a removal by a pretensive and fraudulent joinder. This may not be a very easily enforceable rule, as it leaves to the federal court in each case the duty of deciding whether in that particular case the joinder has been made for the purpose of preventing the exercise by one of the defendants of his statutory right to have the cause removed and tried in the federal court.

This involves in each case the question whether the party joined as a defendant is so clearly not chargeable, under any view of the law and facts, as to furnish just ground for the inference that the joinder of such a defendant could not have been made in good faith, but must have been pretensive, which makes the result in each case depend, not upon any general rule, but on the view the court takes as to this "pretensiveness" under the facts of each case. However that may be, it is the rule governing the question as laid down by the Supreme Court of the United States in the cases cited.

[4] The existence of fraud in such cases may be established as in other cases from circumstances. It is very seldom that fraud can be established, except by inference drawn from the circumstances of the case. If it be clear that legally the defendant who is a citizen of the same state as the plaintiff can be liable to the plaintiff on no reasonably legal ground on the cause of action set up in the complaint or declaration, and that the plaintiff knew or must be presumed to have known such to be the case, then the joinder as a codefendant of such citizen of the same state as plaintiff, the presence of which codefendant cannot be justified by any legal rule as to parties, so as that his presence as a defendant is explainable only by the joinder having been pretensively made so as to defeat a removal. This would justify the inference that the joinder was a fraudulent one on the part of the plaintiff.

[5] In the present case the affidavits show that the plaintiff had no sufficient cause to know that the Southern Power Company was the sole party responsible, and that the Catawba Power Company could not in any event be held responsible also. The line and power plant which furnished the power which inflicted the injury had been built by the Catawba Power Company. There was nothing on the record to show that the Catawba Power Company had transferred the property to the Southern Power Company, and that the latter was the sole party responsible. If the Southern Power Company were only acting as the lessee, agent, or suboperator of the Catawba Power Company, then the plaintiff might have had the right to claim that in the case of public service corporations both lessor, agent, or operator, and lessee and

suboperator, were responsible. By the law of South Carolina the lessor railway corporation continues responsible together with the lessee railway for damages to individuals through the operation of the leased property, and it would be not illogical to hold that the same rule prevailed in the case of other public service corporations.

[6] There does not appear from the affidavits to have been any such open, notorious transfer of the property from the Catawba Power Company, or substitution of the Southern Power Company in the place of the Catawba Power Company in the operation of the line, as would have sufficiently in the absence of any recorded transfer charged the plaintiff with notice that the Catawba Power Company had no longer any interest or part in the ownership or operation of the property. The party injured under such circumstances may have the right to claim that the unnotified public have the right to hold both parties liable. The evidence is not sufficient to show that the plaintiff was or should have been aware of such circumstances as would have clearly established that the Catawba Power Company was not an essential or proper party so as to justify the inference that its joinder as a defendant was not made in good faith, but for the sole purpose of preventing the exercise by the Southern Power Company of its statutory right of removal of the action to this court for trial, and was therefore a fraudulent joinder.

The motion to remand is accordingly granted, and the action is remanded to the court of common pleas for York county.

THE TITANIC.

(District Court, S. D. New York. July 3, 1913.)

1. COURTS (§ 350*)—FEDERAL COURTS—DEPOSITIONS—POWERS OF COURTS OF ADMIRALTY—RULES—COMMISSION FOR ORAL EXAMINATION.

Rule 6 of the general rules of the District Court for the Southern District of New York, of 1913, providing for the issuance of commissions to take testimony, either closed or open, and that they shall be executed as nearly as may be in accordance with the law of the state of New York, is within the power of the court, under Rev. St. §§ 913, 918 (U. S. Comp. St. 1901, pp. 683, 685), and is applicable to practice in admiralty, under rule 46 of the admiralty rules of the Supreme Court, and authorizes a court of admiralty to issue a *dedimus potestatem* to examine witnesses in a foreign country on oral interrogatories.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 923; Dec. Dig. § 350.*]

2. ADMIRALTY (§ 76*)—DEPOSITIONS—COMMISSION FOR ORAL EXAMINATION OF WITNESSES—PROCEEDINGS FOR LIMITATION OF LIABILITY.

A commission granted to damage claimants in proceedings for limitation of liability to examine orally in a foreign country certain witnesses in the employ of petitioner, and denied as to certain other witnesses presumably disinterested.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 588-591; Dec. Dig. § 76.*]

In Admiralty. Petition by the Oceanic Steam Navigation Company, Limited, as owner of the steamship Titanic, for limitation of liability. On application of the Long Island Loan & Trust Company and other

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

damage claimants for commission to examine witnesses. Commission granted.

This is an application for a *dedimus potestatem* to examine certain persons in the kingdom of Great Britain upon oral interrogatories and cross-interrogatories. The proceeding has been brought to limit the liability of the owners of the steamship *Titanic*, sunk on the 15th of April, 1912, in mid-ocean. The moving party has excepted to the petition for limitation, and has likewise filed an answer setting up negligence on the part of the vessel herself, and personal negligence of her owners. The persons to be examined in this action are partly members of the crew of the steamer and partly others. Other claimants joined in the application, which is opposed on two grounds: First, the lack of power of this court to issue such a commission; and, second, the impropriety under the circumstances.

George Whitefield Betts, Jr., of New York City, Edward D. Benedict, of Brooklyn, N. Y., and Reese D. Alsop, of New York City, for applicant.

Charles C. Burlingham, J. Parker Kirlin, and Norman B. Beecher, all of New York City, for the *Titanic*.

A. Gordon Murray, of New York City for claimant Nasrallah.

HAND, District Judge. [1] The sixth rule of the general rules of the District Court, first promulgated January 6, 1912, and repromulgated February 1, 1913, provides as follows:

"Commissions, either closed or open, shall be moved for (if not consented to) upon affidavits specifying the facts expected to be proven, together with the names of the witnesses, the shortest time within which the parties believe the testimony may be taken and the commission returned.

"No commission to examine unnamed witnesses shall issue except by order of the court, entered on consent or cause shown, nor shall a commission operate as a stay of proceedings except by special order of the court."

Then follows a paragraph regarding the settlement of interrogatories, and the rule then proceeds as follows:

"Commissions shall be executed as nearly as may be in accordance with the law of the state of New York."

The rules of the District Court are divided into five parts, general rules, common-law rules, equity rules, admiralty rules, and bankruptcy rules. The general rules are such as apply to all branches of the court's work, and were intended by the court especially to cover all the subsequent four. Under the old admiralty rules of the District Court, promulgated November 6, 1838, provision for the issuance of commissions was made. Rules 105 to 118. These provided for nothing but written interrogatories. Rule 119 provided that:

"The provisions in *perpetuum rei memoriam* to be used in this court may be taken under *dedimus potestatem*, or by any officer authorized by act of Congress to take depositions *de bene esse* to be used in the United States in like cases and by like proceedings as are now authorized by the Supreme Court of the state of New York."

The provision of 1912 abolished these rules, and left nothing in the admiralty rules which at all affected the taking of commissions. It was the clear intent of the court, therefore, to assimilate the taking of commissions in admiralty to the taking of commissions in equity or at common law, and to have but one method for all commissions, wher-

ever taken. No one disputes that under the law of the state of New York a commission may be executed on oral interrogatories, so that the power of this court depends upon the validity of the rule in question. Section 913 of the Revised Statutes (U. S. Comp. St. 1901, p. 683) provides:

"The forms of mesne process, and the forms and modes of proceedings in suits in equity and maritime jurisdiction in the Circuit and District Courts shall be according to the principles, rules and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof."

Section 918 (U. S. Comp. St. 1901, p. 685) provides:

"The several Circuit and District Courts may, from time to time, and in a manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing or returning of writs and process, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and all other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient to the advancement of justice and the prevention of delays in proceedings."

Rule 46 of the Supreme Court rules in admiralty provides that in all cases not provided for by those rules the district and Circuit Courts are to regulate the practice of said courts respectively in such manner as they deem most expedient to the due administration of justice in suits in admiralty.

Under the power so given Judge McPherson decided in *The Westminster* (D. C.) 96 Fed. 766, that the District Court had power to regulate the method of executing a commission *dedimus potestatem* in admiralty. Judge Blatchford, in *Bischoffsheim v. Baltzer* (C. C.) 10 Fed. 1, decided that the Supreme Court equity rule No. 67 changed the method of executing commissions to foreign countries, although he seems to have been also of the opinion that depositions *de bene esse* could be also issued, which can hardly be said to be the law at present. Judge Lanning, in *Encyclopedia Britannica v. Werner Co.* (C. C.) 138 Fed. 461, recognized the equity rule 67 as the authorization for open commissions in equity, following the reasoning in *Bischoffsheim v. Baltzer*, *supra*, and also the decision of Judge Green in *Edison Electric Co. v. Westinghouse, Church, Kerr & Co.* (C. C.) 138 Fed. 460, thus basing the change upon a Supreme Court rule which is certainly as subject to section 866 of the Revised Statutes as any other rule of court. Judge Blatchford in *The Louisiana*, 1 Ben. 328-330, Fed. Cas. No. 8,536, uses the following language of oral commissions in admiralty:

"It is a practice which is not new, and, being one calculated to promote the dispensation of justice, it ought to be observed in a proper case. This court has full control over the mode of procedure to be observed in the matter of taking testimony."

It is quite true that the decision in that case did not require the learned judge to decide that an oral commission might issue out of the admiralty, but the language is none the less an expression of his opinion.

Now the petitioner's answer to all this is that section 866, authorizing the issuance of commissions *dedimus potestatem* according to common usage, fixes as matter of law the method of execution as of the date of the passage of the statute. For this the supposed warrant lies in some language of Judge Brown in *United States v. Fifty Boxes and Packages of Lace* (D. C.) 92 Fed. 601. Concededly the decision in that case was quite different from the case at bar. Judge Brown had before him an objection that the commission was not executed in accordance with the laws of the state of New York. He said that the Conformity Act (section 914 of the Revised Statutes [U. S. Comp. St. 1901, p. 684]) did not control proceedings in the admiralty, that "common usage" meant the usage at the time of the revision of 1874, and that the federal courts were not bound to accommodate their practice to the changing regulations of state procedure. In this respect I do not think that Judge Brown's language is to be taken as meaning that under the powers reserved by sections 913 and 918, together with the forty-sixth Supreme Court admiralty rule, this court has no power to change the method of executing commissions. It is a detail of practice which would normally be within the competence of rules of court.

The phrase "common usage," of the statute, in my opinion only means such usage as may from time to time become common. We should remember that these words occurred in the original Judiciary Act of September 24, 1789 (1 Stat. 73, c. 20). I cannot suppose that all the incidents of practice at that time were necessarily crystallized by that statute for a period of 85 years until the revision of 1874, and similarly that the exact practice of 1874 will be crystallized without power of change until a new revision. The phrase seems to me to admit of changing practice as the new needs of the time require, and I can see no better method of establishing a new common usage than by rules of court. If this be not so, the whole detail of such practice must be held perpetuated in the statute until Congress changes it. That would run counter to the whole policy of federal procedure from the very outset, whose great boast has been its plasticity. I shall therefore follow the opinion of Judge McPherson in *The Westminster*, *supra*, and hold that rule 6 of the general rules of this court, authorizing all commissions to be executed in accordance with the law of the state of New York, give this court power in a proper case to issue a commission upon oral interrogatories.

[2] As to the propriety of granting an oral commission a different question arises. It seems to me eminently fair that the claimants shall have a chance to examine, and indeed to cross-examine, those who were present at the wreck, if in the petitioner's employ at the present time. It is true that they have been twice examined, but not by the claimants. It is a great disadvantage to be required to examine on written interrogatories witnesses to an event like this, who are in the employ of the other side. The very fact that they have once been examined makes it very important to call to their testimony what they have already said, if the story varies, and their best recollections may often be brought out only by those questions which prior answers themselves elicit. Fur-

thermore, the occasion was itself one of great confusion and terror, of which accurate details are not likely to remain. I can see no just reason why a certain number of the named witnesses should not be so examined, who were all of the ship's company and are the following:

Joseph Bruce Ismay.	Charles H. Lightoller.
Joseph G. Boxhall.	Frederick Fleet.
G. Symons.	G. A. Hogg.
Robert Hichens.	Archie Jewell.
Archibald R. Lee.	Hugh Woolner.
Frederick Barrett.	Joseph Scarrott.

As to Lord and Evans, of the Californian, and Balfour, of the Baltic, they are only called to prove the sending of marconigrams and the answer received. It is clear that there would be no need of their oral examination, except for the fact that they were then on ships owned by the petitioner or an allied company. That fact does not, in my judgment, render it at all necessary that they should be orally examined upon a single communication, reduced to writing at the time, or its answer, unless it should appear, for some reason not yet manifest, that there is some ground to expect that they will disown their previous testimony.

There are, besides, several witnesses mentioned in the affidavits whom surely it is unnecessary to examine orally. Their testimony is either of an expert kind, like Sir Ernest Shackelton and James Henry Moore, or as to the structure and equipment of the ship, like Mr. Sanderson and Mr. Wilding, or they are those who sent messages to the Titanic from vessels not owned by the petitioner, or any allied line, men who are certainly accessible for examination and can have no inducement to hide anything. It was always my own custom with friendly witnesses to learn in advance just what their testimony would be and to shape the interrogatories upon it, and I could never see any objection to that practice. The following are such witnesses:

James Henry Moore.	Harold A. Sanderson.
Edward Wilding.	Stanley Howard Adams.
Joseph Barlow Rawson.	George Elliott Turnbull.
Sir Ernest Shackelton.	James C. Barr.

Signor Marconi is in this country now, and may be examined *de bene esse*.

A third part of the witnesses I know nothing about. They are mere names appended to Mr. Betts' affidavit, and I have no means of judging whether justice requires their oral examination. They are the following:

Harold S. Bride.	Thomas Jones.
Herbert S. Pitman.	Walter John Perks.
Harold G. Lowe.	Edward John Buley.
George Thomas Rowe.	Geo. Fred Crowe.
Alfred Oliver.	C. E. Andrews.
Frank Osman.	Frederick Clench.
Edward Wheelton.	E. J. Moore.
W. H. Taylor.	John Poingdestre.
George Moore.	Thomas P. Dillon.

The great interests here involved justify the expense of an oral commission, but the petitioner should be protected from repeated applications. Therefore the order will allow any claimant to join in and examine under this commission, and will provide that he may use the testimony in his own case. Moreover, the order granting a commission, with this provision, will be sent to every claimant at least 20 days before the date fixed for the first examination. If the claimants take no steps to join in these examinations after such a notice, it is hardly possible that the court will consider any future application for similar relief.

Any witness who is mentioned of those to be orally examined may be excluded from the commission who is now on a ship plying regularly back and forth from the port of New York, provided the petitioner give notice where and when he will be at the disposal of the applicants for examination *de bene esse*.

The claimants may have a *dedimus potestatem* on written interrogatories for all those witnesses whom they do not examine orally, including Mrs. Lines.

Settle order on notice.

In re BALLANCE et al.

In re RUBIN.

(District Court, E. D. New York. July 18, 1913.)

BANKRUPTCY (§ 386*)—COMPOSITION—PROCEEDINGS TO SET ASIDE.

Evidence *held* to entitle a judgment creditor of a bankrupt, whose case was pending on appeal at the time of the bankruptcy and of a composition, to have such composition set aside on the ground of fraud, unless the bankrupt placed him on an equality with the other creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 606; Dec. Dig. § 386.*]

In the matter of William A. Ballance and the William A. Ballance Company, bankrupts. On petition of Wolf Rubin to set aside a composition, and demurrer thereto. Demurrer overruled.

Leo Oppenheimer, of New York City, for petitioner.

Jonas, Lazansky & Neuberger, of New York City (Edward Lazansky, of New York City, of counsel), for bankrupts.

CHATFIELD, District Judge. Application has been made upon affidavits to vacate a composition confirmed November 23, 1912, and to reinstate the bankruptcy petition.

It appears that the former bankrupt was in business in his own name, upon the 27th day of December, 1911, when a judgment for personal injuries was recovered against him, in the sum of \$2,638.96, by a workman in his factory. As security upon appeal, certain mortgages upon the real estate of Ballance and \$500 in cash were deposited for the benefit of the respondent Rubin. This judgment was affirmed upon the 6th day of December, 1912, but in the meantime Mr. Ballance incorporated the William A. Ballance Company, to which he transferred the assets of his business, except his real estate, and received

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

298 shares of the capital stock, of the par value of \$100 per share; the remaining 2 shares having been issued to two other individuals as incorporators.

In September, 1912, an involuntary petition was filed against William A. Ballance, and also the William A. Ballance Company. The schedules in bankruptcy of William A. Ballance show the judgment in question as secured, while the schedules of the company make no reference to the judgment creditor. The proceedings in bankruptcy resulted in a composition offer of 2 per cent. to the creditors of Mr. Ballance and 20 per cent. to the creditors of the corporation. All of the "corporation" creditors were included among the "individual" creditors. The compositions were carried through and the property turned back to Mr. Ballance and the Ballance Company.

In the meantime the appraisal in bankruptcy showed the land held as security by the judgment creditor to be worth less than the amount of incumbrance thereon. Upon sales in foreclosure still less was received, with the result that, at the time of the affirmance of the judgment, a deficiency existed in the place of the equity which Mr. Ballance stated when offering the bond.

It also appears that in the individual schedules the judgment creditor was listed as "Wolf Rubin, New York City," and he received no actual notice of the offer of composition. The statutory printed notice was given, and the money for the composition deposited. This was distributed before the judgment creditor learned that, although the equity upon which he was relying as security had been wiped out by foreclosure, Mr. Ballance and the Ballance Company were again in possession of their property and claiming a discharge from all debts scheduled, including the judgment, for the payment of which the creditor had been left to collateral finally amounting to the sum of \$500 deposited in cash.

The petition to vacate the composition charges fraud, not only in the formation of the Ballance Company and the representations under which the judgment creditor took the mortgaged property as collateral, but also in the method of making up the schedules and offering the composition. The respondent, Mr. Ballance, has demurred to the petition, and the matter has been argued as if upon exceptions to the sufficiency of the matters alleged in the petition as fraudulent.

It will be noticed that the petition was filed but a few days before the statutory six months expired. The demurrer has admitted all the allegations of the petition, and this might be construed to admit the charges of fraud in so far as these are allegations of fact; but the record shows that these charges of fraud are in substance conclusions; and the demurrer, therefore, presents substantially an admission of the items above stated, and leaves the question of whether they constitute fraud to the court for determination.

It is further suggested on the argument of the demurrer that the purpose of a composition and the determination of the statutory requirements as to the advantage of the creditors would require denial of the present application, inasmuch as it is in no way shown that the creditors generally would benefit by setting aside the composition, and

inasmuch as the alleged fraud affects the status of but one creditor, who, if he had been present and opposed, would not have been heard by the court, to the extent of finding upon the present showing that the composition should not have been approved.

This last statement of the law is generally in accord with a previous decision of this court (*In re Sacharoff & Kleiner* [D. C.] 163 Fed. 664); but the application thereof to a situation arising upon a debt scheduled against an individual bankrupt, and not scheduled against a corporation in composition of the bankrupt's former assets, must be considered further.

The general propositions, that fraud is shown by a false statement of the bankrupt "relied upon by a creditor in agreeing to a composition" (*In re Roukous* [D. C.] 128 Fed. 645), and that perjury with respect to the property under administration constitutes a false oath sufficient to prevent a discharge by the composition (*In re Conroy* [D. C.] 134 Fed. 764), may be taken as the starting point from which to consider the present application.

It appears from the record that the judgment creditor testified to having some knowledge of the pendency of bankruptcy proceedings, and the notice of discharge was published according to statute. This in general would be sufficient to bind a party who was merely trying to avoid the effect of mistake, accident, or his own neglect; but, as was shown in the *Roukous Case*, *supra*, an application to vacate the discharge upon the ground of fraud may be based upon after-discovered evidence. Even if a creditor has relied upon the general observance of the bankruptcy statute, he will not be estopped from seeking to set aside a composition or discharge, unless it be clearly shown that he was in possession of the information as to which he was guilty of laches, or that he deliberately ignored an opportunity to keep posted and to know of the facts which he should have taken into account.

But, when we consider the situation shown by this record as admitted, a different question is presented. It is evident that the corporation could be formed only with the assets which Mr. Ballance had the right to convey as against his creditors, generally, and that his stock in said corporation, and even the entire assets of the corporation, would be available to any individual member whose claim was not shown to be subordinated to a corporation creditor without notice of the individual debt. If Mr. Ballance's creditors had the right to look to the assets paid for stock in the corporation, then Mr. Ballance could not convey those assets, unless he could legally put all of his property out of his creditors' reach, or unless he received valid consideration therefor.

The judgment of the petitioner herein was then outstanding. It had been secured on appeal; but this was not equivalent to payment, and did not wipe out the personal obligation of Mr. Ballance, which would continue to exist if the collateral were not sufficient to satisfy the same. When therefore, Mr. Ballance conveyed his property to the corporation, he should have known that, unless the judgment creditor's claim was protected, he would be committing a fraud upon that creditor if the collateral proved insufficient. His own good faith as to the value of the collateral could not relieve him from his obligation as

judgment debtor. When both Mr. Ballance and the Ballance Company went into bankruptcy, he should have realized that his individual creditors had the right to attack the transfer to the bankrupt corporation, and to claim payment of their debts from the property of the corporation, except as the claim of corporate creditors should be superior thereto. This he ignored in making up the schedules, and thereby again committed a fraud, in the eyes of the law, upon his individual creditors, even if he did not have the intention of violating the bankruptcy statute. His statements about the matter, even in the face of the admissions by the demurrer, do not indicate the commission of perjury, and would not justify a finding that Ballance was not entitled, under any circumstances, to his discharge.

The creditor, Rubin, states that he had some knowledge that a bankruptcy proceeding was pending, and, although he may not have received notice of the application for composition, he was nevertheless bound to inquire into the effect upon his claim of the bankruptcy proceeding, or else be bound by the discharge effected through composition. The composition proceedings, however, were closed before Rubin's judgment was affirmed, and therefore before he could endeavor to realize upon the collateral given to secure the judgment pending appeal. Both Rubin and the bankrupt, however, had knowledge, prior to confirmation of the composition, that the security for the Rubin claim was inadequate, and the bankrupts knew that Rubin was in effect not secured beyond the \$500 cash deposited. If Rubin had applied for further security, or attempted to file his claim in bankruptcy, he might have learned sufficient to compel composition on his claim upon the basis of 22 per cent. But as to these matters he was guilty of laches. On the other hand, the pendency of the appeal prevented him from discovering what was in effect a fraud upon him, and he is therefore entitled to be placed in the position which all of the creditors would have been, if the entire amount of composition had been distributed equally.

The court can take no notice of the fact that certain creditors have received 22 per cent. and certain others but 2 per cent., as none of these creditors made objection to the proceedings, and their time to do so has expired. But the record is sufficient to show that the composition should be set aside upon the ground of the fraudulent result, unless Mr. Ballance places this creditor upon a par with the individual creditors whom he did recognize as creditors of the corporation, and unless he now completes a composition, which could have been approved by the court, as if to distribute the entire assets among all the creditors, including the petitioner.

The claims upon which a dividend was paid aggregated:

By the company.....	\$11,585.85
By the individual.....	7,930.60
Total.....	\$19,516.45
Dividend at 20 per cent. equals for the company.....	\$2,318.92
Dividend at 2 per cent. equals for the individual.....	159.46
Total dividends.....	\$2,478.38

The Rubin claim amounted to \$2,638.96, less \$500, and this would raise the total liabilities to \$21,655.41. On this amount 11.45 per cent. could have been paid with the sum of \$2,478.38. 11.45 per cent. of \$2,138.96 equals \$244.91, which should be paid by Mr. Ballance to the judgment creditor, in order to put him in the position to which he was entitled, and to avoid the elements of fraud resulting from the previous situation.

KIENDL v. TAUNTON et al.

(District Court, E. D. New York. June 26, 1913.)

BANKRUPTCY (§ 303*)—FRAUDULENT TRANSFER OF PROPERTY—ACTION BY TRUSTEE.

Evidence considered, and *held* to show that a bankrupt was joint owner with his wife of property which a short time prior to the bankruptcy they transferred to a corporation formed for the purpose, and that the trustee was entitled to have the transfer set aside as to his interest.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

In Equity. Suit by Adolph Kiendl, trustee of Charles Taunton, bankrupt, against Charles Taunton and the Taunton Pavilion, Incorporated. Decree for complainant.

Bruce R. Duncan, of Brooklyn, N. Y., for plaintiff.

Arthur J. Westermayr, of New York City, for defendants.

CHATFIELD, District Judge. The trustee in bankruptcy has brought suit against Charles Taunton and the Taunton Pavilion, Incorporated, alleging that Charles Taunton, the individual defendant, was adjudicated bankrupt upon his own petition, on June 25, 1912; that upon the 26th of April, 1912, one of Taunton's creditors recovered a judgment against him, upon which a stay of execution for 30 days was obtained, and before this stay had expired, or on the 21st day of May, 1912, the Taunton Pavilion, Incorporated, was organized under the laws of the state of New York, by Charles Taunton and his wife, and the property of Taunton and his wife in the bathing pavilion, and its lease, good will, chattels, etc., were turned over to this corporation in exchange for the capital stock issued. This capital stock was distributed in the proportion of 46 shares to Mrs. Taunton, 1 share to Charles Taunton, 1 share to Benjamin Frank, and 3 shares to the incorporators, which shares were subsequently transferred to Mrs. Taunton. The par value of these shares was \$100 each. Since that time the property has been run by Mr. Taunton, as manager, and by his wife, as cashier. No dividends have been paid, certain amounts have been paid off of the original debts assumed by the corporation or incurred after a fire which burned up a large amount of the corporation's property, and Charles Taunton and his wife have received their living expenses out of the property.

The plaintiff herein alleges that the property transferred to the corporation was owned equally by Mr. and Mrs. Taunton, and was worth

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

more than \$6,000 at the time of the transfer, over and above all liens and charges thereon. It is alleged that this transfer was made in fraud of creditors, and that both Charles Taunton and the corporation are responsible for the effect of this fraud and must account to the creditors in bankruptcy for a one-half interest in the said property and the income therefrom. The prayer for relief is that the transfer of the property owned by Taunton be set aside and the property returned to the trustee in bankruptcy.

The answer does not deny the formation of the corporation nor the transfer of the property thereto, but does deny that Charles Taunton owned a one-half interest, denies any allegation of fraud, and both Charles Taunton and the corporation allege that the property transferred for the formation of the corporation was really that of Mrs. Taunton, and that in everything that Charles Taunton did he was her agent. The questions have been further complicated by certain allusions to a second suit brought by the creditor Helen Earl against Mrs. Taunton, alleging that she is a joint tort-feasor in the cause of action upon which the said Helen Earl recovered the judgment above mentioned, for injuries sustained at the Taunton Pavilion prior to incorporation.

It appears from the testimony that Charles Taunton was a long-shoreman, and that after his marriage his wife withdrew from the bank some money with which they purchased the interest of one Simon Henry in the bathing pavilion at the location in question. It appears that \$1,800 was paid therefor and that no deed was taken, but when the lease was renewed it was in the name of Charles and Amelia Taunton, and that everything connected with the obtaining of a license or the management of the business was done in the name of Charles Taunton, or as Taunton's Pavilion, and that Charles Taunton actually managed the entire property. It also appears that during the first summer after this purchase some additional money was needed, and that Taunton borrowed what he says was \$300 to meet these needs. The fire in the spring of 1911 required a rebuilding of the property, which was done by means of two contracts for the hotel and bath houses, aggregating \$19,000, and mortgages were placed upon the property to obtain the amount necessary to pay the building contracts, outside of the insurance money, \$4,500, and some \$3,000 met by the proceeds of the business during the year 1911.

This was the condition of affairs when the season of 1912 opened, just before which the judgment was recovered, and almost at the beginning of which season the corporation was formed, and the entire property has since been managed in the way specified.

It appears that, when Helen Earl brought her action for personal injuries received during the season of 1911 against Charles Taunton, he answered the complaint, alleging that he was the proprietor and personally conducting the pavilion. Upon the issue joined upon that complaint and answer trial was had, and judgment for the plaintiff resulted. Upon the present testimony Taunton appears to have been a joint tort-feasor or joint principal in the operation of the pavilion.

His interest therein was an undivided share, but was liable so far as it would go to satisfy the judgment in question.

It must be held upon the testimony that the formation of the corporation was with knowledge of all the parties as to their precise situation and as to the rights of any one who might have a claim collectible from the assets in which Taunton and his wife had these undivided shares making up the entire equity in the premises. In whatever matters Taunton acted as manager, he represented both parties. In whatever matters he performed acts in his own name, he seems to have been doing so with his wife's approval and consent, and the responsibility therefor would rest upon him and upon her, in so far as she would be bound by his acts as agent. The undivided property of both would be responsible for the debts of either, to the extent that their interest might appear. Whether the undivided share of Mrs. Taunton could be made liable for a tort in judgment against Charles Taunton, as nominal sole owner, is a question not raised in this action.

The formation of the corporation disclosed an apparent equity of \$5,000, covering paid-up capital stock of that amount, and the testimony, as has been said, indicates that this property was worth to Taunton and his wife some \$6,000 over and above their debts at that time. This property was subject to various mortgages and liens still unpaid, and upon the testimony Taunton would seem to have received at least an equal interest with his wife in the profit or accumulation which has been made.

The only guide we have as to the amount of money involved, inasmuch as there was no partnership agreement or no acknowledgment of debt between the parties, and inasmuch as the testimony as to the business in no way justifies the claim that Mrs. Taunton was the sole owner, is that \$2,100 in cash was paid in by Taunton and his wife. This would be first taken into account between the owners in estimating their respective shares, as the business has always been run at an apparent profit, and no loss occurred which entirely wiped out the possibility of repayment of the original investment before the Earl judgment.

The fire seems to have caused complete destruction of the old buildings, but the insurance carried was sufficient to more than make up the amount of this original capital of \$2,100. Before dividing between Taunton and his wife the property transferred to the corporation, the sum of \$2,100 would have had to be subtracted over and above the record liens, and \$300 of this would be available for Mr. Taunton's creditors.

But no such division was made. The property as a whole was held jointly or in common by Mr. and Mrs. Taunton. If their title was such that the lien of the Earl judgment against Taunton alone attached to all the property, the trustee in bankruptcy, upon showing that the corporation was formed for the purpose of taking over this property and keeping it out of the hands of creditors, would be entitled to a decree that the entire assets of the corporation should be

transferred by the corporation to the trustee in bankruptcy, over and above the liens which must be considered as valid thereupon.

But the trustee and the creditors do not claim that the proof justifies a finding that Taunton was sole owner, or that a judgment against him attached to his wife's share. Mrs. Taunton, in addition to the \$1,800 contributed by her, seems to have had an equal interest with her husband in the property itself, and her transfer to the corporation is not attacked. The judgment is a valid lien against the interest of Charles Taunton, and is superior to the claim of Mrs. Taunton against him for contribution or repayment of her advance to the firm.

The suit for injury sustained through the operation of the premises was brought against the person ostensibly the owner. This person, Mr. Taunton, defended the action, not as an owner in common, or as an agent, but as the proprietor, or at least as if having joint title to the entire business. There is ground for holding that the creditors' claim, to which the trustee in bankruptcy has succeeded, and subject to which the stockholders' shares were issued and are held, could be satisfied out of the entire property which was conveyed to defeat those creditors' rights; but this would involve an action or proceeding to which Mrs. Taunton would be a necessary party. Mrs. Taunton would also be entitled to defend her claim to one-half of the stock and to any share in the property of the corporation which she might be able to prove. But her stock is subject to the rights and obligations of the corporation, and she is not a necessary party to an action against the corporation with respect to the transfer of property to it, even if the property be a one-half interest in a business in which, in the absence of agreement, she is an equal partner or owner.

The claim by Charles Taunton that his wife had the whole interest in the property at the time of the formation of the corporation, and his attempt to convey to her that interest and to prevent the judgment creditor from making a levy by giving to his wife any claim which he may have had against the property, is absolutely unfounded and must be ignored. If the one-half interest which must be transferred to the trustee in bankruptcy, or declared held by the corporation for the benefit of the bankrupt estate, proves to be more than sufficient to pay the debts of Charles Taunton, then Mrs. Taunton's claim for one-half of the \$2,100, less the \$300 paid by her husband, or for \$750, would seem to be enforceable as against the property of her husband's estate. But the transfer of his interest was in fraud of creditors and must be set aside.

The plaintiff may have a decree.

UNITED STATES v. DELAWARE, L. & W. R. CO.

(District Court, N. D. New York. July 8, 1913.)

CARRIERS (§ 37*)—INTERSTATE CARRIAGE OF LIVE STOCK—28-HOUR LAW—PENALTIES.

A railroad company which receives cars of cattle in interstate commerce from a connecting carrier with knowledge that they have already been confined continuously for more than 28 hours in violation of Act June 29, 1906, c. 3594, § 1, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), is not subject to the penalty imposed by such act, provided it has pens convenient to the place where it receives the cattle, and without unnecessary delay moves them to such pens and unloads them for rest, feed, and water; but it is its duty to move them at once, and if there is any delay it has the burden of excusing it by showing storm, accident, or some unavoidable cause, which could not have been anticipated or avoided by the exercise of due diligence and foresight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*]

Action by the United States against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff.

Suit to recover a penalty of \$500 for neglecting to unload, feed, and water cattle delivered to the Lake Shore & Michigan Southern Railroad Company for transportation and by that company turned over in the car containing them to the defendant, the Delaware, Lackawanna & Western Railroad Company. The facts are agreed upon and a jury trial waived.

George B. Curtiss, U. S. Atty., of Binghamton, N. Y. (Thomas H. Dowd, Asst. U. S. Atty., of Cortland, N. Y., of counsel).

F. W. Thomson and W. S. Jenney, both of New York City, for defendant.

RAY, District Judge. The agreed facts are as follows:

"First. That a car loaded with 19 head of cattle and 4 head of calves, consigned to the order of L. Newhoff, at the city of Albany, by a consignor named C. E. Nixon, of Chicago, was delivered by the Lake Shore & Michigan Southern Railroad Company on December 14, 1910, to the Delaware, Lackawanna & Western Railroad Company, the defendant, at Buffalo, N. Y.

"Second. That said car was delivered as aforesaid and was received by the defendant upon a side track, which is called an interchange track, and which is a track set aside for the common use of both said railroad companies to accomplish the interchange of through traffic.

"Third. That said car was delivered as aforesaid, to defendant at 3:20 o'clock on the afternoon of December 14, 1910.

"Fourth. That in making said delivery as aforesaid, the Lake Shore & Michigan Southern Railroad Company also delivered to the defendant a waybill showing the destination, route, etc., of said car, and also showing by a statement indorsed thereon that said cattle had been 'fed, watered and loaded at 1:30 o'clock in the forenoon of December 13, 1910.'

"Fifth. That at the time defendant received said car as aforesaid, the said cattle had been confined already by the Lake Shore & Michigan Southern Railroad Company without food and water and without unloading for rest in violation of law, for a period of 37 hours and 50 minutes.

"Sixth. That the cattle in said car were subject to the 36-hour period un-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 206 F.—33

der the said law, and the Lake Shore & Michigan Southern Railroad Company had exceeded said period by one hour and 50 minutes.

"Seventh. That when delivery of said car was tendered to the defendant by its said connecting carrier upon said interchange track, under the conditions as aforesaid, there were but two courses for the defendant to follow. One course was to refuse to accept the said car, which would have compelled its connecting carrier to haul said car back on its own line to its nearest stockyard for unloading said cattle; and the other course was to accept the car and assume the duty of hauling said car with reasonable promptness to its own nearest stockyard for unloading.

"Eighth. That the defendant accepted the car and thereby accepted whatever responsibilities and duties in relation thereto which under the conditions then present were placed upon defendant by the federal statute regulating the transportation of live stock.

"Ninth. That said car was delivered to defendant at 3:20 o'clock on the afternoon of December 14, 1910, by the Lake Shore & Michigan Southern Railroad Company at the interchange track in Buffalo, and defendant took said car from said interchange track at 4:30 o'clock in the afternoon of December 14, 1910, and took it to East Buffalo Stockyard, defendant's nearest facility for unloading, where the cattle were unloaded for food, water, and rest at 8:00 o'clock p. m. of December 14, 1910.

"Tenth. That between the time of the delivery of said car to defendant by its connecting carrier and the time when defendant unloaded the cattle as aforesaid, 4 hours and 40 minutes elapsed.

"Eleventh. That the haul from the interchange tracks to the stockyards was a terminal movement.

"Twelfth. That defendant did not carry the car from the interchange track in any main line movement towards destination prior to unloading.

"Thirteenth. That the actual running time of the car from Buffalo to East Buffalo, exclusive of the necessary drilling movements, was one hour.

"Fourteenth. That no penalty has been collected from the Lake Shore & Michigan Southern Railroad Company on account of its handling of said car and no action for such purpose has been commenced."

The defendant claims that under these facts the only question for the court is: "Did the Delaware, Lackawanna & Western Railroad Company violate the statute in keeping the cattle confined for 4 hours and 40 minutes under the circumstances and conditions," without rest, food, or water?

The provisions of the act of Congress alleged to have been violated by the defendant corporation and under which this action was sought are very plain, as is the purpose of the law. The main purpose is to prevent cruelty to animals, and the act so declares on its face. The animals are to be unloaded in a humane manner into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours after having been confined in a car, boat, or vessel of any description in interstate shipment for 28 consecutive hours, unless such unloading is prevented by storm, or other accidental or unavoidable causes, which cannot be anticipated or avoided by the exercise of due diligence and foresight. The act in words says:

"In estimating such confinement the time consumed in loading and unloading shall not be considered (as part of the 28 hours meaning) but the time during which the animals have been confined without such rest, or food, or water *on connecting roads shall be included* (in making up the 28 hours meaning) it being the intent of this act to prohibit their *continuous confinement beyond the period of twenty-eight hours*, except upon the contingencies hereinbefore stated." Act of June 29, 1906, c. 3594, § 1, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178).

By section 3 of the act it is provided that the neglect or failure must be knowingly and willfully done and the penalty is not less than \$100 and not more than \$500. If transported in cars, boats, or other vessels, where such animals can and do have the necessary rest, food, water, and space and opportunity to rest, then the provision in regard to unloading does not apply.

It is no excuse to a defendant, which knowingly and willfully fails to comply with the provisions of the act, that the loading took place on a *connecting road* and that such road had already kept the animals in confinement without rest, food, and water beyond the 28-hour period when the car came to the hands of the other company. That is, if the corporation *receiving* the cattle from a connecting line receives same with knowledge that such connecting company had already offended against the law with respect to such cattle, it does not thereby and from that fact alone become responsible for the offending of the connecting corporation; but, if it, the receiving company, then continues such confinement without unloading for rest, water, and food, and is not prevented from so unloading by storm, or other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight, it becomes liable to the penalty, even if such detention of such cattle without unloading is but for an hour. The provision is that:

"No railroad * * * whose road forms any part of a line of road over which cattle, sheep, swine or other animals *shall be conveyed* * * * shall confine the same in cars * * * for a period longer than twenty-eight consecutive hours * * * unless prevented by storm. * * * In estimating such confinement * * * the time during which the animals have been confined without such rest or food or water on connecting roads shall be included," etc.

When the corporation receives such a car of cattle from the connecting company for transportation knowing the cattle have already been confined for or beyond the 28-hour period, it is its duty *at once* to unload for rest, food, and water. It may, of course, run the cars to its pens for unloading, but must do so without unnecessary delay. It is its duty, if engaged in interstate transportation, to have pens and have them at a point convenient to the place where it receives cars.

Can it be that if one railroad corporation receives within a few rods of its pens a car load of cattle from another railroad corporation connecting with it, which cattle have been confined (without excuse) more than 28 consecutive hours and *immediately* moves the car to its pens on its own rails, such pens being reasonably near, and then *immediately* unloads, as the statute requires, that it is liable to a penalty for so receiving and unloading such cattle? In such case the receiving corporation has not confined such cattle at all within the meaning of the act; it has simply received and unloaded properly for rest, food, and water, and the 28-hour law cannot properly be so strictly and unreasonably construed as to make the receiving corporation liable to a penalty for so doing. The wrongful act which subjects a railroad to the penalty commences when the cattle have been kept in confinement beyond the 28-hour period, but the time necessarily occupied in unloading is no part of the time reckoned. Keeping the animals confined after

the 28-hour period has expired without legal excuse is an offense under this law. Such illegal confinement is a continuing act, and all connecting corporations *participating in such act of illegal confinement* become liable to the penalty but not otherwise. To receive and promptly unload cannot be deemed an unlawful act.

The defendant corporation was informed when it received this car of cattle that the animals had already been confined more than the statutory period. See fourth statement of fact. It then became its duty to proceed promptly to place said car for unloading and unload said cattle for the purposes mentioned. The car was delivered to the defendant at 3:20 o'clock p. m. December 14, 1910, at the interchange track in Buffalo, N. Y., and was removed from said track by the defendant at 4:30 o'clock p. m. of the same day and taken to the East Buffalo Stockyard and unloaded at 8 o'clock p. m. of the same day, 4 hours and 40 minutes after its receipt. Was there a prompt and efficient handling of this car? In other words, was the defendant corporation from 3:20 o'clock p. m. to 8 o'clock p. m., a period of 4 hours and 40 minutes, with due and reasonable diligence under such circumstances and in view of the car and its contents and the fact that the cattle had already been confined over 37 hours when defendant received them, proceeding to place the car so as to unload same?

The distance from defendant's East Buffalo Stockyard to the point where defendant received the car is not given, but the running time required is stated to be one hour. It is stipulated that the haul from the one point to the other was a terminal movement, and that the car was not carried in any main line movement towards its destination prior to unloading. It appears that this car of cattle was in defendant's possession 3 hours and 50 minutes before the unloading commenced over and above the time required to run it from the point where received from the connecting road to the point of unloading, and what was done with the car during that time does not appear. So far as appears there was no storm, no accident, nothing intervening to prevent the delivery of the car at the unloading point in say one hour and 50 minutes. In short, allowing 50 minutes for necessary switching operations and probable delays caused by the movement of other cars and one hour for the main movement from the receiving point to the unloading point, and *three hours' detention are wholly unaccounted for*. It is not made to appear that even 40 minutes were required for switching movements. When a connecting railroad company receives a car of cattle in interstate commerce or movement knowing that the cattle have already been confined without rest, food, or water for more than the statutory time, and such cattle are not promptly unloaded by such receiving company, and prima facie the delay in unloading appears unreasonable and unnecessary, the burden is on such receiving company to excuse the delay by showing storm, accident, or some unavoidable cause which could not have been anticipated or avoided by the exercise of due diligence and foresight. The car is in the possession of the railroad company and subject to its control, and such company, and it alone, knows and controls its movements and the conditions surrounding and controlling them, and it is only fair and just that it should ac-

count therefor and for delays. There *may be* an unforeseen congestion, a break in the rails, the breaking down of an engine engaged in moving the particular car or others that block its way, etc.; but under this statute the court will not presume that the delay was the result of accident or unavoidable causes which could not be avoided by the exercise of due diligence and foresight, and the language of the statute plainly imposes this burden of proof on the defendant.

I think this is the tenor of the decisions and the plain import of the language of the statute. The decision in *United States v. Stockyards Terminal Co.* (C. C.) 172 Fed. 452, may be good law; but I cannot now assent to it. *United States v. St. Joseph Stockyards Co.* (D. C.) 181 Fed. 625, may be good law; but I cannot assent to it. Is it possible that the mere act of receiving cattle kept in confinement more than 28 hours and promptly unloading them for rest, food, and water, shows participation in the illegal confinement of such cattle? Not unless unloading and liberating the cattle is confining them. To my mind it would be as just to hold that the jailer who conducts a prisoner maliciously arrested by a third person to the door of the jail for the purpose of letting him out is equally liable with the one who maliciously caused the prisoner to be arrested and incarcerated. The act in question shows on its face that the main purpose of its enactment was to *prevent* cruelty to animals shipped, not *aggravate and continue* the cruelty by subjecting a corporation who receives and promptly releases and feeds and waters the animals so confined to a penalty. Indeed, on further search I find that *United States v. St. Joseph Stockyards Co.* (D. C.) 181 Fed. 625, was reversed in *St. Joseph Stockyards Co. v. United States*, 187 Fed. 104, 110 C. C. A. 432. I also find that the views above expressed by me are in accord with those of Judge Holt expressed in *United States v. Lehigh Valley R. Co.* (C. C.) 184 Fed. 971, 975 (affirmed 187 Fed. 1006, 109 C. C. A. 211). Judge Holt said:

"The thing intended to be prevented by this legislation was cruelty to the animals, and, as the act expressly provides that the time during which the animals have been confined on connecting roads shall be included, I think that the act clearly makes it the duty of any railroad receiving animals, knowing them to have been confined longer than the statutory term, to unload, water, and feed them, and give them time to rest. The counsel for the defendant urged that, if this view be taken, the mere receipt of such animals immediately imposes a liability upon the receiving road; that, as the term of confinement has been already exceeded, a further confinement for an instant makes the receiving road liable. But the act should be reasonably construed. It provides that, in estimating such confinement, the time consumed in loading and unloading shall not be considered, and therefore, if a road receiving animals which have been confined longer than the statutory period proceeds with reasonable speed to unload, water, and feed them, in my opinion no penalty will be incurred. The fact that it may be necessary to move the cars containing them a short distance to the yards would not necessarily involve a penalty. The question would be: Is the movement substantially a part of the process of unloading, or is it a continuance of transportation? If this construction of the act makes it necessary for railroads engaging in the transportation of cattle to provide suitable yards at which cattle can be unloaded, at the point where the roads connect with other roads, that must be done. Such a requirement seems to me entirely reasonable, in view of the very large number of cattle shipped over long distances in this country, and the possibility of their suffering great cruelties during such transportation."

I do not think Judge Holt intended to hold that in order to incur the penalty the receiving road must actually do some act to carry the animals forward on their journey towards the final destination. If we adopt such a construction, the receiving railroad may take its time and serve its convenience in switching and unloading, so long as it does not move the car forward on its journey at all, and thus defeat the purpose of the law in many cases.

I find nothing in this case showing a purpose on the part of the defendant corporation to violate the law or evade it. I think the neglect in moving and unloading this car was knowingly and willfully done within the meaning of the law; that is, the defendant through its servants and employes was negligent and knew it and appreciated it and willfully failed to move the car more rapidly to serve their own convenience. I do not think the officers of this road approve, or will approve, or sanction such negligence on the part of their employes, but, on the contrary, will do their best, as is their duty, to see that cars containing animals are promptly moved and unloaded even at great inconvenience. The prompt movement of cars containing ordinary freight must be subordinated to the movement of cars containing live stock when necessary, and railroad corporations and their employes should understand this and act accordingly.

Entertaining this view, I think a penalty of \$200 in this case will be sufficient, and a judgment is directed accordingly.

LAZARUS v. EAGEN.

(District Court, M. D. Pennsylvania. February Term, 1912.)

No. 129.

1. **BANKRUPTCY (§ 100*)—PROOF OF INSOLVENCY—EFFECT OF ADJUDICATION.**

In case of an involuntary proceeding in bankruptcy, where insolvency is one of the issues, the adjudication is conclusive against all persons interested in the estate, or having had dealings with him, that the bankrupt was insolvent at the time of the commission of the act of bankruptcy alleged.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 66, 131, 141-144; Dec. Dig. § 100.*]

2. **BANKRUPTCY (§ 159*)—VOIDABLE PREFERENCES—"CREDITOR."**

An indorser of a note is a "creditor" of the maker within the meaning of Bankr. Act July 1, 1898, § 60b, c. 541, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), relating to voidable preferences to creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248, 262, 268-281; Dec. Dig. § 159.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1713-1727; vol. 8, pp. 7622, 7623.]

3. **BANKRUPTCY (§ 303*)—INTENTION OF PARTIES—PRESUMPTION.**

If a transfer of property by an insolvent to a creditor necessarily resulted in giving the latter a preference, it will be presumed that such was the intention of the parties.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

4. BANKRUPTCY (§ 303*)—VOIDABLE PREFERENCES—EVIDENCE CONSIDERED.

A sale of property by a bankrupt within four months prior to his bankruptcy, and while insolvent, to defendant, who was an indorser on his note to a bank, *held* under the evidence to have been made with an agreement or understanding that the bankrupt should pay the note from the proceeds, and to constitute a voidable preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

In Equity. Suit by G. Fred Lazarus, trustee of William J. Greggs, bankrupt, against James Eagen. Decree for complainant.

D. A. Fell, of Wilkes-Barre, Pa., for complainant.

Abram Salsburg, of Wilkes-Barre, Pa., for defendant.

WITMER, District Judge. A bill in equity was filed by the trustee in bankruptcy of the estate of William J. Greggs, to recover from James Eagen a preference. A creditors' petition was filed on the 7th of December, 1911, wherein was contained:

"That the said W. J. Gregg (or Greggs) owes debts to the amount of \$1,000, or over, is insolvent, and is neither a wage-earner nor a person principally engaged in farming or the tilling of the soil. That within four (4) months preceding the filing of this petition, the said W. J. Gregg (or Greggs), while insolvent, committed an act of bankruptcy, in that he conveyed and transferred his real estate to his wife with intent to hinder, delay, and defraud his creditors. Second. That he transferred, while insolvent, a portion of his property to one of his creditors, with intent to prefer such creditor over his other creditors."

This petition with a subpoena, as provided by the Bankruptcy Act, as amended, was served personally upon the alleged bankrupt by Deputy Marshal H. J. Evans, and so returned by him, whereupon, in default of appearance and answer, he was December 28, 1911, duly adjudicated a bankrupt. After adjudication and the plaintiff's election, on refusal to surrender certain property conveyed by the bankrupt to the defendant within two months of the filing of the creditors' petition, the plaintiff brought this bill.

The bill contains the following allegations:

Third. "That prior to the 15th day of September, 1911, said W. J. Greggs was the owner in fee of two certain lots of land, coal and other minerals being excepted and reserved, the same being situate in the borough of Wyoming, Luzerne county, in said district, said lots being Nos. 20 and 22 in the William S. Shoemaker plot of lots in said borough, and being 104 feet in front and 144 feet along Eighth street to an alley, said 104 feet frontage being along Monument street, and being two corner lots, and all improved with a frame dwelling house; title to said two lots being vested in said William J. Greggs by deed of Ira R. Shoemaker et ux., on April 25, 1899, as will more fully appear by reference to the record of said deed in the recorder of deeds office in said county of Luzerne in Deed Book 385, at page 508," etc.

Fourth. "That on said 15th day of September, 1911, said bankrupt, W. J. Greggs, then owing and being indebted to the creditors named in the schedules filed to No. 2,027 in Bankruptcy (creditors whose claims are unsecured, A-3), executed and conveyed to Tillie A. Greggs, wife of said bankrupt (she, the said wife, joining in said deed of conveyance to herself), all of said two lots of land improved as aforesaid, situate in the borough of Wyoming, said district, for the nominal consideration of one (\$1.00) dollar, which said deed was recorded in Deed Book No. 479 at page 301 of said recorder's office of Luzerne county."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Fifth. "That on the 13th day of October, 1911, said William J. Greggs, then owing all creditors whose claims are marked unsecured schedule A—3, and without any notice to said creditors, in violation of the act of March 28, 1905 (P. L. 62), sold and transferred a large part of his property, consisting of a sausage mill and fixtures and machinery thereunto belonging, as well, also, as wagons and horses, to Edward Berkowitz, for the cash payment of \$1,300, which moneys said William J. Greggs received from his said purchaser, and three days thereafter, viz., October 16, 1911, said W. J. Greggs, then owing all of the creditors whose claims are marked unsecured in schedule A—3, No. 2,027 in Bankruptcy, in conjunction with his wife, Tillie A. Greggs, who by virtue of her deed from her said husband was the apparent owner of record of said lots of land, sold and conveyed by deed in fee simple said two lots of land, previously conveyed, as aforesaid, to said wife, unto one James Eagen of the borough of Wyoming, said district, for the cash consideration of \$2,000, subject nevertheless to the lien of a certain mortgage executed by said Greggs, the bankrupt, to one Andrew J. Crouse, for a debt of \$2,000 of record in Mortgage Book No. 171, page 492, etc., of said recorder's office of Luzerne county, which deed to him, the said James Eagen, was duly recorded October 16, 1911, by the bankrupt, William J. Greggs, as recorded in Deed Book No. 472, at page 530, etc., of said recorder's office of said Luzerne county. That on the 16th day of October, 1911, said William J. Greggs was indebted to said James Eagen on a promissory bank note payable three months after date at the First National Bank of Wyoming, Pa., for the amount or sum of \$500, which said note was paid at said bank on October 18, 1911, and was marked by indorsement as follows 'James Eagen.'"

Sixth. "That by the transfer it was intended to create, and did actually create, a 'preference' within the meaning of the Bankruptcy Act of 1898, he, the said James Eagen, receiving from him, the said William J. Greggs, the sum of five hundred (\$500.00) dollars, which said note was paid at said bank on October 18, 1911 (and marked by indorsement, as aforesaid, as follows: 'James Eagen'), to liquidate and pay said note held by said Eagen against said Greggs, at the time of said conveyance by the bankrupt, William J. Greggs, to James Eagen, or about the time of said conveyance receiving said moneys to liquidate said debt; and at the time of said transfer, he, the said James Eagen, had reasonable cause to believe that by said conveyance a preference would be given him, the said James Eagen, over the other numerous creditors of William J. Greggs, bankrupt."

The respondent's answer admits the facts contained in the third paragraph, without denying or affirming the fourth requires proof, disclaiming knowledge of the fifth, and denies the sixth. He furthermore declares said sale and conveyance to have been made bona fide, denying any knowledge on his part that either Greggs or his wife were insolvent at the time of such transfer; that he had no reason to believe that such sale was intended as a preference; that in fact it was no preference, he having been but accommodation indorser for Greggs at the bank to which the note was paid by him without his intervention.

The case having been referred to the referee as special master to take the testimony and make report thereof to court, together with his findings of fact and law, he reported the facts favorable to the defendant, primarily because it was not made to appear that Greggs was insolvent at the date of the transfers.

The learned master says that undoubtedly W. J. Greggs was in financial difficulty at the time he disposed of his property to his wife, and later, when they jointly conveyed the same property to James Eagen, yet he holds that the evidence is not sufficient to hold such difficulties were sufficient to constitute insolvency.

[1] While it is true, as argued, the filing of a petition and adjudication in bankruptcy does not generally establish the insolvency of the bankrupt at any date prior to such filing, it is equally certain that in the case of an involuntary proceeding, where insolvency is one of the issues, the bankrupt by the adjudication is conclusively proven to have been insolvent at the time of the commission of the act of bankruptcy. It is unnecessary to attempt to reconcile the opinion of the learned judge. *In re Chappell* (D. C.) 7 Am. Bankr. Rep. 608, 113 Fed. 545. It, however, also in my opinion holds this to be the doctrine.

Loveland's Bankruptcy, 558, gathering the consensus of opinion, states the law with approval that:

"The mere fact that a debtor is adjudged a bankrupt raises no presumption of insolvency prior to the filing of the petition. But when the question of insolvency is adjudged in determining the act of bankruptcy in an involuntary proceeding, the fact of insolvency at the date the act was committed may be taken by the adjudication."

The decree of this court put in evidence, adjudicating on the 28th of December, 1911, *W. J. Greggs* a bankrupt, conclusively established the fact at issue, as alleged in the petition, that *Greggs* was insolvent when he transferred his property to his wife, and afterwards to *Eagen*. Any other holding would lead to endless confusion in the administration of the law, and would in many cases nullify one of the principal purposes of the Bankruptcy Act, as was said in *De Graff v. Lang*, 92 App. Div. 564, 87 N. Y. Supp. 78. And it matters not that *Eagen* was actually without notice of these proceedings. An adjudication being an adjudication in rem, all persons interested in the res are regarded as parties to the bankruptcy proceedings. Among such parties are, not only the trustee, but all creditors, including lienors. *Chapman v. Brewer*, 114 U. S. 169, 5 Sup. Ct. 799, 29 L. Ed. 83; *Carter v. Hobbs* (D. C.) 1 Am. Bankr. Rep. 215, 92 Fed. 594; *In re Ulfelder Clothing Co.* (D. C.) 3 Am. Bankr. Rep. 425, 98 Fed. 409.

[2] There is furthermore no doubt that at the time of the transfer *Greggs* was *Eagen's* creditor by reason of the indorsement of the note at bank. That an indorser or surety on a note may be a creditor within the meaning of the bankruptcy law has been held in a long line of cases. *In re Bailey & Son* (D. C.) 21 Am. Bankr. Rep. 911, 166 Fed. 982; *Stern v. Paper* (D. C.) 25 Am. Bankr. Rep. 451, 183 Fed. 228; *In re Sanderson* (D. C.) 17 Am. Bankr. Rep. 871, 149 Fed. 273. *Eagen* having permitted or induced payment of the note, thereby intending to relieve himself from payment of all or a portion of it, to that extent was benefited, and constituted him a creditor. He was given a preference over other creditors of his class by reason of such transfer and the payment of his debt within four months of the bankruptcy of *Greggs*.

[3] If *Eagen* had reasonable cause to believe that such transfer would result in his preference, or to enable him to obtain a greater percentage of his debt than any other of the creditors of the same class of the bankrupt, *Greggs*, it is voidable at the instance of the

trustee. It is the result of the transaction that is to be regarded in determining the reasonableness of a preference, since equality between creditors is necessarily the ultimate aim of the law. The parties concerned must be held to have intended the necessary consequences of their acts; the bankrupt to give and the defendant to receive the preference which the conveyance of the property accomplished. If the bankrupt even intended treating Eagen like his other creditors, without giving him advantage over them, and such was, however, not the inevitable effect of their dealings, it will be presumed to have been otherwise intended.

[4] The testimony shows that Eagen was the indorser for Greggs on the Wyoming bank note of \$500, which was carried along for possibly a year, having been renewed several times; meantime he was advised by a person in the bank that Greggs was slow pay, and of doubtful standing financially; he also had learned of Greggs' assignment or transfer of his real estate to his wife for the nominal consideration of \$1; whether he knew of Greggs' transfer of his personal property to Berkowitz, for which Greggs was arrested, is not shown, but, it is proven that Eagen attended the hearing a few days after the transfer to him by Greggs, and secured the recognizance of \$1,000 for the latter's appearance at court. Eagen says that there was nothing said about paying the note when the transfer was made, but he admits that he knew that the note came due soon thereafter. However, when he was asked, "When you paid the \$2,000, didn't you inquire at the bank within a day or two as to whether or not that note had been lifted and paid?" he answered, "I don't remember. I was told the day after—some time—Is that Gregg note paid? and they told me it was." Why did he go to the bank and inquire if the note had been paid and lifted, if he did not expect it to be paid then; and if to be paid then, is it not natural to presume it was understood that it should be paid out of the money supplied by him for the property obtained from the bankrupt? The admission to the deputy marshal who served him with the bill and subpoena is conclusive, however, and proves beyond doubt, as admitted by Eagen, that he bought the property to save himself because of having to make good for Greggs at bank. How could he save himself from loss if he paid a fair and full consideration for the property transferred, if it was not intended that his debt, or the note in bank, should not be paid out of the purchase price? The answer is inevitable, and I am satisfied from all that appears that a preference was effected, and that Eagen had reasonable cause to believe that such would result from the transfer to him of the property in suit.

I cannot excuse the conduct of Eagen because of the advice of counsel, representing as well the bankrupt. The facts necessary to disclose the bankrupt's true financial situation were within his own reach, and I cannot be made to believe that he, having lived across the street in a small town, knowing the bankrupt for many years, and a director of the bank in which he was indorser and kept his accounts, was ignorant of them. If he was, he remained so willingly, and the law will not let him profit.

Again, taking in account the manner in which the transfer was effected, the recording of the deed by Greggs, instructing the recorder not to publish, the purchase of the mortgage by Eagen, and the taking of an assignment therefor before any attempt whatever to retake the property, leaving the property in the possession of the Greggses without insurance, payment of taxes, or the exercise of any ownership over it but the production of receipts for a small rental on an oral lease, color the transaction with such additional doubt as in itself to call for the most satisfactory explanation. Eagen's testimony does not impress me as an attempt, on his part, to throw much light upon the transaction. His answers are evasive, and throughout it is a disclaimer of knowledge, which in many instances was within easy range. I am well satisfied that he had reasonable cause to believe that he was obtaining a preference over the other creditors of Greggs, and possibly assisting the latter in placing some of his property beyond reach.

The defendant, James Eagen, will be required to execute and deliver a deed of conveyance for the property transferred to him by the bankrupt, and surrender his deed to the plaintiff. A formal decree may be accordingly drawn.

In re J. SAPINSKY & SONS.

(District Court, W. D. Kentucky. July 15, 1913.)

1. **BANKRUPTCY (§ 255*)—LEASE TO BANKRUPT—POWER TO ORDER CANCELLATION.**

While a trustee may at his election decline to continue a lease to the bankrupt for the benefit of the estate, and thus relieve himself and the estate from further liability thereon, a referee has no power to order its cancellation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 352; Dec. Dig. § 255.*]

2. **BANKRUPTCY (§ 191*)—LIENS—STATUTORY LIEN FOR RENT TO BECOME DUE.**

The landlord's lien given by Ky. St. § 2317, on the property of the tenant on the leased premises for one year's rent due or to become due under the lease, is enforceable against the trustee in bankruptcy of the lessee for the rent due or to become due within a year after the bankruptcy, although the claim therefor is not a provable debt against the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286, 287, 290, 351; Dec. Dig. § 191.*]

In the matter of J. Sapinsky & Sons, bankrupts. On petitions by the Fidelity Trust Company and others for review of orders of the referee. Reversed in part.

James R. Duffin, of Louisville, Ky., for petitioners.

D. A. Sachs, Jr., of Eminence, Ky., for trustee.

Bruce & Bullitt, of Louisville, Ky., for Fidelity Trust Co.

EVANS, District Judge. Two petitions for review in this case will be disposed of in one opinion.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] 1. On June 12, 1913, the Fidelity Trust Company, executor and trustee under the will of John D. Taggart, deceased, and Sallie D. Taggart Armstrong, Morton Armstrong, M. Ella Taggart McGee, and J. Wheeler McGee (all of whom together will be called the landlord), filed a petition asking for a review by the court of an order of the referee, made on May 30, 1913, wherein, among other things, he directed the trustee in bankruptcy to surrender and renounce a certain lease made to the bankrupts by the landlord, and also ordered that the said lease be canceled as directed in the order. While a trustee in bankruptcy may elect whether or not to decline to continue a lease to a bankrupt for the benefit of the estate, and thus relieve himself of responsibility either personal or as trustee in respect thereto, we cannot see how the referee had any power under the facts of this case to order its surrender or cancellation. Upon authorities which will be more especially noticed further along, it will be made to appear that certain rights continue to exist as between the bankrupts and the landlord, which neither the referee nor the trustee can destroy nor interfere with after the latter has made his election. Here the record distinctly shows that the trustee promptly made his election not to continue the lease for the benefit of the bankrupts' estate. When this was done his interest in the lease terminated, and he had no further concern with it. Nevertheless the lease remained vital as between the landlord and the tenant. The lease contained a clause requiring the tenant to execute a bond with surety for the payment of at least a substantial proportion of the rent for the entire term, and it may be important that the rights thus arising between the landlord and the surety under that bond, if it were given, should not be impaired nor interfered with by the order sought to be reviewed, notwithstanding the provisions of section 16 of the act which preserve the rights of creditors against sureties.

Upon these grounds, on the authority of *In re Roth & Appel*, 181 Fed. 669, 670, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270, and *Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719, we must hold that the order of the referee made May 30, 1913, so far as it directed a surrender or a cancellation of the lease, was erroneous, and consequently must to that extent be reversed and set aside.

[2] 2. By another petition filed on June 14, 1913, the landlord prays for a review by the court of an order made by the referee on the day before disallowing altogether a claim and proof of debt presented and filed by the landlord for \$141,250, being the amount of rent to accrue upon certain premises described therein between June 1, 1913, and November 1, 1922, at a rental of \$15,000 per year, payable in installments of \$1,250 per month, and which proof of debt contained a claim to a lien upon certain assets of the bankrupt, which were on the leased premises, for \$15,000, being the amount of one year's rent accrued and to accrue in that amount. At the hearing the claim for the rent accruing after the filing of the petition in bankruptcy on the 18th day of April, 1913, was abandoned, except as to the \$15,000 thereof just mentioned. As to this last sum the landlord claimed a lien under section 2317 of the Kentucky Statutes, which is as follows:

"A landlord shall have a superior lien on the produce of the farm or premises rented, on the fixtures, on the household furniture, and other personal property of the tenant, or undertenant, owned by him, after possession is taken under the lease; but such lien shall not be for more than one year's rent due or to become due, nor for any rent which has been due for more than one hundred and twenty days. And if any such property be removed openly from the leased premises, and without fraudulent intent, and not returned, the landlord shall have a superior lien on the property so removed for fifteen days from the date of its removal, and may enforce his lien against the property wherever found."

Section 2314 is also referred to by counsel.

Whether rent accruing after a tenant has been adjudicated a bankrupt is a provable debt was considered by us in *Re Jefferson* (D. C.) 93 Fed. 948. That case came up in May, 1899, and the decision therein was probably a pioneer ruling on the question under the Bankruptcy Act of July 1, 1898 (30 Stat. 544, c. 541 [U. S. Comp. St. 1901, p. 3418]). The conclusion was then reached that rent accruing after the adjudication in bankruptcy was not a provable debt. The reasons upon which this conclusion was based can be found in that opinion, but no more need be said of them here than that the leading thought was that the adjudication and discharge of the bankrupt would dissolve the contract of renting, and that as the bankrupt tenant could not perform the obligations he was under to pay the rent the landlord should not be held bound. Hence the relationship was considered as having ended. This view, which in a general way was repeated and enforced in *Re Hays, Foster & Ward Co.*, probably expresses the exact result of the ordinary case of a bankrupt tenant who cannot and does not perform any part of his obligations under the contract. It was perceived, however, that the broad ground taken in the opinion in the *Jefferson Case* ought to be subject to the exception that a *tenant's* contract for renting made with a landlord should not be regarded as abrogated by an adjudication of the *landlord's* bankruptcy, and this was pointed out in the opinion in *Re Hays, Foster & Ward Co.* (D. C.) 117 Fed. 879, 884.

The case before us now suggests that where a landlord has taken security for at least part of the rent due from the tenant—where, in short, the landlord has required the tenant in advance to guarantee the payment of part or all of the rent to accrue during the term—there probably would necessarily arise in connection with section 16 of the act another exception to the general propositions stated in the *Jefferson Case*. It must be confessed that the necessity for such important exceptions much weakened, if it did not destroy, the force of the general reasoning in the *Jefferson* opinion, apart from the controlling authority of the two cases already mentioned, and which, while approving the conclusion reached in the *Jefferson Case*, found a different and, of course, a better reason upon which to rest it. There have, indeed, been few, if any, cases which, upon one ground or another, do not reach the same general conclusions as that reached in the *Jefferson Case*, to wit, that rent accruing after the adjudication in bankruptcy is not a "provable debt" within the meaning of that phrase in the Bankruptcy Act. In short, though upon reasoning which differs, the decisions are well-nigh, if not quite, uniform to the

effect indicated. Probably a large majority of the decisions, and especially those we have named, support the conclusion of the nonprovable character of a claim for rent accruing after an adjudication, upon an interpretation of clause 1, section 63, of the act, which reads:

"Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidence by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable, and did not bear interest."

As indicating the development of the discussion many cases might be cited which would show the various reasons given for the general conclusion reached, some agreeing with and others dissenting from the view we took in the Jefferson Case. But probably it will suffice to refer again to *In re Roth & Appel*, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270 (C. C. A. 2d Circuit), and *Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719 (C. C. A. 8th Circuit). These cases from Circuit Courts of Appeal clearly hold that, though a claim for rent arising after a petition in bankruptcy has been filed is not provable under section 63, nevertheless the contract remains in existence as between the bankrupt and the landlord; and of course as the claim for after-accruing rent is not provable the bankrupt is not discharged therefrom under the provisions of section 17. These conclusions from the premises are hardly to be combated, and they become important because they throw much light upon the one vital question actually involved in the petition for review now under consideration. As we have seen, the bankrupts leased for a term of ten years certain premises in this city at a rental of \$15,000 per year, payable in monthly installments of \$1,250. The petition in bankruptcy was filed very late on the 18th day of April, 1913, and the adjudication was made very early on the next day.

The landlord conceded at the argument that a mere claim for rent accruing after those events is not a provable debt, and hence that as to all the claim except the sum of \$15,000 the ruling of the referee was correct and supported by the authorities. As to the \$15,000 it is insisted, under the provisions of section 2317 of the Kentucky Statutes, which have been set forth, that the landlord has a lien on the property of the bankrupt found on the leased premises for the rent due or to become due for one year. The beginning of this one year is not stated, but it must be understood, we suppose, that the landlord means June 1, 1913, though we hardly see how the period can begin later than April 18, 1913. In support of this contention we find no Kentucky case cited, except *Loth v. Carty*, 85 Ky. 591, 4 S. W. 314, which does not seem to be very applicable; but great reliance is placed by one at least of the counsel upon the ruling of the Circuit Court of Appeals of the Fifth Circuit in *Martin v. Orgain*, 174 Fed. 772, 98 C. C. A. 246. As the Texas statute, upon which the claim in that case was based, is somewhat like, though probably much more explicit than, the Kentucky statute under consideration, the decision is certainly in point. Nevertheless the exact question in respect to the lien for \$15,000 is a

somewhat puzzling one. It has never been mooted before us until now, nor, so far as we know, in this circuit. The Kentucky Court of Appeals does not seem ever to have clearly elucidated the subject by a construction of section 2317, either in *Loth v. Carty* or otherwise. It is therefore important that the question should be cleared up by appellate proceedings in this case, and we hope it will be done.

As we have seen, the petition in bankruptcy was filed very late on April 18, 1913. All of the claim for one year's rent, viz., \$15,000, arose after that date, and indeed after May 31st. As the claim for rent, merely as such, was not a "provable debt," it could not, in that form, share in the bankrupts' assets which came to the hands of the trustee, nor could those assets avail the landlord, unless a valid lien thereon to cover the \$15,000 existed independently of the quality of provability.

The proof of debt made and tendered by the landlord, after describing the claim and showing the facts upon which it is based, alleges:

"That the only security held by deponents is a landlord's lien on the property of the said bankrupt that was on the premises let in said lease, said lien being given by the statute law of the state of Kentucky, which statute gives a lien for rent to accrue or to become due for one year, thereby giving these deponents a lien for fifteen thousand (\$15,000.00) dollars; that these deponents are entitled to a priority of payment out of the assets of this bankrupt in the hands of the trustee, to the extent of fifteen thousand (\$15,000.00) dollars, by virtue of said lien; that they are entitled to a claim for the balance."

It will be observed that these statements in the proof of debt are quite vague in respect to what property was in fact on the premises at the time of the filing of the petition in bankruptcy, and equally so as to whether there was enough of such property then on the premises to amount in value to \$15,000. The record before us on the petition for review gives no light on these subjects, though they may be of vital importance.

Note.—This uncertainty has been made certain by a stipulation filed.

Granting that the mere claim for rent, as such, accruing after April 18th, is not a provable debt, it is nevertheless insisted that a lien on the property of the tenants on the premises at that time existed in the landlord's favor and was valid under the Kentucky statute copied above, and this contention is to be disposed of, difficult as the task is. We have given the proposition very careful consideration, and will briefly state our views upon it, though not altogether confident of their correctness.

In *Re Roth & Appel*, 181 Fed. 669, 104 C. C. A. 651, 31 L. R. A. (N. S.) 270, it is said that "occupation of the land is the consideration for the rent," and also that, "if the lessee remain liable upon the lease after his bankruptcy in cases where it is not assumed by the trustee, it necessarily follows that his estate is not liable therefor." Neither in that case nor in *Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719, however, did any question of lien arise under a statute like ours. In each of those cases the much simpler question arose as to the provability, *against the general assets* of a bankrupt, of a claim for rent accruing after the filing of the petition in bankruptcy, and upon this question the ruling in both was in the negative. It may be quite

true that the bankrupt tenants in this instance may never in fact again occupy the leased premises; but their right to do it is clear, and the obligation to pay all hereafter accruing rent rests upon them by the express terms of the contract of lease. That obligation is not provable as a debt under section 63, clause 1, and consequently there can, under section 17, be no discharge from it in this proceeding. Nevertheless the obligation to pay the rent accruing to the landlord during the entire term is one which was created by the express stipulations of the lease. The right of the bankrupt to occupy the premises (the trustee having elected not to do so) clearly exists, and under the terms of the lease the bankrupts will owe the rent as it becomes due until the term is brought to an end, either by the stipulations of the lease, or by the act of the parties, or by some judicial proceeding. Hence, while not a provable debt *against the general estate* of the bankrupts, the lien of the landlord given by the Kentucky statute may exist and must be recognized and enforced under section 64, clause 5, of the Bankruptcy Act, which protects liens upon property which are valid under the law of the state.

We feel it to be our duty to give effect to the provision just mentioned and to section 2317 of the Kentucky Statutes, and to allow the lien claimed by the landlord to the extent of \$13,250, being the rent to accrue within one year from April 18, 1913, when the petition in bankruptcy was filed. We think that date, and not June 1st, is the one when the one year must begin.

Note.—The court here pointed out the anomalous condition arising from the fact that while the general creditors, in effect, paid the year's rent, the bankrupts continued to be the tenants after the trustee made his election, and suggested the propriety of an effort to correct the results of that situation.

It results that the order of the referee was erroneous to that extent only. It will therefore be modified, so as to allow the lien to the extent of \$13,250, but otherwise the order will be affirmed.

Orders upon both petitions will be prepared accordingly.

WELLS v. RUSSELLVILLE ANTHRACITE COAL MINING CO. et al.

(District Court, E. D. Arkansas, W. D. July 7, 1913.)

1. REMOVAL OF CAUSES (§ 86*)—PETITION FOR REMOVAL—REQUISITES.

The diversity of citizenship to authorize a removal need not be alleged in the petition for removal, when it appears from the complaint or any part of the record when the petition for removal is filed.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. § 86.*]

2. REMOVAL OF CAUSES (§§ 86, 94*)—DIVERSITY OF CITIZENSHIP—SUFFICIENCY OF AVERMENT—AMENDMENT.

A corporation as an entity is not a citizen of any state, and therefore an averment in a petition for removal that a corporation is a "citizen and resident" of a state named is insufficient; but the defect may be cured by amendment at any time before the case has been disposed of in the trial court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179, 203; Dec. Dig. §§ 86, 94.*]

3. REMOVAL OF CAUSES (§ 2*)—REMOVABILITY—LAW GOVERNING.

Under the saving clause contained in section 299 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1169 [U. S. Comp. St. Supp. 1911, p. 246]), providing that suits and proceedings for causes arising or acts done prior to the date of the repeal of any existing law may be commenced and prosecuted within the same time and with the same effect as if such law had not been repealed, a suit on a cause of action arising before the taking effect of the Code but not commenced until afterward is governed as to its removability by the prior law, and if removable under such law is still removable.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 2, 3; Dec. Dig. § 2.*]

At Law. Action by Elizabeth Wells, administratrix of W. J. Wells, deceased, against the Russellville Anthracite Coal Mining Company and the Fidelity Coal Mining Company. On motion to remand to state court. Motion denied.

This action was originally instituted on December 12, 1912, in the circuit court of Pope county, state of Arkansas, to recover damages in the sum of \$2,999.99, alleged to have been sustained by the plaintiff as administratrix of the estate of W. J. Wells, deceased, who, it is alleged, was, while an employé of the defendants, by reason of their negligence, injured on March 9, 1911, from the effects of which he died within a few days of the accident. The complaint alleged that the defendant the Russellville Anthracite Coal Mining Company (hereinafter called the Russellville Company) is a corporation created by and existing under the laws of Michigan, and that the other defendant (hereinafter referred to as the Fidelity Company) is a corporation organized and existing under and by virtue of the laws of the state of ———, not mentioning the state of its creation. In due time the defendants filed a petition and bond for removal to this court, which was granted by the state court. The petition alleges that the defendant the Russellville Company is a citizen of the state of Michigan, and the defendant the Fidelity Company a citizen of the state of Kansas, and were so at the time of the filing of the complaint and petition, but fails to allege under the laws of which states they exist.

The plaintiff has filed a motion to remand, setting up some general grounds that the court has no jurisdiction, and that the cause is not removable, and also the following specific grounds: (1) That the requisite diversity of citizenship required as a condition precedent to the jurisdiction of this court in a controversy of the character presented in this record does not exist. (2) That it is apparent upon the face of the record presented that the amount in controversy does not exceed, exclusive of interest and costs, the sum or value of \$3,000.

R. C. Bullock and M. L. Davis, both of Dardanelle, Ark., and Mehaffy, Reid & Mehaffy, of Little Rock, Ark., for plaintiff.

J. B. Ward, of Russellville, Ark., and W. R. Thurmond, of Kansas City, Mo., for defendants.

TRIEBER, District Judge (after stating the facts as above). [1] The petition for removal alleges that the defendants, both of whom are corporations, are citizens and residents of the states of Michigan and Kansas, respectively, but fails to state what states created either of them. The diversity of citizenship to authorize a removal need not be alleged in the petition for removal, when it appears from the complaint or any part of the record when the petition for removal was filed. *Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. Ed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
206 F.—34

656; *Bondurant v. Watson*, 103 U. S. 285, 26 L. Ed. 447; *Denny v. Pironi*, 141 U. S. 121, 124, 11 Sup. Ct. 966, 35 L. Ed. 657; *Shattuck v. North British & Merc. Ins. Co.*, 58 Fed. 609, 7 C. C. A. 386. By reference to the complaint we find that it is alleged that the Russellville Company was created and exists under the laws of the state of Michigan; but it fails to allege under the laws of which state the Fidelity Company was created, leaving the name of the state blank.

[2] As the jurisdictional facts must clearly appear from the record to give a court of the United States jurisdiction, and there is nothing to show either in the petition or the complaint that the Fidelity Company was created and exists under the laws of a state other than that of Arkansas, of which state the plaintiff is a citizen and resident, the petition is clearly defective, unless the allegation in the petition that these corporations are citizens and residents of the states named is sufficient. That a corporation, as an entity, is not a citizen of any state is now settled by an unbroken line of decisions. *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Norfolk & Western R. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394; *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. 58, 44 L. Ed. 657; *Great Southern Fireproof Hotel Co. v. Jones*, 177 U. S. 454, 20 Sup. Ct. 690, 44 L. Ed. 842; *Rife v. Lumber Underwriters* (C. C. A.) 204 Fed. 33.

When the question of jurisdiction of the national courts in actions by or against corporations first came before the Supreme Court, it was held that the jurisdiction depended upon the citizenship of all the stockholders, as in a partnership, and if any one of the stockholders of the corporation was a citizen of the same state as any one of the parties on the other side to the action, there was no such diversity as will justify the assumption of jurisdiction by a national court. *Hope Insurance Co. v. Boardman*, 5 Cranch, 57, 3 L. Ed. 36; *Bank of United States v. Deveaux*, 5 Cranch, 61, 3 L. Ed. 38. This construction was adhered to and followed by that court for 50 years; the last case in which this rule was recognized being *Irvine v. Lowry*, 14 Pet. 293, 10 L. Ed. 462. But in 1844 in *Louisville, etc., R. R. Co. v. Letson*, 2 How. 497, 11 L. Ed. 353, this rule was changed, and it was there held:

"A corporation created by and transacting business in a state is to be deemed an inhabitant of the state and capable of being treated as a citizen for all purposes of suing and being sued, and an averment of the facts of its creation and place of transacting business is sufficient to give the Circuit Court of the United States jurisdiction."

In that case it will be noticed it was not yet determined that this was a conclusive presumption; but in *Marshall v. B. & O. Ry. Co.*, 16 How. 314, 14 L. Ed. 953, it was finally determined that, the presumption arising from the habitat of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it, the allegation that the defendants are a body corporate by the act of the General Assembly of Maryland is a sufficient averment that the real defendants are citizens of that state, and the earlier decisions expressly

overruled. Since then it has been uniformly held that such an allegation conclusively establishes the citizenship of all the stockholders of the corporation, and cannot be disproved by evidence that the stockholders or some of them are in fact not citizens of the state which created the corporation. *Shaw v. Quincy Mining Company*, 145 U. S. 444, 451, 12 Sup. Ct. 935, 36 L. Ed. 768.

As a corporation is not a citizen, an allegation that it is a citizen and resident of a certain state is insufficient. *Lafayette Ins. Co. v. French*, 18 How. 405, 15 L. Ed. 451; *Great Southern, etc., Hotel Co. v. Jones*, supra; *Thomas v. Board of Trustees*, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. Ed. 160; *Fred Macey Co. v. Macey*, 135 Fed. 725, 68 C. C. A. 363; *Rife v. Lumber Underwriters*, supra. As neither the petition for removal nor the complaint show that the defendant Fidelity Company was created under the laws of a state other than the state of Arkansas, the petition is defective and does not authorize the removal. But since the decision of the Supreme Court, in *Kinney v. Columbia Savings, etc., Ass'n*, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103, it is now no longer open to controversy that defects of this nature may be cured by amendment if the case has not yet been finally disposed of in the trial court, although it would not be subject to amendment after it has reached the appellate court. The reason for this, as stated by the Supreme Court in the *Kinney Case*, is that:

"A petition and bond for removal are in the nature of process. They constitute the process by which the case is transferred from the state to the federal court. Congress has made ample provision for the amendment of process"—referring to sections 948 and 954, R. S. [U. S. Comp. St. 1901, pp. 695, 696].

The defendants will, therefore, be granted leave to amend their petition for removal, if the court determines that it was properly removable in spite of the fact that the amount involved does not exceed the sum of \$3,000, exclusive of interest and costs.

[3] As it appears from the record that the cause of action accrued on March 9, 1911, prior to the date the Judicial Code went into effect (January 1, 1912), although the suit was not instituted in the state court until the 12th day of December, 1912, it is contended on behalf of the plaintiff that it is not removable, and could not have been originally instituted in this court under the provisions of section 24, subd. 1, of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [U. S. Comp. St. Supp. 1911, p. 135]). *Washington Home, etc., Co. v. American Security & Trust Co.*, 224 U. S. 486, 32 Sup. Ct. 554, 56 L. Ed. 854, is relied on as a conclusive authority on that point. On the other hand, it is contended on behalf of the defendants that section 299 of the Judicial Code preserves the jurisdiction of the national District Courts of all actions which arose prior to the date the Judicial Code went into effect, although suit thereon is instituted thereafter. That the action could have been maintained under the amendatory act of March 3, 1887 (24 Stat. 552, c. 373), as corrected by the act of August 13, 1888 (25 Stat. 433, c. 866 [U. S. Comp. St. 1901, p. 508]), and also removed to this court from a state court, is not questioned, leaving the only question for determination the construction of section 299 of the Judicial Code.

The only reported cases on this question are *Taylor v. Midland Valley R. R. Co.* (D. C.) 197 Fed. 323, and *Dallyn v. Brady* (D. C.) 197 Fed. 494, the first decided by Judge Youmans and the latter by Judge Witmer, and in both of them the contention of the defendants in this case was sustained in able opinions. That of Judge Youmans very ably analyzes and distinguishes the opinion of the Supreme Court in the *Washington Home Case*. After careful consideration of this question I concur in the conclusions reached by these learned judges, and will only add to the reasons stated by them the following:

It is an elementary rule of law that in construing a statute it is the duty of the courts to give effect to every word in the statute, or, as it is sometimes expressed, "all the words of a law must have effect rather than that part should perish by construction." *Bend v. Hoyt*, 13 Pet. 263, 10 L. Ed. 154; *Lawrence v. Allen*, 7 How. 785, 12 L. Ed. 914; *Washington Market Co. v. Hoffman*, 101 U. S. 112, 25 L. Ed. 782; *Montclair Township v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391, 27 L. Ed. 431; *United States v. Ninety-Nine Diamonds*, 139 Fed. 961, 72 C. C. A. 9, 2 L. R. A. (N. S.) 185; *Aaron v. United States (C. C. A.)* 204 Fed. 943. Courts are not at liberty to disregard any words in a statute, even if in their opinion they are unwise. The wisdom of all legislation rests solely with the lawmaking department of the government. *Wabash R. R. Co. v. United States*, 178 Fed. 5, 101 C. C. A. 133, 21 Ann. Cas. 819; *United States v. Colorado & Northwestern R. R. Co.*, 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893.

Applying these rules to the language used in the statute, "all such actions and proceedings and suits and proceedings for causes arising and acts done prior to such date may be commenced and prosecuted within the same time and with the same effect as if such repeal and amendments had not been made," it is clear that the intention of Congress as expressed in the act was not to have the Judicial Code apply to "proceedings for causes arising or acts done prior to such date," but that in such cases, which arose or constituted a cause of action within the jurisdiction of the national courts prior to January 1, 1912, it should continue, notwithstanding the changes made by the Judicial Code. If there had been no saving clause of causes of action then existing and not yet in suit, or of those then pending in the national courts, and which under the new Judicial Code are not cognizable in the national courts, parties thus situated would have been deprived of the right to have their controversies tried in those courts. *Ex parte McCardle*, 7 Wall. 506, 19 L. Ed. 264; *Baltimore & Potomac R. R. Co. v. Grant*, 98 U. S. 398, 25 L. Ed. 231. It is true the right to have an action tried in a particular tribunal is not such a right of which the Legislature cannot deprive him, but merely a privilege which the Legislature may grant, withhold, or withdraw after it had been granted.

This same result might probably have been accomplished by a short general provision; but Congress evidently was of the opinion that it was best to use language which would leave no room for doubt, and thus prevent endless litigation before it could be finally determined by

the court of last resort what causes were saved by the exception or proviso. To avoid this, section 299 specifically mentions what causes shall not be affected by the enactment of the Judicial Code. This section, as originally reported to the two houses of Congress by the special joint committee on revision and codification of the laws of the United States, did not contain any provision to save appeals and writs of error then pending. As originally reported, it read:

"The repeal of existing laws or the amendments thereof embraced in this act shall not affect any act done, or any right accruing or accrued, or any suit or proceeding, pending at the time of the taking effect of this act; but all such suits and proceedings, and proceedings for causes arising or acts done prior to such date, may be commenced and prosecuted within the same time and with the same effect as if said repeals and amendments had not been made."

In the Senate this was amended by inserting the words:

"Including those pending on writ of error, appeal, certificate, or writ of certiorari in any appellate court referred to or included within the provisions of this act."

The act, therefore, contains two distinct provisions: (a) Saves the jurisdiction as to any act done or right accruing or accrued before the act took effect, including any cause pending in the courts. (b) The Senate amendment saves the jurisdiction of any suit or proceeding pending on writ of error, appeal, certificate, or writ of certiorari in an appellate court.

The clause inserted by the Senate applies solely to actions then pending in an appellate court, and was so construed in the Washington Home Case, while this section, as originally reported by the joint committee, applied to any right of action which had accrued before and was in existence at the time the new act went into effect or was pending in a court. This is conclusively shown by the last clause of the section:

"And suits and proceedings for causes arising or acts done prior to such date may be commenced and presented within the same time and with the same effect as if said repeals or amendments had not been made."

Nor can it be said that Congress acted inadvertently in the use of the language employed in section 299. By subdivision 20 of section 24, defining the jurisdiction of the district courts in actions against the government, the amendment made by the act of June 27, 1898, 30 Stat. 494, c. 503, to the act of March 3, 1887, 24 Stat. 505, c. 359, U. S. Comp. St. 1901, p. 752 (the Tucker Act), which later act withdrew from the Circuit and District Courts jurisdiction of actions against the government for fees of officers, was re-enacted, but to save the jurisdiction of cases then pending under the act of 1887, it was enacted, "but no suit pending on the 27th day of June, 1898, shall abate or be affected by this provision." This language is clear and unequivocal that, while suits under the act of 1887 then pending shall not be affected by the new Code, causes of action existing but not pending on June 27, 1898, cannot be maintained in a district court under the Judicial Code.

What is now insisted upon by the motion to remand is, in effect,

that the words "causes arising or acts done prior to such date" shall be entirely eliminated, for no other effect can be given to these words except that causes which arose prior to January 1, 1912, although not yet sued on, still remain within the jurisdiction of the national courts as if no change in the law had been made. If the intention of Congress by the enactment of section 299 had been merely to save suits then pending, is it not reasonable to suppose that similar language would have been used as in subdivision 20 of section 24, and the words, "shall not affect any right accruing or accrued," and again, "any act done or right accruing or accrued before the taking effect of this act," found in section 299, omitted? A similar provision is found in section 300 of the Judicial Code in relation to penalties and forfeitures incurred prior to the taking effect of the Code.

Leave will be granted the defendants to amend their petition within three days so as to show under the laws of which state each of the defendants was created, and if so amended the motion to remand will be overruled.

STURGES et al. v. PORTIS MINING CO.

(District Court, E. D. North Carolina. June 28, 1913.)

No. 623.

1. FRAUDULENT CONVEYANCES (§ 172*)—VALIDITY AS BETWEEN PARTIES.

A transfer of property, fraudulent and void as to creditors, is nevertheless valid as against the grantor and his privies in estate.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 523-529, 542; Dec. Dig. § 172.*]

2. FRAUDULENT CONVEYANCES (§ 315*)—DECREE SETTING ASIDE—CONSTRUCTION AND OPERATION.

In a suit by a creditor under Revisal 1905, N. C. § 962, which makes voluntary deeds voidable as to creditors of the grantor when he fails to retain property of sufficient value available for the payment of his then existing debts, it was found that a voluntary conveyance of property by the debtor to his wife and codefendant was fraudulent and void in law under the statute "as to the plaintiff," and decreed that it be "set aside, revoked, rescinded, and annulled." The plaintiffs' debt was afterward paid. *Held*, that the decree could not be construed as going beyond the issues, and that the deed remained valid as between the defendants, and the property passed by a conveyance by the wife, after her husband's death, as against his heirs at law.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 973-975; Dec. Dig. § 315.*]

3. COURTS (§ 335*)—FEDERAL COURTS—PROCEDURE—EQUITABLE RELIEF IN LAW ACTION.

A federal court cannot grant affirmative equitable relief to the defendant, in an action at law removed from a state court, although that court under the state practice might have done so.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 902-907½; Dec. Dig. § 335.*]

At Law. Action by S. E. Sturges and others against the Portis Mining Company. On motion by defendant for judgment on the pleadings. Motion granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Thomas M. Pittman, of Henderson, N. C., for plaintiffs.
Guthrie & Guthrie, of Durham, N. C., for defendant.

CONNOR, District Judge. The pleadings disclose the following case: The locus in quo consists of 500 acres of land, lying and being situate in Franklin county, N. C., the boundaries of which are set forth in the pleadings. The original tract, containing 933 acres, was conveyed by Stephen G. Sturges to his son, W. E. Sturges, on March 31, 1894. (This deed conveyed five-sixths undivided interest; one-sixth undivided interest having theretofore been conveyed to Judge C. M. Cooke. This fact does not affect the merits of this motion.) On June 7, 1898, W. E. Sturges conveyed, in consideration of love and affection, to his wife, Mrs. Lelia A. Sturges. At the date of this conveyance said W. E. Sturges was indebted to John R. Wheless in the sum of about \$3,000. Thereafter said Wheless instituted an action in the superior court of Franklin county against said W. E. Sturges and his wife, in which, at April term, 1900, thereof, upon issues submitted to a jury, it was found that, at the time of the execution of said deed, W. E. Sturges "did not retain sufficient property, in excess of his homestead and exemptions, to pay all of his then existing creditors." Upon this verdict judgment was rendered that plaintiff Wheless recover of defendant W. E. Sturges the amount of his debt \$3,112.56, and:

"It being made to appear to the court, from the proof and pleadings and from the inspection of the record, that the defendant W. E. Sturges, on the 17th day of June, 1898, for the consideration of natural love and affection, and for the other consideration thereto moving, did execute to the codefendant Lelia A. Sturges, who is the wife of the defendant W. E. Sturges, a deed by which he undertook to convey to the said Lelia A. Sturges a five-sixths undivided interest in and to the following described tract or parcel of land; * * * and it appearing and being, by the jury, found as their verdict that, at the time of the voluntary conveyance by W. E. Sturges to his wife, Lelia A. Sturges, the defendant W. E. Sturges was indebted to the plaintiff John R. Wheless in the sum of nearly \$3,000, and that he did not retain property sufficient in value and in excess of his homestead and personal property exemptions to pay his then existing creditors what he justly and legally owed them; * * * Now, therefore, it is declared, considered, adjudged and decreed that the said deed, so attempted to be made by W. E. Sturges to Lelia A. Sturges * * * is fraudulent and void in law as to the plaintiff John R. Wheless and the same is hereby set aside, revoked, rescinded and annulled."

The court thereupon directs that Judge Cooke, the other tenant in common of said land, be made a party defendant, to the end that his one-sixth interest be allotted and set apart to him, and the cause "is held for further orders."

On the 13th day of February, 1901, the record contains the following entry signed by counsel for plaintiff:

"Received of C. M. Cooke, attorney for defendant, three thousand dollars in full payment of the principal and interest of this judgment."

It does not appear that any further proceedings were had in the cause.

On January 23, 1901, Judge Cooke conveyed to Mrs. Lelia A. Sturges his one-sixth undivided interest in the land. W. E. Sturges

died intestate prior to this date, leaving the plaintiffs his children and heirs at law. Mrs. Lelia A. Sturges occupied the land until January 25, 1909, when, in consideration of \$150,000, she sold and conveyed that portion of said land described in the pleadings containing 500 acres, with full covenants of warranty, to A. C. Deniston who, on February 8, 1909, conveyed, with full covenants of warranty, the same land to the defendant Portis Mining Company. Mrs. Sturges thereafter died, leaving a last will and testament. As both parties claim under W. E. Sturges, the plaintiffs as his heirs at law, and defendant by the recited conveyances, the sole question presented upon the pleadings is which of them have his title. It is not denied by plaintiffs that the deed executed by W. E. Sturges to his wife, Mrs. Lelia A. Sturges, June 17, 1898, was sufficient in form to convey his title to her and was delivered to her. It was duly and properly admitted to probate and registration. The plaintiffs' contention is thus clearly stated in their reply to the new matter set up in defendant's answer.

"The claim of plaintiffs to recover in this action, so far as they are now informed and believe, rests upon the said cancellation and avoidance of said deed by the judgment above recited; and, if the same did not avoid the said attempted conveyance, and revert the title to said land in the said W. E. Sturges, they have no right of recovery herein. Plaintiffs expressly repudiate any suggestion that the said conveyance between their father and mother was infected with any element of bad faith or fraudulent purpose or moral turpitude, but the same was only fraudulent in law as adjudged."

This language very properly relieves the case of any question which might arise under the provisions of section 960, Rev. 1905, being substantially a re-enactment of St. 13 Elizabeth, c. 2, wherein deeds are declared void as to creditors if "contrived and devised of fraud to the purpose and intent to delay, hinder, and defraud creditors," etc. It is conceded that the only infirmity in the deed is found in the provisions of section 962, Revisal, avoiding voluntary deeds "as to creditors of the donor or grantor, when he fails to retain property of sufficient value, available for the payment of his then existing debts."

[1] It is settled by uniform and ample authority in North Carolina, and elsewhere, that conveyances within the condemnation of the statute of St. 13 Elizabeth (Rev. § 960) are good and valid as against the grantor or maker and his privies in estate; they are fraudulent and void only "as to creditors." *York v. Merritt*, 80 N. C. 285; *Haliburton v. Slagle*, 130 N. C. 487, 41 S. E. 877. The doctrine, sustained by an unbroken current of decided cases, is thus stated:

"No rule of law is more firmly established than that a transfer of property made in fraud of creditors, while void as to them, is binding upon the parties and those in privity with them. The statutes against fraudulent conveyances are designed merely to protect the interest of creditors, and their provisions do not, in any manner, affect the rights of the parties to the conveyance, and these must therefore be determined by the principles of the common law." 14 Am. & Eng. Enc. 274.

So it is held that:

"When property has been fraudulently conveyed by deed the grantor, his heirs and assigns, are afterwards estopped to set up the fraud as a foundation for an action at law for the recovery of the property." *Id.* 274.

Nor will a court of equity assist him to recover the property. *York v. Merritt*, supra. The learned counsel for defendant, in their well-considered brief, quote from *Moore on Fraudulent Conveyances*, vol. 2, section 9, page 1025:

"A decree avoiding a deed as to creditors of the grantor leaves the deed operative inter partes. The legal effect of a judgment declaring a conveyance void as against a judgment creditor is not to restore title to the debtor, but to make the property subject in the hands of the grantee to the judgment lien, and clear the way for the judgment creditor to sell in satisfaction thereof."

[2] In *Bell v. Wilson*, 52 Ark. 171, 12 S. W. 328, 5 L. R. A. 370, it is said that:

"A decree setting aside a conveyance as a fraud upon the grantor's creditors does not make the deed invalid as to any one except such creditors."

The learned counsel for plaintiff meets this contention by saying:

"It may be that Wheless was only entitled in law to a judgment or decree to the extent that the conveyance was an obstacle to the recovery of his debt. Yet it is competent for the parties to litigate beyond the mere allegations of the pleadings; and, if the judgment goes beyond the plaintiff's right of recovery it will be presumed that the parties did litigate such matter and by consent."

He further says:

"If the judgment went further than the law, on the facts, warranted, it was error to be corrected on appeal, and not by collateral attack."

If the defense to this action involves a collateral attack on the judgment rendered in the action determined in the superior court of Franklin county, it cannot be maintained. If the judgment rendered in that action is properly interpreted by plaintiffs, although erroneous, yet if it was "within the issue" raised by the pleadings, it is not open to attack—the only remedy open to the party against whom it was rendered was to have it reversed or corrected upon an appeal. *Settle v. Settle*, 141 N. C. 569, 54 S. E. 445; *Bunker v. Bunker*, 140 N. C. 18, 52 S. E. 237.

In inquiring into the validity of a judgment invoked as the basis of a recovery, or a defense, in another action, it is always necessary to examine the entire record, to the end that it may be ascertained whether the court was empowered to render such judgment—whether the parties had brought the question determined, within the jurisdiction of the court. In *Jones v. Davenport*, 45 N. J. Eq. 77, 17 Atl. 570, cited in *Settle v. Settle*, supra, it is said:

"A decree or judgment, on a matter outside of the issue raised by the pleadings, is a nullity, and is nowhere entitled to the least respect as a judicial sentence."

The writer of this opinion, speaking for the court in that case, after reviewing the authorities, said:

"The test appears to be whether the questions which passed into the decree were presented to the attention of and (were) within the jurisdiction of the court; the parties being before the court."

Applying this principle to the judgment relied upon by plaintiffs, for the purpose of taking the title out of Mrs. Lelia A. Sturges and vest-

ing it in *W. E. Sturges*, we find that the plaintiff Wheless was seeking to remove the deed made by his debtor, so far as it operated to obstruct the process of the court in the enforcement of his right to subject the land to the payment of his debt. He was in no other way concerned with the purpose of the husband to give the land to his wife. He made only such allegations as were proper to bring his grievance to the attention of the court; no other issue was, or could be, raised between the grantor and grantee and himself. That purpose being accomplished, he was content; he had no other cause of complaint. If the court, in this condition of the pleadings, and as between Wheless and Sturges and wife, had decreed the title to the land to be, for all purposes, in *W. E. Sturges*, it would have acted "outside the issue," or, as said by Mr. Justice Brewer in *Reynolds v. Stockton*, 140 U. S. 255, 265, 11 Sup. Ct. 773, 35 L. Ed. 464, rendered a judgment which was not "substantially responsive to the issues presented by the pleadings." Numerous cases may be found in the state and federal reports in which the courts have undertaken to define and apply the doctrine of *res judicata*. It is doubtful whether an attempt to reconcile many of them would be profitable or successful. To this extent, at least, it may safely be said the law is reasonably well settled—that a judgment is *res judicata* in respect to all matters actually put in issue by the pleadings. For the purposes of the instant case, this rule is sufficient. As between the plaintiff Wheless and the defendants the only question put in issue and decided by the jury was whether, the deed being voluntary, Sturges retained property of sufficient value to pay his existing indebtedness. That being found by the jury, the only judgment which could have been rendered was that "as to the plaintiff" it was void. The title to the land, as between Sturges and his wife, was not in issue; neither of them suggested by any pleading that the court was invited or empowered to pass a judgment or make deliverance, as between them; an inspection of the judgment discloses that the court carefully restricted its judgment to the validity of the deed "as to the plaintiff." The judgment against *W. E. Sturges* having been paid before any further action was taken, the plaintiff Wheless had no further interest in the cause, or the title to the land—the cancellation of the judgment left the parties to the deed as they were before the action was brought. Plaintiffs say, however, that the court adjudged the deed to be "revoked, set aside, rescinded, and annulled"; that, from and after this adjudication, there was no deed in existence, and of necessity the title reverted in *W. E. Sturges*. The same argument was made in the case of *Allred v. Smith*, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 924. There, a deed was attacked for that the grantor was without sufficient mental capacity to execute it. The jury having so found, a decree was passed declaring the deed "null and void," and directing its cancellation. Thereafter, in another action, the effect of this decree upon the rights of persons who were not parties to the original action was passed upon. It was said, in regard to the language of the decree, that the deed was avoided only as between the parties to the action. So here, the deed was declared void, etc., only in so far as its validity was "put in issue," and was necessary to afford the plain-

tiff the relief to which, upon the facts alleged by him and found by the jury, he was entitled. The land in controversy is of large value, and the development of its resources is dependent upon the assurance of the title. The question raised by the plaintiffs is more interesting than difficult of solution. Considered either from the viewpoint of the jurisdiction of the court to render a judgment involving the result contended for by plaintiffs, or the construction of the language of the decree in the light of the pleadings in that action, the defendant's motion should be granted. The facts upon which the merits of the litigation depend are uncontroverted, and fully stated in the pleadings. The motion, treated as a demurrer, is an appropriate way to bring the cause to a determination. There is no controverted question of fact.

[3] The defendant, by way of counterclaim and affirmative equitable relief, asks that a decree be made quieting its title. This cannot be done for more than one reason. This is an action at law, and while, if it had remained in the state court, wherein the distinction between actions at law and suits in equity do not obtain—the court could have granted such relief, either legal or equitable, as upon the facts found, the parties may be entitled to—in this court such distinctions prevent the administration of purely equitable remedies in actions at law. While, by the new equity rules (rule 22 [198 Fed. xxiv, 115 C. C. A. xxiv]) it is provided:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be then proceeded with, with only such alterations in the pleadings as shall be essential."

Such change in the procedure does not abolish or in any degree change the essential distinctions existing between legal and equitable rights and remedies; they are fundamental. This case was, upon its removal into this court, properly docketed on the law side. It involved only the legal title to the land. If, however, the case was on the equity side or, if in a court, proceeding under the code practice, the defendant would encounter the difficulty in asserting his equitable counterclaim that it shows no equity for the relief demanded. It does not appear that there is in existence any paper, or other muniment of title, affecting the land which should be canceled or declared invalid. If the equity asserted be that the new matter set up in the answer entitles it to an injunction against the institution of other actions of ejectment, in the nature of a bill of peace, it is manifest that, under the well-settled principles of equity jurisprudence, no case is made upon the pleadings upon which such relief could be granted. Adams, Eq. 199–202.

The defense set up by way of an estoppel in pais need not, in view of what has been said, be considered.

The motion of defendant must be granted. A judgment to that effect may be drawn.

OSTRANDER v. DEERFIELD LUMBER CO. et al.

(District Court, N. D. New York. June 16, 1913. On Rehearing, July 7, 1913.)

1. REMOVAL OF CAUSES (§ 112*)—PROCEEDINGS AFTER REMOVAL—MOTION TO VACATE SERVICE.

A removing defendant may challenge the validity of the service in the federal court after removal, provided he has not entered a general appearance.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 238; Dec. Dig. § 112.*]

2. COURTS (§ 344*)—PROCESS—FOREIGN CORPORATION—RULE OF FEDERAL COURTS.

Service on an officer of a foreign corporation in a personal action in a state court against the corporation, although good under the state statute, is not necessarily good in the federal courts, which follow the general law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. § 344.*]

3. CORPORATIONS (§ 668*)—ACTION AGAINST FOREIGN CORPORATION—JURISDICTION—VALIDITY OF SERVICE.

Under the rule of the federal courts, service of summons on the president of a foreign corporation, who is temporarily in the state on his own private business, or in relation to a single transaction of the company, does not give the court jurisdiction in a personal action against the corporation, where it has no officer, place of business, agent, or property in the state, and is not carrying on any business within the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2627; Dec. Dig. § 668.*]

At Law. Action by George N. Ostrander against the Deerfield Lumber Company and Amos N. Blandin. On motion by defendants to set aside service of summons. Motion sustained as to the corporation, and denied as to the individual defendant.

Edward M. Angell, of Glens Falls, N. Y., for plaintiff.

J. B. McCormick, of Granville, N. Y., for defendants.

RAY, District Judge. The defendants, having appeared specially and moved this case from the Supreme Court of the state of New York to the District Court of the United States, now move to set aside the service of the summons made on the defendant Deerfield Lumber Company by serving same on Amos N. Blandin, its president, at Troy, N. Y., and on the said Amos N. Blandin individually, on the grounds: (1) That defendant Deerfield Lumber Company is a corporation of the state of Vermont, and not of the state of New York, and has no property, business, or place of business in the state of New York, and that its president was not in the state of New York, transacting any business of or for the company, when the summons was served on him, and that, as to the defendant Blandin, there is no separable controversy; and (2) that defendant Blandin was enticed into the state of New York by the plaintiff by trick, artifice, and deceit, for the purpose of making such service.

I do not need to go into the evidence on this last proposition, but

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

content myself with stating that, while the circumstances of obtaining such service are somewhat suspicious, I do not think the charge made is sustained. The presumption is in favor of honesty of purpose, and, accepting the explanation of the suspicious circumstances, I am of the opinion I would not be justified in holding that the service was obtained in the manner and by the means alleged by the defendant.

[1, 2] On the other question the law is quite strict and well settled. First, the Supreme Court of the United States has held that service of a summons on a nonresident corporation, good under one law, may not be good under the general law, which the federal courts must follow; and, second, that after removal to the United States courts the validity of such service may be attacked and set aside, provided the defendant has not appeared generally and submitted himself to the jurisdiction of the court. *Remington v. Central Pac. R. Co.*, 198 U. S. 95, 25 Sup. Ct. 577, 49 L. Ed. 959; *Goldney v. Morning News*, 156 U. S. 523, 525, 15 Sup. Ct. 559, 39 L. Ed. 517; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; *Wabash Western R. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431; *Pennsylvania, etc., v. Meyer*, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; *Loudon Machinery Co. v. American M. I. Co. (C. C.)* 127 Fed. 1008; *Wilkins v. Queen City, etc. (C. C.)* 154 Fed. 173; *Craig v. Welch Motor Car Co. (C. C.)* 165 Fed. 554.

[3] The defendant corporation asserts and so far as appears it had no property or business office or place of business in the state of New York, and neither carried on nor carries on or transacts any business in such state (except that it be occasional and special in relation to some special matter). So far as appears, Mr. Blandin, defendant's president, came into the state of New York February 19, 1913, to consult in regard to some business matter connected with some real property owned by the Rich Lumber Company, a corporation, which land is situated in the state of Vermont, but in fact held no consultation and transacted no business whatever. He was not in the state of New York in his capacity of president of the defendant corporation, or for the purpose of transacting any business for it or in its behalf. He was in the state of New York, therefore, in his individual capacity and on his own business.

Under such circumstances, service on Mr. Blandin was not good service on the defendant corporation. The defendant corporation had no property in the state of New York; it was not transacting or carrying on any business in the state of New York at or about the time the action was commenced; it had no office or place of business in the state of New York; and Blandin, the president, was not in the state of New York on any business of the company, or engaged in transacting any business for the corporation, at the time when service was made.

In *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 410, 411, 23 Sup. Ct. 728, 729 (47 L. Ed. 1113), it was held:

"Granting the existence of a cause of action, it is not every service upon an officer of a corporation which will give a state court jurisdiction of a foreign corporation."

The residence of an officer of a corporation does not necessarily give the corporation a domicile in the state. *He must be there officially representing the corporation in its business.* *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517. Service in New York of a summons in New York upon a director of a foreign corporation *who resides in New York* is not sufficient to bring the corporation into court when, *at the time of service*, the corporation was not doing business in the state of New York. The doctrine of *Goldey v. Morning News* was reiterated and affirmed in *Wabash Western Railway v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431. See, also, *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222.

In *Lumberman's Insurance Co. v. Meyer*, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810, it was held:

"In order that a federal court may obtain jurisdiction over a foreign corporation, the corporation must, among other things, be doing business within the state."

In that case, however, the foreign corporation issued policies of insurance on real property situated in New York. After loss its agents were there adjusting the loss when service was made. This was held sufficient, as the corporation was then engaged in doing business in the state of New York. At page 415 of 197 U. S., at page 485 of 25 Sup. Ct. (49 L. Ed. 810), the court, per Mr. Justice Peckham, said:

"A fire insurance company, which issues its policies upon real estate and personal property situated in another state, is as much engaged in its business when its agents are there under its authority adjusting the losses covered by its policies as it is when engaged in making contracts to take such risks. If not doing business, in such case, what is it doing? It is doing the act provided for in its contract, at the very place where, in case a loss occurred, the company contemplated the act should be done; and it does it in furtherance of the contract and in order to carry out its provisions, and it could not properly be carried out without this act being done; and the contract itself is the very kind of contract which constituted the legal business of the company, and for the purpose of doing which it was incorporated."

In the case at bar there are no facts indicating that the defendant company had any business or was doing any business in the state of New York.

Conley v. Mathieson Alkali Works, supra, is a case where the case was commenced in the state court, and thereafter, and after alleged service of the summons, transferred to the Circuit Court of the United States, where the motion to set aside the service was made. *Goldey v. Morning News*, supra, *Craig v. Welch Motor Car Co.*, supra, and other cases above cited are where the action was brought in the state court and transferred to the federal courts, where the motion was made to set aside the service.

It follows that service of the summons in this case as against and on the Deerfield Lumber Company was of no force and must be set aside, but the service on the defendant Amos N. Blandin was good and sufficient. Whether the action is one that can be prosecuted against him alone is a question that will come up on the trial.

Ordered accordingly.

On Rehearing.

Certain papers were not before me when a decision was rendered setting aside the service process on the defendant Deerfield Lumber Company, but refusing to do so as to the defendant Amos N. Blandin individually. I have now examined and considered again all the affidavits and briefs of the respective counsel, but must adhere to my former conclusions. The action is to recover for services in negotiating the sale of certain lands then belonging to the Deerfield Lumber Company pursuant to an agreement for compensation in so doing, and which were sold later. It is alleged that the agreement was between Ostrander, the plaintiff, and both the defendants, and it would seem both were interested in procuring the sale. While defendants deny the agreement, and deny that it was made in the state of New York, as asserted by the plaintiff, for the purposes of this motion, I assume and hold that the agreement was made, and that it was made in the state of New York. Assuming a breach of that agreement and the liability of defendants under it, as I am bound to do on this motion, the question is: Could valid service, which will be recognized by the federal courts, of the summons in this action in the Supreme Court of the state of New York be made on the defendant corporation by service on Amos N. Blandin, the president of the corporation, when he was temporarily in the state of New York, his residence being in the state of New Hampshire, but not on business of the defendant company, and not representing the defendant company, or transacting any business for such company?

The affidavits presented by the plaintiff do not establish that Blandin was in the state of New York on any business of the defendant company, and representing it, when the service of the summons was made on him at Troy, N. Y., or that the company was then doing any business in the state of New York, or that it had any property or place of business, or agent designated by it upon whom service of process could be made in the state of New York. The affidavits tend to show, and I will assume do show, that this property referred to, situated in Vermont, having been sold and transferred to Rich Lumber Company by the Deerfield Lumber Company, some considerable time before, there was some question as to the lines, and Blandin had agreed with one Hanley, the woods superintendent of the Rich Lumber Company, to have lines run or located on said lands, which were situated in the state of Vermont, and not in the state of New York, and that under the employment of Blandin one Howard was then on said lands engaged in locating lines. Also, Blandin had hardwood for sale in Vermont, and Hanley was desirous of discussing both matters with Blandin, and an appointment was made by Hanley with Blandin to meet him and a third person, one Veatries, at Troy, and Blandin and Hanley did meet them at the time the service of the summons was made.

Hanley said they did discuss such matters, but the affidavits fail to show that Blandin even represented himself to be acting for the Deerfield Lumber Company, or that any discussion was had in its behalf, or that it was in fact interested in the discussion. If the Deerfield

Lumber Company, as well as Blandin, was obligated to survey the lines, and was then engaged in such survey, and some discussion was had at Troy between Hanley and Blandin, this hardly rises to the dignity of transacting business within the meaning of the decisions. Blandin was interested in the lands sold and the lines to be run, and the affidavits say he made the agreement as to the lines, but do not show he made any such agreement *as president* or in behalf of the defendant company. But it is not necessary to decide that proposition, as only by way of inference upon a very slight foundation can it be said the defendant had any interest in the matter, and it is not made to appear that Blandin was then representing or acting for the Deerfield Lumber Company in that, so far as appears, independent discussion.

In *Craig v. Welch Motor Car Co. et al.* (C. C.) 165 Fed. 554, decided by Ward, Circuit Judge, of the Circuit Court of Appeals in this circuit, the plaintiff and defendant had matters in dispute, and defendant, a foreign corporation, sent its agent into the state of New York to effect some sort of a settlement. While these negotiations were in progress, one of the defendant's directors, named Swaut, came to New York City on his way to visit some friends in Amsterdam. It was shown that he went to the office of the plaintiff company every day for some time, and discussed the pending negotiations, which finally fell through. Swaut went on to Amsterdam, and there he was served with the summons in an action in the state court, and the case was removed to the federal court, where the motion was made to set aside the service of the summons. Ward, Circuit Judge, in granting the motion, said:

"As the cause of action arose here, the service was good in the courts of this state [New York] under section 432, Code of Civil Procedure. But the rule in the federal courts is different. *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517. The affidavits satisfy me that Swaut was not acting for the defendant while in this state, *and if he were, a single transaction would not be enough to make service on him as a nonresident director good service on the defendant in the federal courts*"—citing many cases.

In *Wilkins v. Queen City Savings Bank & Trust Co.* (C. C.) 154 Fed. 173, Lacombe, Circuit Judge, also of the Circuit Court of Appeals in the Second Circuit, held:

"The presence of an officer of a corporation in another state than that of its domicile, *for the purpose of discussing a proposed adjustment of a single controversy, does not constitute a doing of business within the state* by the corporation, such as to subject it to the jurisdiction of a federal court thereon by service of process on such officer."

Following these decisions, as I feel bound to do, the presence of Blandin in Troy, N. Y., for the purpose of discussing the matter referred to, even if in behalf of the corporation of which he was president, did not subject the corporation to the jurisdiction of the state courts for the purpose of serving a summons in an action; that is, he was not transacting business within the meaning of the decisions. It was not like adjusting losses, etc. And see *Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569.

I do not need to reiterate what was stated in my former opinion, that it is now settled that service on an officer of a foreign corporation in the state of New York, held good by the courts of that state under the Code of Civil Procedure, is not necessarily good under the federal law, and, if not, then, when the case is removed from the state of New York to the federal court, the service may be set aside, unless the defendant has appeared generally in the state court, or has answered, or otherwise waived the defective service. All cases to the contrary are now overruled by the decision of the Supreme Court of the United States. *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517, was a case commenced in the Supreme Court of the state of New York and removed by defendant to the federal court, when the motion to set aside the service was made. The Supreme Court held:

"In a personal action brought in a court of a state against a corporation which neither is incorporated nor does business within the state, nor has any agent or property therein, service of the summons upon its president, temporarily within the jurisdiction, cannot be recognized as valid by the courts of any other government. A corporation sued in a personal action in a court of a state, within which it is neither incorporated nor does business, nor has any agent or property, does not, by appearing specially in that court for the sole purpose of presenting a petition for the removal of the action into the Circuit Court of the United States, and by obtaining a removal accordingly, waive the right to object to the jurisdiction of the court for want of sufficient service of the summons."

The motion to set aside the service on the defendant corporation must be granted.

MERCHANTS' SYNDICATE CATALOG CO. v. RETAILERS' FACTORY CATALOG CO. et al.

(District Court, N. D. Illinois, E. D. July 14, 1913.)

No. 30,839.

1. INJUNCTION (§ 55*)—UNLAWFUL USE OF INFORMATION OBTAINED BY EMPLOYÉ.

Complainant company established a business by making contracts with factories to sell their goods, furnishing an illustrated catalogue of the same, with retail price lists, to local merchants, with whom it also made contracts, and who sold from such catalogue to customers, making the difference between the catalogue price and the price in a confidential price list furnished by complainant, which caused the goods to be shipped from the factory direct to the customer. Complainant expended a large sum in organizing its business and establishing a valuable good will. Defendant corporation was organized by one of the individual defendants while in the employ of complainant to engage in the same business, which it started by using confidential information obtained by its codefendant while in such employment for that purpose, consisting of lists of factories, merchants, and sales agents with whom complainant had or was negotiating for contracts. It also used complainant's catalogue, at first directly and afterwards by copying it as its own, and wrote complainant's agents, and attempted to secure their services. *Held*, that such use of information so obtained was fraudulent, and constituted unfair competition, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
206 F.—35

that complainant was entitled to an injunction restraining the same, and also to an accounting for profits so made.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 108, 109; Dec. Dig. § 55.*]

2. EQUITY (§ 65*)—CLEAN HANDS—APPLICATION OF MAXIM.

The fact that complainant, in making its own catalogue, copied from those of other concerns, did not debar it from relief on the ground that it did not come into court with clean hands; its right to such relief arising from the relationship between the parties and the fraudulent acts of its employé.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185-187; Dec. Dig. § 65.*]

In Equity. Suit by the Merchants' Syndicate Catalog Company against the Retailers' Factory Catalog Company, Thomas H. Baskin, A. G. Clune, and Ina Mullane. On final hearing. Decree for complainant.

Zimmerman & Myers, of Chicago, Ill., for complainant.

Adams, Crews, Bobb & Wescott, of Chicago, Ill., for defendants.

SANBORN, District Judge. A bill for fraud and unfair competition was filed July 1, 1912. On September 30, 1912, this court issued a temporary injunction, restraining defendants from using complainant's catalogue in building up defendants' catalogue, using complainant's catalogue in making sales, selling or giving away catalogues made up by copying complainant's catalogue, using certain lists of merchants under contract with complainant, as well as any list or lists of prospective merchants intending to do business with complainant, approaching or interfering with the salesmen of complainant, and the use of a certificate of deposit contract similar to that of complainant. The temporary injunction was later modified, by making certain additions thereto, restraining defendants, among other things, from approaching any of the merchants referred to in said lists, in conducting any competing business.

[1] It appears from the bill and proofs that John Baskerville, president of complainant, adopted a plan of merchandising through local merchants, which was to publish a large general catalogue of merchandise, showing the description and retail prices of commodities. The catalogue was to be furnished to merchants throughout the country, who were under contract with complainant, together with a confidential price list, but without disclosing to the merchants the cost or place of manufacture. The merchant was to sell the goods mentioned in the catalogue to his customers and order the same from complainant, and by it ordered from the factory and shipped directly to the consumer. The contract with the merchant consisted of a certificate of deposit, by which he agreed to pay \$100, which was to be returned to him when sales to a certain amount had been made.

The scheme was not original with Baskerville, but was an extension of the Berkley system, so called. Complainant's catalogue was compiled, in part, from Sears, Roebuck & Co.'s catalogue, from cuts and facts furnished by some of the factories interested, and from other

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sources. The complainant corporation was organized in 1910. After the outlay of considerable sums of money by the complainant in getting the plan started, the defendant Baskin was employed to make contracts with factories, and obtain from them the necessary facts from which the catalogue or catalogues were to be prepared. Baskin started work for complainant in September, 1910, continuing until January, 1911, again being employed in June, 1911, and severing his connection with the company April 6, 1912, taking effect April 10, 1912.

The complaint is that the defendant Baskin, while in the employ of complainant as its trusted servant, acquired the information and experience necessary to the carrying on of a successful business similar to that of the complainant, and in the latter part of the year 1911 entered into negotiations with one McCauley for the purpose of organizing a rival business, when the money could be raised, and Baskin could collect sufficient facts and obtain sufficient experience to make the arrangement a feasible one. Baskin had been formerly employed by the Berkley system, which was, however, not so complete or thoroughly organized as that of complainant; that Baskin proceeded to obtain all confidential information from the complainant company, and, through his connection with it as sales manager, whereby he obtained the names of all the factories who were willing to sell goods under the plan in operation, the names of all the merchants under contract with complainant, as well as the names of a large number of merchants who had answered advertisements, and who had under consideration the making of sales contracts with complainant. About three months before Baskin ceased to be in the employment of complainant, he and McCauley formed a South Dakota corporation for the purpose of carrying on a like business. Shortly before Baskin severed his connection with complainant a sufficient amount of money had been raised by McCauley, through the sale of stock in the defendant corporation, to enable that company to begin business. On April 7, 1912, Baskin sent out a form letter to the salesmen of complainant, stating that he had severed his connection with the company and formed one of his own, and proposing to make a contract for the sale of his company's goods with them. It is claimed that the plan was that Baskin should continue in the employment of complainant until he obtained all their factory lines, made acquaintance with all their salesmen, obtained a list of the merchants who were under contract with them, complainant meanwhile paying the expense of all the necessary experiments to make the business a success, and at the proper time, when sufficient money should be raised by Baskin and McCauley, they would then start the new business, substantially upon the good will and outlay of the complainant.

Shortly after the 10th of April, 1912, when Baskin severed his connection with complainant, the defendant company commenced to do business. They had no catalogue, however, and it was necessary for a while to proceed almost entirely upon the basis established by complainant. Salesmen were sent out by the defendant company, who for a while used complainant's catalogue. A certificate of deposit was gotten up, of a different appearance from complainant's, but containing

substantially the same provisions. The business was, however, conducted in the name of the Retailers' Factory Catalogue Company. The complaint is that Baskin thus used the good will, and information of a confidential character, which he had gotten almost wholly through his connection with the complainant, for his own benefit, and to the prejudice of complainant, and against its interest, and that the law does not permit this to be done.

It is claimed by defendants, on the other hand, that the plan pursued by both companies is practically the former Berkley system, that Baskerville practically copied that system in forming his own, that in making up his catalogue he copied very liberally from Sears, Roebuck & Co. and other catalogues, and therefore that his company is in no position to obtain any injunction, or recover any profits realized by the defendant company for doing substantially the same thing as the complainant company had formerly done. Defendants claim that the complainant company does not come into court with clean hands, for the reason that it has thus appropriated the outlay and efforts of other people, and cannot under the circumstances have any cause of action against the defendants. It is substantially admitted by complainant that, if Baskin had never had any connection with the complainant company, defendants' position would be correct, but, inasmuch as he was in the employ of complainant, and obtained substantially all the information necessary to launch his business while in that capacity, the company formed by him has no right to use materials or facts obtained by him in the course of his employment, and for his employer, against the interest and to the prejudice of complainant company.

It is found as a fact, from the testimony and exhibits admitted on the hearing, that the complainant's case is substantially proved. The claims of the complainant as herein stated are true in substance and effect. Baskin and McCauley entered into a combination or conspiracy to obtain the benefit of detailed facts and information which Baskin gained solely through his connection with complainant, and they carried out their scheme by appropriating to themselves everything of value which had been obtained by complainant in the building up of its business, and which had become an exceedingly valuable good will. This the law does not permit them to do without liability, as held by the Circuit Court of Appeals of the Second Circuit in *International Register Co. v. Recording Fare Register Co.*, 151 Fed. 199, 80 C. C. A. 475. Baskin was under legal obligation not to act adversely to the interests of complainant in connection with any of its business, and especially any business with which he had become connected by means of information and relations growing out of said agency. The like rule is held in many other cases, among others, *Stevens v. Stiles*, 29 R. I. 399, 71 Atl. 802, 20 L. R. A. (N. S.) 933, 17 Ann. Cas. 140, *Stone v. Goss*, 65 N. J. Eq. 756, 55 Atl. 736, 63 L. R. A. 344, 103 Am. St. Rep. 794, and *Westervelt v. National Paper Co.*, 154 Ind. 673, 57 N. E. 552.

[2] Although it is a fact that Baskerville copied from other catalogues in the preparation of his own, this does not excuse a person in Baskin's situation from appropriating to himself such confidential in-

formation, although a third person might have copied from Baskerville's catalogue without making himself in any way liable to the complainant. Baskin did much more than copy the catalogue prepared by Baskerville. He knew thoroughly all the contract relations existing between the factories listed in that catalogue and the complainant, and, in addition to this, he appropriated to himself lists of merchants under contract with the complainant, lists of prospective merchants with whom a contract might possibly be made, and took over also as much of the good will established by complainant as he could possibly assimilate. The rule of unclean hands does not apply to such a case as this. *Simmons Med. Co. v. Mansfield Drug Co.*, 93 Tenn. 84, 23 S. W. 165; *Sartor v. Schaden*, 125 Iowa, 696, 101 N. W. 511; *Stirling Silk Mfg. Co. v. Sterling Silk Co.*, 59 N. J. Eq. 394, 46 Atl. 199; *Medical Association v. Pierce*, 203 N. Y. 419, 96 N. E. 738; *Johnson v. Seabury*, 69 N. J. Eq. 696, 61 Atl. 5.

Any profit gained by the defendant company through the use of complainant's catalogue or confidential information belongs to complainant; but how far a permanent injunction should go, in view of the fact that the temporary injunction has now been in force more than nine months, is another question. It would not appear to be necessary to continue the injunction much longer. The lists of merchants have been turned over to complainant, and it has had as broad an order in respect to the catalogue and agents of complainant as it was entitled to. It is true defendants' catalogue is copied in part from complainant's, but they could lawfully now make one just like it.

The injunction now in force should be continued to July 31, 1913, which will make 10 months, and be dissolved from and after August 1, 1913; and defendants should be decreed to account as prayed.

WILLIAM WHITMAN & CO. v. NAMQUIT WORSTED CO.

(District Court, D. Rhode Island. July 29, 1913.)

No. 2,966.

1. PRINCIPAL AND AGENT (§ 23*)—SELLING AGENTS—EVIDENCE OF AGENCY—CONTRACT OF SALE—BREACH—ACTION BY AGENT—PROFITS RECOVERABLE.

Where, in an action for breach of a contract for the sale of yarns, defendant wrote plaintiffs that they might make sample lots of 250 pounds out of a specified grade, and an invoice referred to plaintiffs as "selling agents for Arlington Mills," and the terms recited were "60 days f. o. b. Lawrence," where the Arlington Mills were situated, there being also evidence that plaintiffs were commission merchants, and were the selling agents of the entire product of the Arlington Mills, it sufficiently appeared that defendant knew it was dealing with plaintiffs as manufacturers' agents, authorized by the mills to sell its product in advance on its behalf, so as to entitle plaintiffs to recover, as damages for breach of contract, the loss of profits to the mills.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.*]

2. PRINCIPAL AND AGENT (§ 103*)—SELLING AGENT—CONTRACT OF SALE—BREACH—ACTION BY AGENT.

A manufacturer's selling agent, with authority to sell the product of the manufacturer's mill, had authority to make contracts of sale which would

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be binding on the manufacturer, for breach of which either the manufacturer or the agent might recover full damages.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 278-293, 353-359, 367; Dec. Dig. § 103.*]

3. SALES (§ 374*)—ACTION FOR BREACH OF CONTRACT—TIME TO SUE.

Where a contract for the sale of yarns provided for deliveries during October, November, and December, 1909, at specified prices, and, though the seller was willing to extend the time, there was no offer of extension definitely accepted by the buyer, nor any definite request for an extension made by the buyer, and no waiver of the seller's right to performance, and the buyer failed to receive deliveries during October, November, and December, 1909, its breach of contract was complete December 31st of that year.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1091; Dec. Dig. § 374.*]

4. SALES (§ 1*)—CONTRACT—DEFINITENESS.

Where a contract for the sale of yarn specified 50,000 pounds of 3-grade white worsted, on the basis of 2/32 on Dresser Spools, 97¢, and 1/24 on Bobbins, 89¢, the contract was not rendered uncertain by reason of the fact that the buyer was entitled to make variations within such general description and to give specifications for spinning the yarn, which it failed to do.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1, 3-5; Dec. Dig. § 1.*]

5. SALES (§ 153*)—CONTRACT—MANUFACTURED MATERIAL—TENDER.

Where a contract for the sale of yarn to be manufactured specified certain basic prices, the buyer being expected to give specifications for spinning, it having failed to do so, the seller was excused from tendering the yarn, provided it was always ready and willing to perform.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 358-366; Dec. Dig. § 153.*]

6. SALES (§ 384*)—MATERIAL TO BE MANUFACTURED—CONTRACT—BREACH—PROFITS.

Where a contract for the sale of yarns to be manufactured specified 50,000 pounds 3-grade worsted, with basic prices, from which the buyer was entitled to specify various grades and quantities, but refused to give specifications or to take the yarn, the seller was entitled to recover an amount equal to the profit which would have been made on the yarn, had the buyer selected the quality calling for the lowest price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. § 384.*]

7. FRAUDS, STATUTE OF (§ 106*)—CONTRACT OF SALE—MEMORANDUM.

A commission merchant's memorandum of a contract for the sale of yarn, directed to the buyer and reciting entry of buyer's order for 50,000 pounds 3-grade white worsted yarn for delivery during October, November, and December, 1909, on specified basic prices, from Arlington Mills, terms 60 days f. o. b. Lawrence, discount 6 per cent. per annum, signed by a representative of the commission merchants, and indorsed, "This is in accordance with our understanding," by an agent of the buyer, was sufficient to satisfy the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 193, 210, 211; Dec. Dig. § 106.*]

At Law. Action by William Whitman & Co. against the Namquit Worsted Company. Judgment for complainants.

Edwards & Angell, of Providence, R. I., for complainants.

Gardner, Pirce & Thornley, of Providence, R. I., for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BROWN, District Judge. This is an action for breach of contract, brought by William Whitman, and others, citizens and residents of New York and of Massachusetts, copartners under the firm name of William Whitman & Co., against the Namquit Worsted Company, a corporation of Rhode Island.

The case is not free from difficulties. The defendant insists upon the application of the statute of frauds. I am of the opinion that this is not applicable, for the reason that there is no indefiniteness or uncertainty in the contract, and that evidence as to the former course of dealing between the parties, and of a right to make variations in prices and spins of yarns, does not render the contract uncertain. Considered generically, the contract is definite and certain, and comprehends in general terms all that is claimed by the plaintiffs. Evidence that specific variations were permissible, and that there might be a great variety in the counts or spins of yarn, is not inconsistent with the contract, nor does it show that any essential element was omitted in the memorandum.

[1] The principal difficulty is as to the right of William Whitman & Co. to recover as damages the loss of profit to the Arlington Mills. The declaration does not disclose the Arlington Mills as a principal, and it must be conceded that the evidence as to the exact relation between William Whitman & Co. and the Arlington Mills is most meager in character. It consists of the following testimony:

"Q. What is the business of William Whitman & Co.?"

"A. It is commission merchants.

"Q. What is their relation with the Arlington Mills?"

"A. They are selling agents of all their product."

It must be confessed that there is uncertainty in this testimony. There is, however, evidence in the correspondence tending to show that the defendant understood that it was dealing with a manufacturer's selling agent. Thus, in Exhibit 9, defendant writes plaintiffs:

"You may make our sample lots of 250 pounds out of the B D grade."

Invoice of September 15, 1909, is headed: "Selling Agents for Arlington Mills." Terms are 60 days f. o. b. Lawrence, where the Arlington Mills are situated.

While it is possible that selling agents may be selling on their own account, under an arrangement such as is indicated in *Willcox & Gibbs Company v. Ewing*, 141 U. S. 627, 12 Sup. Ct. 94, 35 L. Ed. 882, in which case they would not be entitled to recover the manufacturer's profit, yet, as the plaintiffs rested their case with general proof that plaintiffs were selling agents, and the defendant made no cross-examination, I think I must find that William Whitman & Co. had authority to sell in advance the product of the Arlington Mills on behalf of the Arlington Mills, and to recover upon a breach of contract of sale according to the rule of damages laid down in *River Spinning Company v. Atlantic Mills* (C. C.) 155 Fed. 466.

The evidence is insufficient to authorize an inference that William Whitman & Co. were selling agents merely in the special sense in which that term is sometimes used, as including agents who are given an ex-

clusive right to buy goods within a restricted territory at a fixed discount and to dispose of them on their own account, without being accountable to the principal, except for the price at which goods are sold by the principal to the agent.

The plaintiffs called as a witness William D. Hartshorn, the agent of the Arlington Mills, who testified as to the ability of the mill to produce and deliver the yarn. He also testified at length as to the cost of production at the mills. From this I think can be drawn a permissible inference that the present suit is not brought without the knowledge and acquiescence of the Arlington Mills.

[2] Authority to sell the product of the mill in the manner shown in this and previous transactions would naturally include authority to make contracts for sale which would be binding on the true principal, and for which the true principal might, in its own name, recover damages if it chose, but for which the agent may sue and recover all damages which his principal might have recovered.

I am of the opinion that upon the evidence in the case the defendant understood that it was dealing with a manufacturer's agent for sale, and that there is no injustice in charging it with damages according to the rule laid down in *River Spinning Company v. Atlantic Mills* (C. C.) 155 Fed. 466.

Findings of Fact.

On or about July 14, 1909, the parties entered into the following contract in writing:

William Whitman & Co.,
Dry Goods Commission Merchants,
Worsted Yarn and Tops Department,
78 Chauncy St.

No. 2760—Corrected.

Boston, Mass., July 14, 1909.

Namquit Worsted Co., Bristol, R. I.

Dear Sir: We have entered your order of July 12 as our No. 2297 as given our Mr. Bankart for 50,000 lbs. 3-grade white worsted yarn for delivery during Oct. Nov. & Dec. '09 on following basis of prices:

2/32 on Dresser Spools 97¢
1/24 on Bobbins 89¢

From Arlington Mills

How put up, as above

Terms, 60 days f. o. b. Lawrence.

Delivery, during October, November & December, 1909.

Yours very truly,

Price, as above.

Discount at rate 6% per annum.

William Whitman & Co.,

By W. C. Ballard.

This is in accordance with our understanding.

[Signed]

J. H. Merrill.

I find that J. H. Merrill was duly authorized to sign, and did sign, on behalf of the Namquit Worsted Company.

That the parties had previously executed similar papers and had had previous dealings of a similar character.

That the former course of business upon similar contracts was for the defendant to give to the plaintiffs specifications of the particular species of yarn of the general description contained in the contract,

and for the plaintiffs to have the yarn spun at the Arlington Mills according to these specifications.

While there is no evidence of an express agreement on the part of the buyer to specify the sizes and styles of spinnings for yarns deliverable under the contract in suit, it was fully understood between the parties that this should be done, and that the yarn should not be spun until after the receipt of specifications by the plaintiffs from the defendant.

That two species of 3-grade white worsted yarn are described in the contract, with the prices therefor as follows:

2/32 on Dresser Spools 97¢.

1/24 on Bobbins 89¢.

That according to the former course of business between the parties, with prices so given for particular species of the general description of yarn, the price for any other particular species of 3-grade white worsted yarn could be determined according to a scale of variation in price for different spins of yarn of the general description.

That the expression "following basis of prices" was an expression formerly used by both parties to signify that in computing prices for various spins of yarn the prices specifically named in the contract should be a sufficient basis for determining prices on other yarns, according to a system of variations understood by both parties, and was in the present contract so used.

That according to the former course of business, and to the present understanding of the parties based thereon, the defendant might at its option have specified about 48 species of 3-grade white worsted yarn, but that the contract itself gave prices from which the prices of these various species could be determined.

That each of the 48 styles and sizes that might be delivered under the contract in suit was at a price per pound differing from that of any of the other styles and sizes.

That the profit upon the execution of the contract in suit would have been a different amount for each of the different sizes and spinnings.

There is testimony from a witness for the plaintiffs that according to a custom of the trade between these parties the specifications of the Namquit Worsted Company had been subject to the approval of William Whitman & Co. I find this testimony insufficient to show that William Whitman & Co. had a right to withhold their approval of specifications sent for yarns.

Both buyer and seller were bound to the performance of the agreement above set forth, and such was the understanding of the parties.

That in accordance with the understanding of the parties specifications should have been given approximately two months before the time of delivery.

That there was no express agreement between the parties to extend the time for the performance of the contract, or to vary the terms thereof as to delivery.

That the plaintiffs were willing to extend the time, but that no offer of extension was definitely accepted by the defendant, nor was any definite request for an extension of time made by the defendant.

[3] That the plaintiffs did not waive their right to performance according to the terms of the contract, and were not precluded, either by agreement or by conduct, from claiming a breach of contract by reason of defendant's failure to receive deliveries during October, November, and December, 1909. The defendant's breach of contract was complete on December 31, 1909.

[4] That the defendant agreed to purchase 50,000 pounds of 3-grade white worsted yarn, and that this was a certain and definite agreement, which was not made indefinite and uncertain merely by reason of the fact that the defendant had the right to make variations within this general description.

[5] The defendant failed, though requested, to give specifications for the spinning of yarn, and I find that by reason of such failure the plaintiffs were excused from tendering the yarn to the defendant, and that the plaintiffs have on their part been always ready and willing to perform the contract.

That the plaintiffs were dry goods commission merchants and were selling agents of the Arlington Mills.

On September 13, 1909, the paper marked "Plaintiffs' Exhibit 2" passed between the parties, and the yarn called for therein was manufactured and delivered from the Arlington Mills, and was accepted and paid for by the defendant.

At various times between November 2, 1909, and the latter part of May, 1910, the plaintiffs requested the defendant to specify yarns described in the paper marked "Plaintiffs' Exhibit 1." In response to requests of the plaintiffs, the defendant promised in general terms to give specifications, but did not promise specifically to give specifications upon the present contract. As other contracts were outstanding upon which specifications were due, I am unable to say that the general promise to give specifications amounts to a specific promise to give specifications upon this particular contract.

No specifications, other than Plaintiffs' Exhibit 2, were made by the defendant, and there still remains undelivered 49,000 pounds of the yarn described in the paper marked "Plaintiffs' Exhibit 1."

The defendant did not definitely refuse to specify the balance of the yarns described in Plaintiffs' Exhibit 1 until the latter part of May, 1910.

[6] The Arlington Mills did not at any time manufacture any of the yarns mentioned in Plaintiffs' Exhibit 1, except an amount less than 1,000 pounds.

Taking December 31, 1910, as the date of the final breach of contract, the smallest profit to the Arlington Mills on any of the yarn which the defendant might specify under the paper marked Plaintiffs' Exhibit 1 is \$6,404.30.

The prices for each of the various counts or spins of yarn, calculated upon the basis of the figures named in the contract, according to the course of business and understanding of the parties, are as contained in Defendant's Exhibit F.

That under the contract the defendant was entitled to order yarn of the smallest price, and that upon its breach of contract it became lia-

ble to the plaintiffs in an amount equal to the profit which the plaintiffs would have made on yarn of the smallest price.

The contract in writing was definite as to quantity and grade and as to price for two specific varieties, and although the defendant, according to the unwritten understanding of the parties, might have specified yarns at a lesser price upon the basis of the figures set forth in the contract, the defendant did not specify yarns at any price, and therefore did not exercise its rights according to the understanding and according to the former course of dealing.

Findings of Law.

The paper marked "Plaintiffs' Exhibit 1" constituted a valid and binding contract between the parties.

Said contract is not invalid for indefiniteness or uncertainty.

The facts shown in evidence as to the former dealings of the parties and as to the rights of the defendant to specify many different varieties of yarn do not make indefinite or uncertain the terms of Exhibit 1, or show that this was an incomplete memorandum of agreement.

The defendant could not, by failure to specify, escape the performance of the terms of the agreement specifically set forth in Exhibit 1.

The plaintiffs are entitled to hold the defendant to the terms of Exhibit 1, for the reason that the evidence as to specifying and as to varying prices is not inconsistent with the terms of Exhibit 1, and amounts merely to evidence that the defendant, had it chosen to exercise the right, might have made particular variations, but all within the scope of the general agreement of Exhibit 1.

[7] The contract is not insufficient nor unenforceable by reason of the statute of frauds.

The measure of damages is the least profit which the plaintiffs would have made on any of the yarns which the defendant was entitled to specify under the contract.

Judgment will be entered for the plaintiffs in the sum of \$6,404.30, with interest thereon from December 31, 1909, to February 16, 1911, at 6 per cent.

HOWARD v. MOYER, Warden.

(District Court, N. D. Georgia. July 2, 1913.)

CRIMINAL LAW (§ 984*)—HABEAS CORPUS (§ 30*)—JUDGMENT—SENTENCE IN GROSS.

Rev. St. § 5478 (U. S. Comp. St. 1901, p. 3696), provides that any person who shall forcibly break into or attempt to break into any post office, with intent to commit therein a felony or other depredation, shall be punished by a fine of not more than \$1,000 and by imprisonment for not more than five years. *Held*, that where accused was charged in different counts with breaking and entering different post offices with intent to violate such section, and on conviction of both offenses a single sentence of 10 years' imprisonment and a fine of \$2,000 was assessed, such sentence, though erroneous, was not absolutely void, or a nullity, so as to entitle accused to discharge from imprisonment on habeas corpus.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2504-2509, 2541; Dec. Dig. § 984; * Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Application by Frank Howard for discharge from the custody of William H. Moyer, Warden of the United States Penitentiary at Atlanta, Ga., on a writ of habeas corpus. Denied.

Lamar Hill, of Atlanta, Ga., for petitioner.

John W. Henley, Asst. U. S. Atty., of Atlanta, Ga., for respondent.

NEWMAN, District Judge. This is an application for discharge under habeas corpus from confinement in the United States penitentiary at Atlanta, Ga. The petitioner was tried in the United States District Court for the District of Connecticut for violations of section 5478 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3696). It appears that the indictment, which was against Howard and one Edward F. Blake, contained three counts; the first charging them with breaking and entering the post office at Morris, Conn., with intent as stated in section 5478, and the second count charging them with breaking and entering the post office at East Morris, Conn., with the same intent, and the third charging them with conspiracy under section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676), presumably, although it is not shown in the record, to violate section 5478. The petitioner and the other defendant were convicted and sentenced by the court to ten years in gross and a fine of \$2,000, as appears from the commitment sent to the warden of the penitentiary at Atlanta, Ga.

The maximum sentence under section 5478 was confinement in the penitentiary not more than five years and a fine of not more than \$1,000. Although the first count in the indictment charged the breaking into one post office, and the second count into another and a different post office, the contention here is that the sentence could not be for more than five years' imprisonment and a fine of \$1,000, the highest sentence provided for in the statute, though it is conceded that the sentence might have been cumulative and the petitioner have been sentenced to five years and \$1,000 on the first count and five years and \$1,000 on the second count, the latter to commence at the expiration of the first, making an aggregate of ten years and \$2,000, which, although in gross, was the sentence.

The case mainly relied upon by the petitioner for his discharge is *Ex parte Peeke*, the decision of the District Court being reported in 144 Fed. 1016, and the decision of the case in the Circuit Court of Appeals, under the name of *United States v. Peeke*, in 153 Fed. 166, 82 C. C. A. 340, 12 L. R. A. (N. S.) 314. It appears that in that case the defendant was convicted on five counts in an indictment drawn under section 5440 of the Revised Statutes of the United States, the maximum term of imprisonment on each of which would have been two years. The defendant was sentenced to five years' imprisonment in gross. In the opinion of the Circuit Court of Appeals the facts in that case are commented on in this way:

"The petitioner was convicted under section 5440 for conspiracy to violate section 5501 [U. S. Comp. St. 1901, pp. 3676, 3709] in five different counts in the same indictment, and, it is contended, for five distinct offenses, for each of which offenses section 5440 authorized the imposition of a maximum term

of imprisonment of two years. The authorities cited by Judge Lanning are sufficient to show that cumulative sentences can be imposed in the federal courts (*Ex parte Peeke* [D. C.] 144 Fed. 1018), but, in order that a sentence should have this effect, it must be imposed in that form (*United States v. Patterson* [C. C.] 29 Fed. 775). Where there is a general verdict on two or more counts of an indictment charging crimes which are of the same character, although growing out of totally distinct and separate transactions, sentence may be passed and judgment may be entered for a specified term of imprisonment upon each count, which terms must be consecutive, and it is error to sentence for a certain period in gross. 12 Cyc. 962. Upon these five different counts of the indictment there is no doubt but that a term of imprisonment in the aggregate could have been inflicted by cumulative sentences of five years, or even ten years; but this was not done. The judgment was a single sentence 'for the term of five years, beginning this day (to wit, August 2, 1904) and ending on the 1st day of August, 1909.' As the maximum term for which the prisoner could be sentenced upon any count in the indictment was two years, this sentence is clearly excessive to the amount of three years, and to that extent null and void. If construed, as suggested by counsel for the government, to be five successive sentences of one year each, it would be entirely void. Section 5440 does not prescribe confinement in a 'state jail or penitentiary,' and section 5541, Rev. St. (U. S. Comp. St. 1901, p. 3721), prohibits confinement in a 'state jail or penitentiary' unless the statute violated prescribed such imprisonment, or the sentence is for a period longer than one year. *Mills Case*, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107. If the prisoner, therefore, is to be detained for the full term of five years, there must be an apportionment of the time other than one year to each count. If we were to divide it into three successive sentences, the first of 2 years, the second for $1\frac{1}{2}$ years, and the third for $1\frac{1}{2}$ years, to which count in the indictment would we assign the different terms? The prisoner has already served two years, and it may be asked upon which count of the indictment he did serve this term, which count would cover the second period of confinement, and, after the expiration of that, to which count should we assign the last year and a half? These counts charge distinct conspiracies with different persons to violate section 5501. Should some newly discovered evidence induce the executive to pardon the prisoner on one or more counts, how would it be possible to ascertain to what part of the sentence the pardon applied? To what reduction from the five-year term would he be entitled? To state these questions is to answer them."

There is no difficulty of that kind in this case. It is perfectly clear here that what the court intended was to sentence the prisoner for five years and \$1,000 on the first count and to sentence him for five years and a fine of \$1,000 on the second count, which, added together, make the sentence in this case. The defendant, having been convicted of breaking into two separate and distinct post offices "with intent," in the language of the statute, "to commit therein larceny or other depredation," would naturally be given a severe sentence. So the purpose of the court is clear, which was to give him the maximum sentence for each offense.

In delivering the opinion in the *Coy Case*, 127 U. S. 731, page 757, 8 Sup. Ct. 1263, page 1271 (32 L. Ed. 274), Mr. Justice Miller says this:

"An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."

In the present case the maximum period for which the defendant might have been sentenced, if the sentence had been on the separate

counts, is not exceeded, and, as has been stated, it is perfectly clear what the court intended. Therefore, even if the judgment of the court be irregular, or even erroneous, it cannot be considered as a nullity, and the prisoner discharged, when it does not exceed the term for which he might be sentenced under the statute.

Even if the court committed an error in imposing the sentence as it did, that cannot be corrected by a writ of habeas corpus. A writ of habeas corpus is not a writ to be used for the correction of errors. This question was before this court in the Glasgow Case (D. C.) 195 Fed. 780, affirmed by the Supreme Court in *Glasgow v. Moyer*, 225 U. S. 420, 32 Sup. Ct. 753, 56 L. Ed. 1147. In the opinion in that case Mr. Justice McKenna said:

"The writ of habeas corpus cannot be made to perform the office of a writ of error. This has been decided many times, and, indeed, was the ground upon which a petition of appellant for habeas corpus to this court, before his trial, was decided. It is true, as we have said, that the case had not then been tried; but the principle is as applicable and determinative after trial as before trial. This was decided in one of the cases cited, *In re Lincoln*, 202 U. S. 178 [26 Sup. Ct. 602, 50 L. Ed. 983], which cited other cases to the same effect. Subsequent cases have made the principle especially pertinent to the case at bar. *Harlan v. McGourin*, 218 U. S. 442 [31 Sup. Ct. 44, 54 L. Ed. 1101, 21 Ann. Cas. 849], was an appeal from a judgment discharging a writ of habeas corpus petitioned for after conviction, and it was held that the writ could not be used for the purpose of proceedings in error, but was confined to a determination whether the restraint of liberty was without authority of law. In other words, as it was said: 'Upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions.' *Matter of Gregory*, 219 U. S. 210 [31 Sup. Ct. 143, 55 L. Ed. 184], was a writ of habeas corpus brought after conviction, and we said that we were not concerned with the question whether the information upon which the petitioner was prosecuted and convicted was sufficient, or whether the case set forth in an agreed statement of facts constituted a crime—that is to say, whether the court properly applied the law, if it be found that the court had jurisdiction to try the issues and to render judgment. And for this many cases were cited."

My conclusion in this case is that the sentence of the petitioner is not absolutely void, that the natural and undoubtedly the proper inference from the extent and character of the sentence is that it was the purpose of the court to sentence the prisoner to five years on each of the first two counts in the indictment and a fine of \$1,000 on each, and, while this was entered as a gross sentence for ten years and a fine of \$2,000, it is not for that reason a nullity.

The \$1 fine imposed by the court on the third count in the indictment seems to have been omitted from the sentence as stated in the commitment to the penitentiary. It, of course, would not be sufficient to change what has been said above. None of the fine has been paid, and Howard would not have to remain any longer in the penitentiary for the nonpayment of the \$2,001 than he would for the nonpayment of the \$2,000.

The petitioner must be remanded to the custody of the warden of the United States penitentiary at Atlanta, Ga.

BLAKE v. MOYER, Warden.

(District Court, N. D. Georgia. July 2, 1913.)

Application by Edward F. Blake for a writ of habeas corpus to obtain his discharge from the custody of William H. Moyer, Warden of the United States Penitentiary at Atlanta, Ga. Denied.

Lamar Hill, of Atlanta, Ga., for petitioner.

John W. Henley, Asst. U. S. Atty., of Atlanta, Ga., for respondent.

NEWMAN, District Judge. This is an application to be discharged, under habeas corpus, from confinement in the United States penitentiary at Atlanta, Ga. The petitioner was indicted with Frank Howard, whose case has just been disposed of, and at the same time, on the same counts, and was sentenced by the court on the same date for the same term.

For the reasons stated in the opinion in the Howard Case, 206 Fed. 555, this application for discharge under habeas corpus must be denied, and the petitioner be remanded to the custody of the warden of the United States penitentiary at Atlanta, Ga.

CHEHALIS RIVER LUMBER & SHINGLE CO. v. EMPIRE STATE SURETY CO.

(District Court, W. D. Washington, S. D. July 23, 1913.)

No. 1,320.

INSURANCE (§ 627*)—ACTION ON POLICY—PROCESS—FOREIGN COMPANY—SERVICE ON INSURANCE COMMISSIONER.

Under Sess. Laws Wash. 1911, c. 49, § 13, which requires a foreign insurance company, before it can lawfully transact business in the state, to appoint the state insurance commissioner as an attorney upon whom all lawful process "may be served with the same effect as if it were a domestic company," such an appointment is not revocable when the company ceases to do business in the state, but remains in force so long at least as it has contracts outstanding which were made while it was so doing business.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1573, 1574; Dec. Dig. § 627.*]

At Law. Action by the Chehalis River Lumber & Shingle Company against the Empire State Surety Company. On demurrer to defendant's plea to jurisdiction. Demurrer sustained.

H. G. & Dix Rowland, of Tacoma, Wash., for plaintiff.

John P. Hartman, of Seattle, Wash., for defendant.

CUSHMAN, District Judge. This matter is for decision upon demurrer of the plaintiff to defendant's plea denying the court's jurisdiction. By the suit plaintiff seeks to recover upon a policy of insurance against loss on account of injuries to plaintiff's workmen. The policy was issued in 1910. In July, 1910, an employé of plaintiff was injured. In March, 1911, such employé began suit against plaintiff, which resulted in judgment against it in February, 1912, which judgment was sustained upon appeal to the state Supreme Court, by decision rendered in 1913. Plaintiff is a Washington corporation, while defendant is a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

New York corporation. Service of summons and complaint is shown to have been made on the state insurance commissioner, a statutory agent for service, in 1913.

The defendant's answer, challenging the court's jurisdiction, alleges that more than four years ago the defendant qualified to engage in business in Washington; that it continued transacting business therein until August 22, 1912, when it ceased to do business in the state, canceled its agencies, and reinsured its risks in force in the state; that, theretofore, in August, 1910, it appointed an agent for service in the state; that in June, 1911, it appointed the state insurance commissioner its agent for service; that in November, 1912, after ceasing to do business in the state, it canceled and revoked both of the foregoing appointments; that such revocations were filed with and accepted by the insurance commissioner.

Plaintiff relies upon the following authorities: Section 6235, Rem. & Bal. Code; Laws Wash. 1911, c. 49, § 13, pp. 173, 174; Mutual Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987; Hunter v. Mutual Reserve Life Ass'n, 218 U. S. 573, 31 Sup. Ct. 127, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686; Bedford v. Eastern B. & L. Ass'n, 181 U. S. 227, 21 Sup. Ct. 597, 45 L. Ed. 834; Moore v. Mutual Reserve, 129 N. C. 31, 39 S. E. 637; Groel v. United Elec. Co., 69 N. J. Eq. 397, 60 Atl. 822; Mutual Reserve Fund Life Ass'n v. Tuchfeld, 159 Fed. 837, 86 C. C. A. 657; Michael v. Mutual Ins. Co., 10 La. Ann. 737; Pervangher v. U. C. & Surety Co., 81 Miss. 32, 32 South. 909; Gibson v. Mfg. F. & M. Ins. Co., 144 Mass. 81, 10 N. E. 729; Germania Ins. Co. v. Ashby, 112 Ky. 303, 65 S. W. 611, 99 Am. St. Rep. 295; Hill v. Empire State-Idaho Min. & Dev. Co. (C. C.) 156 Fed. 797; Collier v. Mutual Reserve (C. C.) 119 Fed. 617.

Defendant relies upon the following authorities: Pierce's Code, § 5631; Swann v. Mut. Reserve Fund Life Ass'n (C. C.) 100 Fed. 922; Friedman v. Empire Life Ins. Co. (C. C.) 101 Fed. 535; Milian v. Mut. Reserve Fund Life Ass'n (C. C.) 103 Fed. 764, at page 769; Lathrop-Shea & Henwood Co. v. Interior Construction & Imp. Co. (C. C.) 150 Fed. 670, reversed and remanded 215 U. S. 246, 30 Sup. Ct. 76, 54 L. Ed. 177; Home Ins. Co. v. New York, 119 U. S. 129, at page 147, 8 Sup. Ct. 1385, 30 L. Ed. 350.

A Washington statute, applicable to insurance companies of the character of defendant at the time the insurance policy was issued, provided:

"Every such corporation organized outside of this state, shall constitute and appoint an agent who shall reside in this state, to be designated as hereinafter required * * * and shall authorize such agent to accept service of process in any action or suit pertaining to the property, business or transactions of such corporation within this state, in which such corporation may be a party, * * * and such corporation shall have and keep continually some resident agent, empowered as aforesaid, during all the time such corporation shall conduct or carry on any business within this state, and service of any process, pleading, notice or other paper on such agent shall be taken and held as due service on such corporation. If any attorney of any surety corporation, appointed under the provisions of this act, shall remove from the state, or become disqualified in any manner from accepting service, valid service may be made on such corporation by service upon the insurance commissioner." Section 6235, Rem. & Bal. Code.

In 1911, the state Legislature by a further act provided:

"The commissioner shall not issue a certificate of authority to transact any business of insurance in this state to any foreign or alien insurance company until it has executed and filed in his office a written appointment of the insurance commissioner to be the true and lawful attorney of such company in and for this state, upon whom all lawful process in any action or proceedings against such company commenced in any county in this state may be served with the same effect as if it were a domestic company having its principal office in such county. The service upon such attorney shall thereafter be deemed service upon the company." Session Laws 1911, pp. 173, 174, c. 49, § 13.

As stated, the defendant complied with the latter act, and in 1911 designated by proper appointment the insurance commissioner as its agent for service, and thereafter continued in the transaction of insurance business in the state until August, 1912. The question is whether, under such statutes and circumstances, the defendant could withdraw from the state and revoke the authority of its agent for service, so as to defeat the court's jurisdiction in a suit brought against the defendant upon liability accruing while the appointment was in force.

It is claimed that such withdrawal and alleged revocation of authority had this effect, because the law in force at the time the policy of insurance was written provided:

"And such corporation shall have and keep continually some resident agent, empowered as aforesaid [that is, to accept service of process in any action or suit, pertaining to the property, business or transactions of such corporation within this state, in which such corporation may be a party] during all the time such corporation shall conduct or carry on any business within this state."

That, as the only duty in this respect imposed upon the defendant was to have and keep such service agent during the time such company "shall conduct or carry on any business within this state," it necessarily follows by implication that, having ceased to conduct and carry on any business in this state, it had the right to cancel and revoke that authority given the agent in order to obtain the right to transact business in the state.

If this act stood alone, the position taken by defendant would probably have to be conceded; but the act of 1911 does not so limit or restrict the duty to maintain such an agent to the time during which the company shall continue to transact business in the state. By the latter law, before a company can lawfully transact business in the state, it must appoint the state insurance commissioner as an attorney "upon whom all lawful process in any action or proceeding against such company * * * may be served with the same effect as if it were a domestic company." Under such a law, the appointment of a service agent is irrevocable, in that it may not be canceled upon the company's ceasing to transact business in the state. *Mutual Reserve Fund Life Ass'n v. Phelps*, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987; *Hunter v. Mutual Reserve Fund Life Ass'n*, 218 U. S. 573, 31 Sup. Ct. 127, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686; *Mutual Reserve Fund Life Ass'n v. Tuchfeld*, 159 Fed. 833, 86 C. C. A. 657; *Hill v. Empire State-Idaho Min. & Dev. Co.* (C. C.) 156 Fed. 797.

Such must be the construction given the law by the defendant at the time of appointing the insurance commissioner as its attorney under such law, for the instrument by which it appointed such officer, made a part of defendant's answer, declares:

"Now, therefore, in accordance with the terms and requirements of the section above set forth, the said the Empire State Surety Company does, by these presents, irrevocably appoint and authorize the state insurance commissioner of the state of Washington (by whomsoever such office of commissioner may be held and exercised under the laws of the state of Washington), for the purposes mentioned in the section above recited, to do any and all the things in said section specified in its behalf to be done by said commissioner, and hereby further consenting that service of process as therein referred to upon such commissioner shall be valid and binding, and be deemed personal service upon the company, so long as it shall have any liabilities outstanding in the state of Washington."

The law of 1911 is the one applicable to this case, and it is not necessary now to determine whether, if the older law gave to plaintiff a benefit not afforded by the latter act, it might not be held, in a proper case, to be an advantage which the plaintiff could enforce; but it will be time enough to determine that question when the older law is invoked by a plaintiff, a citizen of the state.

The Legislature, in providing for the protection of and obtaining benefits for the people of the state, saw fit to enact the law of 1911. The defendant accepted its provisions, designated the required agent therein provided for, and continued after its enactment to transact business in the state of Washington—a right to do which was dependent, by the act, on such appointment; and it cannot now, after such action on its part, successfully claim that plaintiff must be relegated to the older law and is not protected by the provisions of the later.

Demurrer sustained.

SHERARD et al. v. WALTON et al.

(District Court, W. D. Tennessee, W. D. July 15, 1913.)

No. 669.

1. COURTS (§ 367*)—FEDERAL COURTS—DETERMINATION—RULE OF PROPERTY.

The decision of the Supreme Court of Tennessee that no constitutional union between the Cumberland Presbyterian Church and the Presbyterian Church of the United States of America was effected May 24, 1906, notwithstanding the decision to the contrary of the two General Assemblies of the respective churches, did not constitute a rule of property in Tennessee, but was the decision of a question of general jurisdiction, and therefore not conclusive on federal courts sitting in that state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. § 367.*]

2. RELIGIOUS SOCIETIES (§ 12*)—UNION—EFFECTIVENESS—ECCLESIASTICAL QUESTIONS—DETERMINATION BY THE ECCLESIASTICAL JURISDICTIONS—CONCLUSIVENESS.

Whether a constitutional union between the Cumberland Presbyterian Church and the Presbyterian Church of the United States of America was effected by the attempted consolidation in May, 1906, was an ecclesiastical

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

question, the determination of which in favor of the validity thereof was conclusive on the civil courts.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 87-98; Dec. Dig. § 12.*]

In Equity. Suit by Mary Flautt Sherard, by her husband, Holmes Sherard, as her next friend, and others, against C. H. Walton and others. Decree for complainants.

F. S. Elgin, of Memphis, Tenn., and Jno. M. Gaut, of Nashville, Tenn., for plaintiffs.

W. C. Caldwell, of Trenton, Tenn., for defendants.

McCALL, District Judge. It would be almost an interminable undertaking to state all the facts in this case. Suffice it to say that it is a controversy between the plaintiffs and the defendants for the occupation and use of a church building formerly known as the First Cumberland Presbyterian Church of Memphis, Tenn., and grows out of the question of whether or not a union between the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America, was effected on May 24, 1906.

It appears from the record that the General Assembly of the Cumberland Presbyterian Church, which is the highest authority of that organization, and the General Assembly of the Presbyterian Church in the United States of America, which is the highest authority in that organization, declared on the date last above mentioned that the two churches had been united under and in accordance with the constitutions and rules governing the said two bodies. And this union was promulgated.

A number of Cumberland Presbyterians (hereafter referred to as "Persisting Cumberlands") opposed the union, and, after the two General Assemblies had declared the union had been legally and constitutionally effected, met and declared that the union had not been so effected, thus repudiating the action of the two General Assemblies, and undertook to continue the religious organization known as the Cumberland Presbyterian Church. So that a controversy arose as to who should have the use and occupancy of the various churches and other property that belonged to the Cumberland Presbyterian Church prior to May 24, 1906. This resulted in the bringing of the suit of Landrith v. Hudgins in the state chancery court of Lincoln county, at Fayetteville, Tenn., for the purpose of having the court determine which of these organizations was entitled to the church property in that city. The result of that suit, as decided on appeal by the Supreme Court of Tennessee, was that those calling themselves the Persisting Cumberland Presbyterians were entitled to occupy and use the church at Fayetteville for worship. That conclusion was reached after the Supreme Court of Tennessee had decided in that case that there had been no legal and valid union of the two churches. *Landrith v. Hudgins*, 121 Tenn. 556, 120 S. W. 783.

The result of the suit before me must turn, in my judgment, upon whether or not there was a valid union of the churches.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] It is insisted by counsel for the defendant that the Supreme Court of Tennessee, in the case of *Landrith v. Hudgins*, has decided that question in favor of the defendants, and that that decision established a rule of property in Tennessee and is binding upon the federal court. It is as strenuously insisted by plaintiffs that the holding of the Supreme Court of Tennessee in *Landrith v. Hudgins* did not establish a rule of property, and that the question is one of general jurisprudence, and that the holding in that case is not binding upon this court.

The respective rights of the plaintiffs and the defendants in this case were fixed on May 24, 1906; that is to say, if the union was valid, plaintiffs here are, and have been since that date, entitled to the use and occupancy of the church property in question. If it was invalid, the defendants are entitled to its use and occupancy. The validity of the union was the primary and basic question that was before the Supreme Court of Tennessee for its determination, and which it must have decided before reaching a conclusion as to who was entitled to the use and occupancy of the church property in question in that case.

[2] I am of the opinion that in the case of *Landrith v. Hudgins* there is no rule of property announced, but that the right to use and occupy the property there in controversy followed the conclusion reached as to whether or not there was a valid union of the two churches. That question, I think, is an ecclesiastical one, which must be determined, under the constitutions and laws of the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America, by the General Assemblies, which are the highest authorities of those churches. *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666; *Nance v. Busby*, 91 Tenn. 328, 18 S. W. 874, 15 L. R. A. 801; *Mack v. Kime*, 129 Ga. 1, 58 S. E. 184, 24 L. R. A. (N. S.) 675; *Brown v. Clark*, 102 Tex. 323, 116 S. W. 360, 24 L. R. A. (N. S.) 670; *Ramsey v. Hicks*, 174 Ind. 428, 91 N. E. 344, 92 N. E. 164, 30 L. R. A. (N. S.) 665; *Presbyterian, etc., v. Cumberland, etc.*, 245 Ill. 74, 91 N. E. 761; *Wallace v. Hughes*, 131 Ky. 445, 115 S. W. 684; *Committee of Missions v. Pacific Synod*, 157 Cal. 105, 106 Pac. 395; *Sanders v. Baggerly*, 96 Ark. 117, 131 S. W. 49; *Harris v. Cosby*, 173 Ala. 81, 55 South. 231. The conclusion reached in *Landrith v. Hudgins*, that no union was effected, while entitled to the highest respect, is not, in my judgment, controlling in federal jurisdictions.

This record discloses the beginning of the effort at a union in 1903, and the successive steps taken by the two churches, with the result that on the 24th day of May, 1906, the General Assemblies of both churches declared that the union had been consummated, as provided by the laws of the two respective churches. The steps, leading up to the final result, were directed by learned men of the respective churches, who were far more familiar with the canons of their respective organizations than it is possible for the judge of any civil court to be, and it would seem that those learned and pious men, whose life work is that of going about the world doing right themselves, and exhorting others to like conduct, would have conducted this effort at union fairly and under a correct interpretation of the laws of the respective

churches, and that the result of the union, as announced by the two General Assemblies, followed the wishes of the two organizations, as fairly, legally, and constitutionally expressed.

I think, upon reason, as well as upon authority, that the two churches should be left to determine for themselves whether or not there was a valid union between them. The highest authority of both churches having determined that there was such a union, that question should be left at rest, in so far as the civil courts are concerned. Holding that the action of the two churches was conclusive on the subject of the union, it follows that after the union the use and occupancy of the church building formerly known as the Cumberland Presbyterian Church of Memphis, Tenn., became subject to the use and occupancy of the Presbyterian Church in the United States of America—the united church.

This conclusion would be further justified, if further justification were necessary, for the reason that this record shows that, out of a membership of something like 280 of the First Cumberland Presbyterian Church of Memphis, Tenn., at the time of the union, all of them acquiesced in the union for more than three years thereafter, and until the decision in the case of Landrith v. Hudgins. Then it was that 8 or 10 of the members of the Cumberland Presbyterian Church before the union declared themselves "Persisting Cumberlands," repudiated the actions of the General Assemblies of the respective churches, and set about to revitalize the First Cumberland Presbyterian Church in the city of Memphis, and to get the possession and use of the church building on Court Avenue, the property in question here. The same congregation that worshipped in that building prior to the union is worshipping in it now, and have been ever since the union, with the exception of these 8 or 10 defendants. The right of the congregation to use and occupy the church was not called in question by these defendants until the opinion in the case of Landrith v. Hudgins was announced; the only change in the congregation being the name. Formerly it was the First Cumberland Presbyterian Church of Memphis, Tenn.; now it is the Court Avenue Presbyterian Church, U. S. A., of Memphis, Tenn.

Other questions raised by the pleadings and proof, and discussed at the hearing, I do not think material, in view of the opinion hereinbefore expressed touching the power of the churches to determine for themselves whether or not there was a union. It is sufficient to say that I think the relief prayed for by the plaintiffs should be granted, and a decree will be entered, enjoining the defendants, according to the prayer of the bill.

PEOPLE ex rel. OTTERSTEDT v. SHERIFF OF KINGS COUNTY.

(District Court, E. D. New York. June 25, 1913.)

BANKRUPTCY (§ 391*)—STAY OF PROCEEDINGS AGAINST BANKRUPT—FINE FOR CONTEMPT.

A fine imposed on a bankrupt by a state court for a civil contempt under Judiciary Law N. Y. (Consol. Laws 1909, c. 30) §§ 753, 773, for disobedience of an order of that court, made in an action against him, prohibiting him from transferring his property, by disposing of property and shortly after filing the petition in voluntary bankruptcy, is not a provable debt, and the court of bankruptcy is without jurisdiction to interfere with its enforcement.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 637-655; Dec. Dig. § 391; * Courts, Cent. Dig. § 1331.]

Habeas corpus proceeding by Henry Otterstedt against the Sheriff of Kings County, N. Y. Writ denied.

Alfred J. Patterson, of Brooklyn, N. Y., for relator.

Moore, Williams & Upson, of Brooklyn, N. Y., for judgment creditor.

Jacob Brenner, of Brooklyn, N. Y., for sheriff.

CHATFIELD, District Judge. The bankrupt has mistaken his remedy. He must apply to the County Court to be discharged if unable to comply with its order, and especially since he has turned over all his property to be administered in bankruptcy. His right to file such a petition in bankruptcy is well established.

The fine imposed under sections 753 and 773 of the Judiciary Law of New York (chapter 35 of the Laws of 1909 [Consol. Laws 1909, c. 30]) is expressly stated to be for the purpose of giving recompense for "damages" which were incurred prior to the bankruptcy proceedings and which have been liquidated by the finding of the County Court. This fine has been imposed for what is named in the state law as a civil contempt, although a charge of criminal contempt would also lie for the same act. Section 753. This contempt consisted in the disobedience of an order of the County Court forbidding transfer of assets by the judgment debtor, who filed the petition in bankruptcy a short time before he was adjudged in contempt.

The entire question of punishment is within the jurisdiction of the County Court, except as it is affected by the bankruptcy statute (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). Section 9, subd. "a," of the bankruptcy law (2) exempts a bankrupt from arrest when in attendance upon a court of bankruptcy or engaged in the performance of duties imposed by the act. Section 11 of the bankruptcy statute provides for staying a suit founded upon a claim from which a discharge in bankruptcy will be a release. A claim of "damages" accruing prior to the petition in bankruptcy and equal in amount to the judgment which is discharged would be a provable debt, if it arises from a legal right growing out of a tort or breach of contract. But the state courts have held that, although payment of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

fine will extinguish the debt and satisfy the judgment, as well as constitute a bar to an action for further damages (where the right to such an action is recognized), yet the obligation to pay the amount of this fine is not a debt. They have held that the order of the state court compelling the payment to the judgment creditor shall stand and be enforced, even though the creditor has also a provable claim in bankruptcy for the amount of his judgment, and although the order of the state court directing the payment of the fine would seemingly give to this creditor a preference prohibited by the bankruptcy statute. The ruling of the state court that such a right to receive "damages" is not dischargeable in bankruptcy (*Matter of Lyman A. Spalding*, 10 Paige [N. Y.] 284) was affirmed by the Court for the Correction of Errors for the state of New York, and upon appeal to the Supreme Court of the United States was affirmed by that court; the Chief Justice stating:

"There is some difference among the justices who concur in affirming the judgment as to the principles upon which the affirmance ought to be placed. No further opinion will therefore be delivered than merely to pronounce the judgment of this court, affirming the judgment rendered by the state court." *Spalding v. State of New York*, 45 U. S. (4 How.) 21, at page 36 (11 L. Ed. 558).

The Circuit Court of Appeals for this circuit, in the Case of *Koron-sky*, 170 Fed. 719, at page 720, 96 C. C. A. 39, at page 40, held that a fine for contempt of court was not dischargeable in bankruptcy, citing the case of *Spalding v. New York*, supra, and using the following language:

"Manifestly the offense was one peculiarly against the court, and of the sort where the punishment of the offender is a vindication of the dignity of the court; it does not lose that character because the statute authorizes the court to turn over the amount of the fine when collected to some person pecuniarily aggrieved by the offender's conduct."

The Circuit Court of Appeals calls attention to the fact that the present bankruptcy statute is substantially like section 9 of the Bankruptcy Act of August 19, 1841 (5 Statutes at Large, p. 440, c. 9), and that the provisions of the New York Code of Civil Procedure (now embodied in the Judiciary Law above quoted) are substantially the same as the provisions of the Revised Statutes of New York in effect in 1841. In the case of *In re Hall*, 170 Fed. 721, the District Court in the Southern District of New York, in a case similar to the one under discussion, held that a stay to prevent punishment by a state court for contempt of its order must be vacated.

It must be held, therefore, that the jurisdiction of the state court with respect to the punishment for contempt, and also with respect to its order that the proceeds of the punishment be paid to the judgment creditor, is outside of the jurisdiction of this court, and that the judgment debtor or bankrupt must apply to the state court for relief from that punishment. General order 30 in bankruptcy (89 Fed. xii, 32 C. C. A. xxx) provides for considering, upon a writ of habeas corpus, any unwarranted imprisonment or interference with the liberty of a bankrupt. The method pursued in the present case to raise the ques-

tion in this court was therefore correct in form, but the decision must be against the bankrupt so far as complete release from the commitment to the sheriff of Kings county is concerned.

The bankrupt will be temporarily kept subject to the jurisdiction of this court while his attendance may be needed in the bankruptcy proceeding, and the judgment creditor will be restrained from receiving any money which may be collected from or paid by the bankrupt out of any property which he had prior to the filing of his petition in bankruptcy. The right to all such property (not affected by a lien antedating the petition by more than four months) has passed to the trustee, and the creditor may not be preferred therefrom.

The bankrupt may, in the meantime, apply to the state court to be relieved from further punishment, after the requirements of that court shall have been met in support of its own orders. In other respects, and as soon as the necessities of the bankrupt's case will allow, the writ of habeas corpus will be dismissed, and the bankrupt remanded to the custody of the sheriff of the county of Kings.

In re EPSTEIN.

(District Court, E. D. Pennsylvania. July 14, 1913.)

No. 4,165.

BANKRUPTCY (§ 235*)—ASSETS UNACCOUNTED FOR—PROCEDURE.

Where it is charged that assets of a bankrupt have not been accounted for, the first step in the logical procedure is to determine by a hearing before the referee whether they were in his possession or under his control at the date of the bankruptcy. If the referee so finds, as he may do if they were recently in the bankrupt's possession and he fails to account for them satisfactorily, and the referee's decision is affirmed, or not reviewed, it is conclusive of that question, and may be properly followed by an order directing the bankrupt to turn over the property. His failure to comply with such order renders him presumptively liable to punishment for contempt, but only presumptively, and he is entitled to a second hearing, at which he may show his physical inability to comply, in which case the civil inquiry is at an end.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 389, 395-397; Dec. Dig. § 235.*]

In the matter of A. Epstein, bankrupt. On certificate of referee. Order modified and affirmed.

George P. Rich and Wessel & Aarons, all of Philadelphia, Pa., for trustee.

Alexander J. Brian and Levi & Mandel, all of Philadelphia, Pa., for bankrupt.

J. B. McPHERSON, Circuit Judge. Whatever opinion may be entertained in some other circuits about the proper method of inquiring into a bankrupt's failure to account for assets, and the proper method of punishing such failure, the practice in the Third circuit seems to be logical and to have the advantage of attending to one subject at a time. It may be as well to state it in outline:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

When the charge is made that assets have apparently not been accounted for, the referee hears and decides the dispute in the first instance. The point of time to which the inquiry is directed is the date of bankruptcy, and the precise question is whether the bankrupt was then in possession or control of money or of goods that apparently should have come into the hands of the trustee. Being fundamental, this question needs to be examined first of all, but it neither involves the bankrupt's present ability to turn over, nor raises the question whether he should be punished for contempt—except, of course, as the complexity of human affairs may compel an occasional approach to these allied subjects. The two questions last referred to, therefore, do not need consideration at the first stage of the investigation. If the assets that presumably should have been in the bankrupt's possession or control at the time of bankruptcy have not been accounted for, the referee may, and probably will, draw the natural inference, and direct the bankrupt to pay the money or deliver the goods, as the case may be. If this order becomes final, either by failure to have it reviewed or by affirmance in the District Court, a definite step has been taken; the proper tribunal has settled beyond future controversy that the assets described were in the bankrupt's possession or control at the time of bankruptcy.

Then comes the next question: Are they still there? Or what has become of them? This is evidently a distinct subject, which should not be confused with the other, but should be separately treated. It will need no attention, unless the bankrupt should fail to comply with the order to hand over; but failure to comply makes him presumptively liable to punishment for contempt. But only presumptively; he may have a complete answer to any attempt to punish, and in any event he cannot be punished until he has been heard. In such a hearing the inquiry is directed to the bankrupt's present ability to pay the money or deliver the goods, and unquestionably he makes a sufficient answer if he shows that he is physically unable to obey the order. If it be true that he does not now possess or control the assets, he may still be liable to the criminal law; but, except for willful disobedience of the court's command, he cannot be confined by civil process. The evidence produced must therefore satisfy the judge that the bankrupt is really unable to obey, and is not merely defying the order. This presents a mere question of evidence, and, if the bankrupt fails to prove that he cannot comply, he is simply in the ordinary position of a suitor that has not offered enough evidence to prove a fact, and is obliged to take the consequence of such failure. In the case in hand the consequence is, that, as the order to pay or deliver stands without sufficient reply, it remains what it has been from the first—an order presumed to be right, and therefore an order that ought to be enforced. In the pending case, or in any other, the court may believe the bankrupt's assertion that he is not now in possession or control of the money or the goods, and in that event the civil inquiry is at an end; but it is also true that the assertion may not be believed, and the bankrupt may therefore be subjected to the usual pressure that follows willful disobedience of a lawful command, namely, the inconvenience

of being restrained of his liberty. No doubt this may be unpleasant; it is intended to be unpleasant, but I see no reason why the proceeding should be condemned, as if it interfered with the liberty of the citizen without sufficient reason or excuse. I have known a brief confinement to produce the money promptly, thus justifying the court's incredulity, and I have also known it to fail. Where it has failed, and where a reasonable interval of time has supplied the previous defect in the evidence, and has made sufficiently certain what was doubtful before, namely, the bankrupt's inability to obey the order, he has always been released, and I need hardly say that he would always have the right to be released as soon as the fact becomes clear that he cannot obey. Actual or virtual imprisonment for debt has ceased, but imprisonment to compel obedience to a lawful judicial order (if it appear that obedience is being willfully refused) has not yet ceased, and ought not to cease, unless it should be thought expedient to destroy all respect for the courts by stripping them of power to enforce their lawful decrees.

The foregoing statement is supported by the following opinions, in which other citations will be found: *Cummings v. Synnott* (C. C. A.) 184 Fed. 718, 107 C. C. A. 62; *Re Cummings* (D. C.) 26 Am. Bankr. Rep. 130, 186 Fed. 1020; *Re Cummings* (D. C.) 188 Fed. 767; *Re Marks* (D. C.) 176 Fed. 1018; *Re Sax* (D. C.) 15 Am. Bankr. Rep. 455, 141 Fed. 223.

In the present controversy (which is only in the first stage) I have considered the evidence, and approve the findings and order of the referee. But I think it desirable to modify the order slightly by striking out the words, "of the value of \$28,686.34," and by striking out also the words, "and still withholds." And, as it is also desirable to fix another time within which the order is to be obeyed, I substitute July 25, 1913, for "forthwith." Thus modified, the order is affirmed. It will read as follows:

It is hereby ordered that the said A. Epstein, the bankrupt, do deliver to Abraham Steinfeld, trustee of the estate of A. Epstein, 3,061 dozen waists and 8,013 $\frac{3}{8}$ yards and 10,750 $\frac{5}{12}$ dozen trimmings, on or before July 25, 1913, which property the said bankrupt had in his possession at the time of the filing of the petition against him, and which he withheld from his said trustee.

UNITED DRUG CO. v. THEODORE RECTANUS CO. et al.

(District Court, W. D. Kentucky. July 11, 1913.)

1. TRADE-MARKS AND TRADE-NAMES (§§ 55, 98*)—ADOPTION—PRIORITY OF USE—INJUNCTION.

Complainant's predecessor in business, whose name was "Regis" prior to 1880, adopted the word "Rex" as her trade-mark, and used it in connection with the sale of medicinal preparations made by her and sold for the cure of dyspepsia or other kindred diseases. Complainant in 1900 registered the name as a trade-mark in the Patent Office. Defendant's predecessor, without knowledge of complainant's use of the word,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

adopted the same word as his trade-mark upon another closely related medicinal preparation, which use was continued by defendant until suit was brought; no attempt having been made by it to register the same as a trade-mark. *Held*, that complainant by virtue of the priority of use was entitled to an injunction against the future use of the word "Rex" in connection with the character of preparations put out by it in connection with which it had been previously used, but was not entitled to an accounting of profits against defendant, nor to an assessment of damages for unfair trade.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 63, 112; Dec. Dig. §§ 55, 98.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 84*)—INFRINGEMENT—DEFENSES.

In a suit to restrain defendant's use of the word "Rex" in connection with a medicinal preparation sold in competition with complainant's "Rex" Dyspepsia Tablets, the fact that such tablets were made from drugs which were deleterious, harmful, or worthless, when erroneously prescribed or administered, was no defense.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 93, 97; Dec. Dig. § 84.*]

In Equity. Suit by the United Drug Company against the Theodore Rectanus Company and others. Decree for complainant.

Emery, Booth, Janney & Varney, Laurence A. Janney, and John R. Moulton, all of Boston, Mass., and Wehle & Wehle, of Louisville, Ky., for complainants.

Blakey, Quin & Lewis, of Louisville, Ky., for defendants.

EVANS, District Judge. [1] A very careful consideration of the testimony has led us to the conclusion, and we so find the fact to be, that prior to 1880 Mrs. Ellen M. Regis commenced in a somewhat crude and simple way the use of the word "Rex" as her trade-mark, and that she used it in commerce and trade up to the time when she sold her trade-mark and business to the plaintiff. Since before 1880 these two persons in succession have used the word "Rex" as a trade-mark in connection with a medicinal preparation made by Mrs. Regis, and which trade-mark came to indicate its origin.

Equally clearly, we think, the testimony warrants the finding, and we accordingly find, that Theodore Rectanus (to whose rights, if any, the defendant Theodore Rectanus Company has succeeded) in 1883, through a play upon his own name, adopted the word as his trade-mark upon another, though somewhat closely related, medicinal preparation. The use of this trade-mark has also been continued to this date by Rectanus and the defendant company, which succeeded him. The adoption and use by Rectanus of the word "Rex" as his trade-mark was a perfectly innocent act, done without any knowledge of the trade-mark previously adopted by Mrs. Regis. The trade-mark of the latter was duly registered in the Patent Office in 1900. That of Rectanus has never been registered at all.

In our broadly extended country the separate and independent use of these two trade-marks ran along contemporaneously in widely separated localities, without either of the parties most interested knowing what the other was doing, until a comparatively few months before this

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

action was brought. The judgment in this case, we think, must necessarily work a hardship upon one or the other of the parties, and possibly upon both. But, notwithstanding that probable result, we are clearly of opinion that the facts stated require us, under the express mandate of the authorities presently to be cited, to hold that the right of the plaintiff to the exclusive use of the word "Rex" in connection with medicinal preparations for dyspepsia and kindred diseases of the stomach and digestive organs must be sustained. The following, among many cases, while requiring that judgment, also show that, while an injunction against the future use of the word Rex in connection with the character of preparations indicated should be granted, no accounting for profits, nor any assessment of damages for unfair trade, need, on the facts found, be decreed: *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19-39, 21 Sup. Ct. 7, 45 L. Ed. 60; *Saxlehner v. Siegel-Cooper Co.*, 179 U. S. 42, 21 Sup. Ct. 16, 45 L. Ed. 77; *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526; *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828.

We also have reached the conclusion that the authorities require us to hold that the articles upon which the defendant Theodore Rectanus Company uses the word "Rex" are sufficiently related to the plaintiff's Rex Dyspepsia Tablets as to bring that use within the reach of the injunctive relief to be awarded. *American Tobacco Co. v. Polacsek* (C. C.) 170 Fed. 117, and cases cited. And this is so, although one class of preparations are fluids and the other usually solids, though they have sometimes been fluids.

[2] We find that the testimony does not sustain that one of the defenses set up in the answer, to the effect that the plaintiff's Rex Dyspepsia Tablets are made from drugs which are deleterious, harmful, or worthless. The criticism of these drugs went rather to the possibility that they might be erroneously prescribed or administered, but we think the issues in this case cannot properly have anything to do with the wrongful use of the tablets or the drugs they contain. Any poisonous drug, useful though it may be in appropriate doses, would be extremely dangerous, deleterious, and harmful if unwisely or ignorantly prescribed in improper quantities. We think the testimony shows that ox gall is, per se, beneficial in certain cases, and that it is harmful only when ignorantly or unwisely prescribed.

We are of opinion that the testimony is not sufficient to support a judgment against the individual defendants, and the bill, as to them, will be dismissed. We think that the conduct of those defendants in the premises should fairly be imputed to the corporation defendant only. We mean this remark to apply to what they have done up to this date only.

The plaintiff is entitled to a decree enjoining the Theodore Rectanus Company and all its officers, agents, and employees from in any wise using the word "Rex" upon any of the preparations in respect to which they have heretofore used it, and upon any advertisements or dressing of such preparations. The use by said defendant of the word "Rex" upon any preparation for the cure of dyspepsia or kindred diseases of the stomach and digestive organs should also be enjoined. The

judgment, however, should provide that such injunction does not apply to any sale by the defendant Theodore Rectanus Company of the Rex Blood Purifier or the Rex Celery and Iron Compound heretofore made and labeled by it or its predecessor, provided that before such sales, and before any negotiations for such sales, the word "Rex" is utterly and entirely obliterated therefrom. The decree should further provide that the injunction does not in any way prevent the manufacture or sale in the future by said defendant of either of the two last-named preparations, provided that the word "Rex" is not used in connection therewith, nor upon any wrapper or dress thereon, nor in any advertisements thereof.

The plaintiff will recover its costs against the Theodore Rectanus Company. The defendants M. S. Preston, C. A. Dralle, and Otto K. Dietrich will recover any separate costs they may have individually incurred.

THE FORTUNA.

(District Court, W. D. Washington, N. D. July 15, 1913.)

No. 2,514.

ADMIRALTY (§ 13*)—JURISDICTION—ACTION FOR SERVICE OF WATCHMAN.

The services of a watchman, rendered to a vessel while disengaged and laid up for repairs, with the master discharged, is not a maritime service, and a suit to recover therefor is not within the admiralty jurisdiction.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 164-176; Dec. Dig. § 13.*]

In Admiralty. Suit by Sunde & Erland, Herman Larson and others, partners as I. N. Larson & Sons, the Dickson Bros. Company and A. J. Stuckey against the schooner Fortuna. On exceptions to intervening libel of A. J. Stuckey. Exceptions sustained.

Wedell Foss, of Tacoma, Wash., for libelant Stuckey.
Willett & Oleson, of Seattle, Wash., for respondent.

CUSHMAN, District Judge. This matter is for decision upon the exceptions of the respondent to the intervening libel of A. J. Stuckey, seeking to enforce a claim against the respondent schooner for services of a watchman. The intervening libel alleges: That the Fortuna belongs to the port of Tacoma, in this district. "That the said schooner, some time in the month of September, 1912, arrived at the port of Dockton, Washington (about ten miles from Tacoma), under the command of her late master, K. Anderson, where the said schooner was laid up and said master discharged. While said schooner was so disengaged, it was necessary for her to undergo certain repairs, and be furnished with certain supplies, and be taken care of in order to preserve said schooner and to fit her to go to sea." That Joseph Kildall, president of said company, and manager of said schooner, ordered and purchased certain supplies and secured cer-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tain advances in money for supplies and repairs of the intervening libellant, who also furnished material and labor for the repairing of the schooner, "and in order to take care of said schooner, upon the request of the said Joseph Kildall, as aforesaid, this intervening libellant furnished a watchman to take care of said schooner during the months of March, April, and May. * * *

Libellant relies upon the following authorities: *The Erinagh* (D. C.) 7 Fed. 231; *The Seguranca* (D. C.) 58 Fed. 908; *Benedict on Admiralty* (4th Ed.) § 147.

Respondent relies on the following authorities: *The America* (D. C.) 56 Fed. 1021; *The Mary F. Chisholm* (D. C.) 129 Fed. 814; *Baltimore Steam Packet Co. v. Geo. F. Patterson*, 106 Fed. 736, 45 C. C. A. 575, 66 L. R. A. 193 at 231 & note.

The question to be determined upon the exceptions is whether, under the facts alleged, the intervening libellant has a lien upon the vessel of which admiralty will take jurisdiction, and this depends upon whether the services of the watchman furnished by the intervening libellant were maritime in character.

The exceptions must be sustained: *The America* (D. C.) 56 Fed. 1021; *The Champion*, Fed. Cas. No. 2,584; *McGinnis v. The Grand Turk*, Fed. Cas. No. 8,800; *The John T. Moore*, Fed. Cas. No. 7,430; *The E. A. Barnard* (C. C.) 2 Fed. 712; *The Sirius* (D. C.) 65 Fed. 226. No case to which the court's attention has been called can be said to support the contrary contention.

The case of *The Erinagh* (D. C.) 7 Fed. 231, was the case of a foreign vessel. The watchman was employed while the vessel was in quarantine, and before she came to the dock to discharge her cargo. Therefore the voyage had not yet ended. In that case it is said:

"In the first two cases referred to (*Gurney v. Crockett*, Abb. Adm. 490 [Fed. Cas. No. 5,874]; *The Harriet*, Olc. 229 [Fed. Cas. No. 6,097]), which were decisions in this court in 1845 and 1849, the claims of watchmen employed upon a vessel laid up, and not at the time employed in any voyage, or in the performance of any contract of affreightment, were disallowed, as not being for services maritime in their nature. * * * The cases of *The John T. Moore* and of *The E. A. Barnard* appear also to have been cases of vessels laid up and not in use for purposes of commerce. * * * And whatever may be the rule upon the facts of those cases, where the vessel was laid up, undergoing repairs, dismantled, or not engaged in any voyage, or earning freight, I have no hesitation in holding that it is in accordance with the present view of what constitutes a maritime contract that the service of a watchman on board a vessel coming into port utterly disabled by the sickness of her crew, and having on board a cargo to deliver in order to earn her freight, is a maritime service for which there is a maritime lien on the ship." Pages 234, 235.

The case of *The Seguranca* (D. C.) 58 Fed. 908, was also a case of a watchman's services where the cargo had not yet been discharged. In the course of the opinion in that case it was said:

"The personal services of watchmen or stevedores, on the other hand, in cases like the present, are necessary to enable the ship to discharge her maritime duty, to accomplish her voyage, and to earn her freight; they are rendered in the course of the voyage; since the voyage is not ended as regards the goods, until they are delivered, or ready for delivery." Page 909.

In the case of *The Maggie P.* (D. C.) 32 Fed. 300, the contract was held an indivisible one for the repair and preservation of the vessel; that to preserve the vessel its navigation was necessary. The opinion recites:

"It is averred in the libel that it was part of libellant's duty as watchman to keep the steamer in a place of safety, and to that end to move and navigate her from place to place as circumstances demanded. * * *"

These cases are each, therefore, clearly distinguishable from the present one—that of a vessel with the master discharged, the vessel disengaged and laid up for repairs. The service of a watchman, under such circumstances, is not a maritime service.

No reason has been advanced in argument, based on the peculiar situation or needs, either of such a vessel, those interested in her, or the persons performing such services, to justify vesting the jurisdiction in a court of admiralty. The service does not pertain to the sea.

The exceptions are sustained.

SCHAUPP v. MILLER.

(District Court, D. Oregon. July 21, 1913.)

No. 5,608.

BANKRUPTCY (§ 184*)—TRANSFERS—VALIDITY—EFFECT OF TAKING POSSESSION BY MORTGAGEE.

In states where the rule prevails that a chattel mortgage of a merchandise stock under which the mortgagor is permitted to retain possession and sell without accounting to the mortgagee for the proceeds is fraudulent in fact and void ab initio, the taking of possession by the mortgagee before the bankruptcy of the mortgagor does not validate his lien as against other creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

In Equity. Suit by A. W. Schaupp, as trustee in bankruptcy of S. E. Forestrom, against Ole Miller. Decree for complainant.

Bauer & Greene and A. H. McCurtain, all of Portland, Or., for complainant.

A. M. Runnells, of Joseph, Or., and Sheahan & Cooley, of Enterprise, Or., for defendant.

BEAN, District Judge. From the stipulation of facts it appears that the two mortgages under which the defendant claims cover a stock of general merchandise and after they were executed and recorded the bankrupt was permitted by the mortgagee to continue in possession of the goods and sell the same at retail in the usual course of business, without paying any of the proceeds on the mortgage indebtedness, or in any manner accounting to the mortgagee therefor, but applying the same to his own use. About two months prior to the adjudication the mortgagee, learning that the bankrupt was so deeply

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

involved in debt that he could not continue in business, demanded possession of the stock of goods alleged to be covered by the mortgages and the same was delivered to him, to be sold and disposed of "by virtue of the said chattel mortgage" for the purpose of paying the indebtedness secured thereby and the expenses of foreclosure, and the surplus, if any, to be paid to the mortgagor's creditors.

From the facts as so stipulated it is apparent that the mortgages were originally invalid, but the position of the defendant is that the possession taken by him in pursuance of the terms of the mortgage before the adjudication and before other creditors had seized the property cured the defect. The effect of a mortgagee taking possession of property covered by a mortgage like the one in question has been much discussed by the courts, and there is not entire harmony in the decisions. It seems to depend on whether the mortgage is regarded as fraudulent in fact and void ab initio, or only presumptively fraudulent. In Oregon such a mortgage is held to be fraudulent in fact and from the beginning, for the reason, as stated by Mr. Justice Moore in *Fisher v. Kelly*, 30 Or. 1, 46 Pac. 146, "it is for the mortgagor's own use and benefit." *Orton v. Orton*, 7 Or. 478, 33 Am. Rep. 717; *Jacobs v. Irvin*, 9 Or. 52; *Bremer v. Fleckenstein*, 9 Or. 266; *Aiken v. Pascall*, 19 Or. 493, 24 Pac. 1039; *Fisher v. Kelly*, supra; *Sabin v. Wilkins*, 31 Or. 450, 48 Pac. 425, 37 L. R. A. 465. Where such a rule prevails, the courts generally hold that possession taken by the mortgagee does not purge the original transaction of its fraudulent character, because a void instrument cannot be the foundation of a valid lien. *Catlin v. Currier*, 1 Sawy. 7, Fed. Cas. No. 2,518; *Wells v. Langbein* (C. C.) 20 Fed. 183; *Robinson v. Elliott*, 22 Wall. 513, 22 L. Ed. 758; *Edmondson v. Hyde*, 2 Sawy. 205, Fed. Cas. No. 4,285; *In re Antigo Screen Door Co.*, 123 Fed. 249, 59 C. C. A. 248; *Mandeville v. Avery*, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678; *Stephens v. Perrine*, 143 N. Y. 476, 39 N. E. 11; *Blakeslee v. Rossmann*, 43 Wis. 116; *Stein v. Munch*, 24 Minn. 390; *Madson v. Rutten*, 16 N. D. 281, 113 N. W. 872, 13 L. R. A. (N. S.) 554; *Zartman, Trustee, v. First Nat. Bank*, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083.

In the absence of authoritative ruling by the courts of the state, I feel constrained to follow the authorities cited, and direct a decree in favor of the plaintiff.

OREGON & C. R. CO. v. GRUBISSICH.†

(Circuit Court of Appeals, Ninth Circuit. July 17, 1913.)

No. 2,181.

1. EVIDENCE (§ 352*)—CORPORATE BOOKS AND RECORDS.

While a corporation's books and records are evidence to prove its own acts, they are not competent evidence against third persons to prove contracts with them in the absence of proof that they knew and assented thereto.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1398-1403; Dec. Dig. § 352;* Corporations, Cent. Dig. § 1318.]

2. EVIDENCE (§ 208*)—PLEADINGS—ADMISSIONS.

The name of H. was affixed to the answer of defendant railroad company in a prior suit as president of the company, but he did not sign the verification thereto, nor did it appear whether he signed such answer or whether the attorney for the corporation did so for him. Attached to the answer as an exhibit was a copy of the bill of sale by which H. transferred personal property to the railroad company. There was nothing, however, to show that H. ever read the answer, or exhibit, or knew that his name was signed thereto. *Held*, that, H. not being a party to the suit, the signing of his name to the answer under such circumstances did not constitute an admission against his interest, nor was it sufficient to raise the presumption that he knew of the existence of the instrument attached as an exhibit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 713-725; Dec. Dig. § 208.*]

3. CORPORATIONS (§ 428*)—KNOWLEDGE OF OFFICERS.

Where the interests of officers or stockholders of a corporation are adverse to it, their knowledge of facts and circumstances affecting such interest will not be imputed to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748-1761; Dec. Dig. § 428.*]

4. EJECTMENT (§ 95*)—CONVEYANCE OF PROPERTY—KNOWLEDGE.

In ejectment to recover certain property alleged to have been conveyed by H. to defendant corporation, evidence *held* insufficient to warrant a finding that H. ever conveyed the property or had knowledge of its conveyance.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 280-295; Dec. Dig. § 95.*]

5. EJECTMENT (§ 82*)—ISSUES, PROOF, AND VARIANCE.

Where, in ejectment to recover certain real property, defendant's claim of title was based entirely on a written bill of sale by H. to defendant, which plaintiff alleged should in equity be deemed either a deed or an agreement to make a deed, and prayed that the same be reformed and specifically enforced and that plaintiff be required to execute a good and sufficient deed, defendant could not sustain its claim to the property on the theory of a lost grant.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 222-228; Dec. Dig. § 82.*]

6. ADVERSE POSSESSION (§ 104*)—LOST GRANT—PRESUMPTION.

It is only where possession of land has been actual, open, and exclusive for the period prescribed in the statute of limitations to bar an action for the recovery of land that the presumption of a deed can be invoked,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
206 F.—37

† Rehearing denied October 20, 1913.

but it may be invoked where a proprietary right has been exercised beyond such statutory period, though the exclusive possession of the whole property to which the right is asserted may have occasionally been interrupted during such period, if in addition to the actual possession there have been acts of ownership.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 595-602; Dec. Dig. § 104.*]

7. ADVERSE POSSESSION (§ 104*)—PRESUMPTION OF TITLE—STATUTES.

Under the statutes of Oregon providing that the presumption of title shall be based on 10 years' continuous adverse possession, mere silent possession, no matter how long continued, will not destroy the right of the true owner.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 595-602; Dec. Dig. § 104.*]

8. ADVERSE POSSESSION (§ 104*)—LOST GRANT—PARTICULAR INSTRUMENT.

Where defendant's claim to land in controversy was based entirely on a certain instrument executed by H., the prior owner, defendant was not entitled to rely on the presumption of lost grant under the rule that, where the origin of the claim of title is known and is at variance with the supposition of a grant, there will be no presumption of lost grant.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 595-602; Dec. Dig. § 104.*]

9. DEEDS (§ 26*)—VENDOR AND PURCHASER (§ 21*)—BILL OF SALE—CONSTRUCTION—TRANSFER OF REAL PROPERTY.

An instrument transferring property of H. to defendant railroad company, after enumerating all sawmills and machinery connected therewith, all tools, implements, apparatus, live stock, horses, cattle, drays, wagons, leases, and property of every name and kind owned by the grantors in the possession of H. & Co., provided that the same consisted of machinery, implements, railroad materials used by the grantors in construction of the railroad, and added that it was the intention to transfer to the railroad company all property, real and personal, of every name and nature owned or possessed by the grantors in the state of Oregon. The paper was executed as a bill of sale of personalty, was not stamped as a conveyance of real property, and was not recorded. *Held*, that such instrument could not operate as a deed, or a contract for the conveyance of land in Oregon belonging to the grantors to the railroad company.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 50-52; Dec. Dig. § 26;* Vendor and Purchaser, Cent. Dig. §§ 6, 25, 26, 89; Dec. Dig. § 21.*]

Ross, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Oregon; R. S. Bean, Judge.

Ejectment by Maria de Grubissich against the Oregon & California Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The appellee herein had brought an action of ejectment to recover the possession of certain land in the state of Oregon, claiming title thereto as the devisee of her grandfather, Ben Holladay, who had died in 1887. The appellant herein, being the defendant in that action, brought the present suit to enjoin the prosecution of the action at law; it claiming to be the equitable owner of the property by virtue of an alleged unwitnessed and unacknowledged instrument of date March 28, 1870, which it alleged should be held in equity to be either a deed, or an agreement to convey, and praying that the instrument be reformed and specifically enforced, and that the appellee be required to convey said property to the appellant. The facts are as follows: On November 19, 1868, the then owners of the land in controversy executed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to Ben Holladay & Co., a copartnership consisting of Ben Holladay, C. Temple Emmet, and S. G. Elliott, then engaged in constructing and equipping a railroad for the Oregon Central Railroad Company, a bill of sale of all the fir timber upon the land in controversy, with the right to erect a sawmill thereon. In the course of constructing the first 20 miles of the railroad, all the timber was cut and removed from the land, and thereupon the sawmill was also removed therefrom. While the timber was being removed, a portion of the land on May 4, 1869, and the remainder on October 5, 1869, was deeded to Ben Holladay & Co. The land has never been cleared or cultivated, but has remained in the condition in which it was when the timber was removed. In March, 1905, the land was inclosed by a fence constructed by the appellant for the purpose of initiating a title by adverse possession in the Oregon & California Land Company, a holding corporation for certain of the appellant's lands. From 1869 to 1872, the land was not listed for assessment. From 1873 to 1902, it was included in the corporation property assessed against the appellant, except that in the year 1880 it was assessed to Ben Holladay. From 1902 to 1910 it was assessed in the name of Ben Holladay & Co.

The alleged instrument under which the appellant claims title is as follows:

"Know all men by these presents: That we, the undersigned, Ben Holladay & Co., of Portland, Oregon, in consideration of the cancellation this date by the Oregon Central Railroad Company of Salem, Oregon, of all certain contracts in writing heretofore existing between said company and the undersigned, in relation to the construction of a railroad and telegraph line from Portland, Oregon, through the Willamette, Umpqua and Rogue River valleys to the California line, and the agreement of such company to pay the undersigned for all moneys paid out, expended and incurred under such contracts, to wit, an amount not less than eight hundred thousand dollars in United States gold coin. It being a part of the arrangement that all the property hereinafter specific should be transferred and delivered to said company, and in consideration of the full sum of one dollar to us in hand paid, the receipt whereof is hereby acknowledged, have sold, assigned, set over, transferred, delivered and conveyed, and by these presents we, Ben Holladay & Co., do sell, assign, transfer, set over, deliver and convey unto said Oregon Central Railroad Company, of Salem, Oregon, all sawmills and machinery connected therewith, all machinery, tools, implements, apparatus, of every name and description, all live stock, horses, mules, cattle, work oxen, carts, drays, wagons, gearing-tackle, and all leases and all property of every name and nature owned by us, in the possession of Ben Holladay & Co., all of such property being in the state of Oregon, principally in Multnomah and Clackamas counties, the same being the mills, machinery, tools, implements, apparatus, live stock, horses, mules, cattle, carts, drays, wagons, gearing-tackle, railroad ties, iron rail spikes and other railroad materials now and heretofore used by us in the construction of the Oregon Central Railroad Company. It being the intention of this conveyance to transfer to said Oregon Central Railroad Company all property real and personal of every name and nature now owned or possessed by the undersigned in the state of Oregon.

"To have and to hold the said property and every part thereof unto the said Oregon Central Railroad Company, of Salem, Oregon, its successors and assigns, absolutely and forever.

"In witness whereof, we have hereto set our hands and seals this 28th day of March, A. D. 1870.

"[Five-cent United States stamp canceled.]

"Ben Holladay.

"C. Temple Emmet, by Ben Holladay, Atty. in Fact.

"Ben Holladay & Co., by Ben Holladay."

The bill alleged that on March 28, 1870, the land in controversy belonged to Ben Holladay & Co. The answer denied that it was the property of Ben Holladay & Co., and alleged that it was the property of Ben Holladay, and it denied that by the alleged instrument, or otherwise, it was intended to be conveyed to the appellant. Upon the issues and the testimony, the court found that the appellant was not the owner, either legally or equitably, of the land in controversy, and ordered that the bill be dismissed.

William D. Fenton, Kenneth L. Fenton, Ben C. Dey, and Alfred P. Dobson, all of Portland, Or., for appellant.

Henry Conlin, of San Francisco, Cal., and H. W. Hogue, of Portland, Or., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The appellant relies upon the alleged copy of the instrument of date March 28, 1870, and contends that at the date thereof the property in controversy belonged to Ben Holladay & Co., and that, although it is not described in the copy of that instrument, it was intended to be included therein and conveyed thereby. There is no legal proof, however, that the alleged instrument was ever executed, or that it was ever seen or was in existence or was lost. The evidence offered to prove that there was such an instrument is the minutes of a meeting of the board of directors of the Oregon Central Railroad Company of March 28, 1870, which contain a record of the agreement of cancellation of the construction contract of Ben Holladay & Co., and what purports to be a copy of the instrument which is relied upon, together with certain admissions which are alleged to have been made by Ben Holladay in the answer in the suit of Nightengale & Elliott v. Oregon Central Railroad Company and the Oregon & California Railroad Company, and in an affidavit made by Ben Holladay and filed in that suit, which is referred to in the record as Exhibit 52. We agree with the court below that this evidence is not sufficient to overcome the legal title of record. There is no evidence as to the original of the alleged copy of the instrument which is found in the minutes. It is shown in whose handwriting the copy is made, but it is not shown that the copyist was at any time an officer or employé of the corporation.

[1] While a corporation's books and records are evidence to prove its own acts, they are not competent evidence against third persons to prove contracts with them, in the absence of proof that they knew and assented thereto. *Carey v. Williams*, 79 Fed. 906, 25 C. C. A. 227; *Edwards v. Bates County* (C. C.) 117 Fed. 537; *Harrison v. Remington Paper Co.*, 140 Fed. 402, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; *Rudd v. Robinson*, 126 N. Y. 113, 26 N. E. 1046, 12 L. R. A. 473, 22 Am. St. Rep. 816. In *Thompson on Corporations* (1st Ed.) § 7740, it is said:

"The general rule is believed to be that, excepting for the purpose of proving what the corporation did, or what action its corporators took in effecting its organization, its books and records are not evidence as against a stranger, or as against a stockholder holding adversely to it."

[2] Nor does the record show that Ben Holladay ever admitted his knowledge of the alleged conveyance. It does appear that his name was affixed to an answer made by the Oregon & California Railroad Company in the Nightengale suit, to which was annexed as an exhibit what purports to be a copy of the instrument which is copied in the minutes. The execution of the instrument, however, was not made an issue in that case. But Holladay did not make the verification to the answer. His name appended thereto appears only as that of the pres-

ident of the corporation. It does not appear whether he signed it, or whether the attorney of the corporation signed for him. There is nothing to show that Holladay ever read the answer or the exhibit attached thereto, or knew that his name was signed thereto. No presumption that he did can arise from the fact that his signature is found subscribed to the answer as an officer of one of the corporations defendant. He was not a party to that suit, and it was not his answer, and, in the absence of proof that he knew and assented to the contents of the answer, nothing contained therein can be properly considered as an admission by him against his individual interest.

[3] In *McCaskill Co. v. United States*, 216 U. S. 504-514, 30 Sup. Ct. 386, 391 (54 L. Ed. 590), the court said:

"Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interest distinct from theirs. Their interests, it may be conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge is its knowledge, the counter presumption that, in transactions with it, when their interest is adverse their knowledge will not be attributed to it."

[4] The affidavit of Ben Holladay (complainant's Exhibit 52) which is said to contain an admission of his knowledge of a conveyance of the property may be searched in vain for any statement or suggestion, directly or indirectly, or even remotely, relating to the question of a conveyance of this real estate or the title thereto. It contains no reference whatever to any sale or conveyance of real or personal property from Ben Holladay & Co. to the Oregon Central Railroad Company. Holladay's statements as to the proceedings at the stockholders' meeting of March 28, 1870, and the vote of the stockholders in favor "of said sale and transfer," refer only to the sale and transfer of the franchises and property of the Oregon Central Railroad Company to the Oregon & California Railroad Company. From the fact that Holladay admitted that it was the common judgment of all the stockholders of the Oregon Central Company, its directors, and himself, that the corporate proceedings of March 28 and 29, 1870, were had for the best interests of all concerned in said company, it is not to be inferred that he ratified or affirmed the alleged instrument of March 28, 1870, as a conveyance of, or as expressing an intention to convey, real estate to the Oregon Central Company.

[5] It is contended that the decree of the court below should be reversed on the ground that upon the facts proven the presumption arises that a deed was executed from Ben Holladay or Ben Holladay & Co. to the Oregon Central Railroad Company. The presumption of a deed is not only not suggested by the facts alleged in the bill, but is directly at variance with those facts and with the prayer for relief. The appellant's claim of title, as presented in the bill, is based entirely upon the alleged instrument of date March 28, 1870, which it alleges should in equity be deemed either a deed or an agreement to make a deed, and the prayer is that the same be reformed and specifically enforced, and that the appellee be required to execute a good and sufficient deed of conveyance of the premises in controversy; in other words, the appellant by the allegations of its bill expressly negatives the presumption of a conveyance and rests its claim of title wholly

upon a specified instrument which it says has been lost, but the terms of which it presents to the court as shown by an entry in the minute book of the Oregon Central Railroad Company. The presumption of a conveyance is said to be aided by the proof of two facts: First, the payment of the taxes upon the property by the appellant, and the failure of Ben Holladay or his heirs to pay the same; and, second, those alleged admissions by Ben Holladay of the appellant's title which have already been discussed in this opinion.

[6] To sustain the contention the following authorities are cited: *Fletcher v. Fuller*, 120 U. S. 534, 7 Sup. Ct. 667, 30 L. Ed. 759; *Holtzman v. Douglas*, 168 U. S. 278, 18 Sup. Ct. 65, 42 L. Ed. 466; and *United States v. Chavez*, 175 U. S. 520, 20 Sup. Ct. 159, 44 L. Ed. 255. In *Fletcher v. Fuller*, the court held that although, as a general rule, it is only where the possession has been actual, open, and exclusive for the period prescribed in the statute of limitations, to bar an action for the recovery of land that the presumption of a deed can be invoked, yet that presumption may properly be invoked where a proprietary right has been exercised beyond such statutory period, although the exclusive possession of the whole property to which the right is asserted may have occasionally been interrupted during such period, if in addition to the actual possession there have been other open acts of ownership. In that case there had been an exclusive working of a quarry on the land for more than 28 years under a claim of title of the whole tract by virtue of conveyances in which it was described, and the parties in possession had paid taxes on the property for a period of 77 years. In *Holtzman v. Douglas*, there was no question or discussion of a presumption of a conveyance. The defendants relied entirely upon title derived through a tax deed, and continued adverse possession thereunder for more than twenty years. In *United States v. Chavez*, the proof showed uninterrupted possession of lands in Mexico for more than 100 years prior to the transfer of the territory in which they were situated to the United States, and continuing thereafter until the presentation of a petition to the court of private land claims for a decree confirming the title of the petitioners. It was upon these facts that the court remarked:

"Upon a long and uninterrupted possession, the law bases presumptions as sufficient for legal judgment, in the absence of rebutting circumstances, as formal instruments, or records, or articulate testimony. Not that formal instruments or records are unnecessary, but it will be presumed that they once existed and have been lost."

It is apparent that the facts in those cases differ widely from the facts in the case at bar.

[7] As to the possession of the land in controversy, the court below found that it has never been in the actual possession or occupancy of any person or persons since Holladay & Co. ceased logging operations thereon in 1869. It is admitted that the land has never been cleared or cultivated, and that it was not inclosed until March, 1905. It is true that the complainant has paid taxes on the land since 1873, but in the year 1880 the property was assessed to Ben Holladay, and from 1902 to 1910 it was assessed as the property of Ben Holladay & Co. The mere fact of the payment of these taxes is certainly no ground

on which to presume a conveyance to the taxpayer. The land had been denuded of its timber, and in 1870 it was of little value. There is no evidence of any act of possession, or any assertion of ownership, by the Oregon Central Company or by the appellant, other than the payment of taxes, until after the death of Ben Holladay. The first act of assertion of ownership that is claimed was in 1890, when an agent of the appellant examined the land to ascertain its value. In 1905, the appellant placed a wire fence about it, the explanation of which was that:

"Inasmuch as there was no record title, it would be inadvisable to stir the matter up, and thought we would just fence it, and assert our possession in that way, and I presume to take advantage of the statute of limitations in that case."

The statutes of Oregon assume to declare upon what the presumption of title may be based. It is upon ten years of continuous adverse possession. Under those statutes mere silent possession, no matter how long continued, does not destroy the right of another.

The presumption of a grant had its origin at a time when there was no registration of conveyances, and the muniments of title were subject to loss or destruction. It was indulged upon the theory that long-continued, open, notorious, and adverse possession of property must have had its origin in a conveyance, which had been lost. The best expression of the doctrine is found in *Ricard v. Williams*, 7 Wheat. 59, 108 (5 L. Ed. 398) where Judge Story said:

"Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession. They may therefore be encountered and rebutted by contrary presumptions, and can never fairly arise where all the circumstances are perfectly consistent with the nonexistence of a grant."

With this doctrine for our guidance, we have to inquire whether the elements on which such a presumption is based are to be found in the case at bar. It is to be observed, first, that during the period of the appellant's alleged possession there has been no difficulty in the way of preserving muniments of title; the registration laws having obviated that difficulty. Nor, according to the policy of the present laws of the states, is there a necessity for indulging a presumption to support long and uninterrupted possession; the policy of the law in that respect being definitely expressed in statutes of limitation, and in provisions for the acquisition of title through short periods of adverse possession. These statutes leave little or no room for the indulgence of the presumption of a grant. In *Wigmore on Evidence*, § 2522, it is said:

"But the systematic extension of the principle of acquisition by limitation, the reduction of the required possession to short periods, and (in the United States) the practice of compulsory registration of deeds of conveyance, have left little scope for the presumption."

[8] Again, all the circumstances in the present case are "perfectly consistent with the nonexistence of a grant," and, in fact, those circum-

stances, instead of supporting the presumption of a deed, tend strongly to rebut it. The alleged copy of the instrument found in the minutes, if it has any probative effect, establishes the fact that no other instrument was executed, and that therefore there was no conveyance. "Where the origin of the claim of title is known, there will be no presumption of a lost grant." *Clafin v. Boston & Albany R. R. Co.*, 157 Mass. 499, 32 N. E. 659, 20 L. R. A. 638. And the presumption cannot arise "where the claim is of such a nature as is at variance with the supposition of a grant." *Ricard v. Williams*, supra, 7 Wheat. page 108, 5 L. Ed. 398.

[9] There is no legal proof whatever of the execution of the alleged instrument of date March 28, 1870. There is no evidence that the instrument ever was signed or was in the possession of any one, or that it was lost. There is only the bare fact that what purports to be a copy of an instrument is found in the minute books of the Oregon Central Railroad Company. And that copy does not appear to be the copy of a deed, but of a bill of sale of personal property. In the granting part thereof there is enumerated:

"All sawmills and machinery connected therewith, all machinery, tools, implements, apparatus of every name and description, all live stock, horses, mules, cattle, work oxen, carts, drays, wagons, gearing-tackle, and all leases and all property of every name and nature owned by us, in the possession of Ben Holladay & Co."

Then follows the further specification:

"The same being the mills, machinery, tools, implements, apparatus, live stock, horses, mules, cattle, carts, drays, wagons, gearing-tackle, railroad ties, iron rail spikes, and other railroad materials, now and heretofore used by us in the construction of the Oregon Central Railroad Company."

So far there is no mention or suggestion of any real property. But next there is added, as through inadvertence or afterthought, the words:

"It being the intention of this conveyance to transfer to said Oregon Central Railroad Company all property, real and personal, of every name and nature now owned or possessed by the undersigned in the state of Oregon."

That it was not the intention of the parties to the instrument to convey real property is shown by the form of the instrument itself. If such a paper was executed, it was executed as a bill of sale, for it was not sealed, witnessed, or acknowledged, and it was stamped with the revenue stamp of a bill of sale, and not with the stamp required of a conveyance of real estate. If it was ever delivered, it was treated as a bill of sale, for it was never recorded; no recording of a bill of sale being necessary under the registration laws of Oregon. Now, this very copy of an instrument, which is not a copy of a deed nor of an agreement to make a deed, is referred to to support the presumption that there was another instrument, and that that other instrument was a deed, and this in the face of the evident fact and the distinct allegation of the bill that the appellant's claim of title had its origin in the very instrument of which the minute book contains the alleged copy. We find no ground on which to sustain such

a presumption and no ground for reversal of the decree of the court below.

The decree is affirmed.

ROSS, Circuit Judge (dissenting). On the 24th of April, 1911, the complainant filed in the court below its bill of complaint, which, after the trial of the cause, was dismissed. In the bill it was alleged, among other things, that on the 13th of the preceding March the defendant to the bill commenced an action at law in the same court against the complainant as defendant to recover the possession of the north half of the northeast quarter of section 32, and the east half of the southeast quarter and lots 5 and 6 of section 29 in township 1 south, range 2 east, of the Willamette meridian, in Clackamas county, Or., with alleged damages, rents, issues, and profits, to restrain the prosecution of which law action the bill was brought, as also to establish by the decree of the court title to the property in the complainant and to enjoin the defendant to the bill from ever asserting any title thereto.

The facts out of which the litigation grows occurred more than 40 years ago; the bill alleging that in 1867 an Oregon corporation called Oregon Central Railroad Company, having its principal office at Salem in that state, for the purpose of building and operating a railroad from Portland southward to the California line, entered into certain contracts for the construction of a portion of the road with one A. J. Cook and A. J. Cook & Co., which contracts subsequently passed by assignment to the firm of Ben Holladay & Co.; that in the carrying out of those contracts by Holladay & Co. that firm first purchased the timber on the tracts of land mentioned, and thereafter, to wit, in the year 1869, acquired the title to the lands by deeds which were duly recorded in the recorder's office of the county in which they are situated; that on the 28th day of March, 1870, the said firm of Ben Holladay & Co. made a settlement with the Oregon Central Railroad Company of and concerning the performance of the said contracts and all matters in relation thereto; and that on that day those parties made and entered into this written agreement:

"Know all men by these presents: That we, the undersigned, Ben Holladay & Co., of Portland, Oregon, in consideration of the cancellation this date by the Oregon Central Railroad Company, at Salem, Oregon, of all certain contracts in writing heretofore existing between said company and the undersigned, in relation to the construction of a railroad and telegraph line from Portland, Oregon, through the Willamette, Umpqua and Rogue River valleys to the California line, and the agreement of such company to pay the undersigned for all moneys paid out, expended and incurred under such contracts, to wit, an amount not less than eight hundred thousand dollars in United States gold coin. It being a part of the arrangement that all the property hereinafter specified should be transferred and delivered to said company, and in consideration of the full sum of one dollar to us in hand paid, the receipt whereof is hereby acknowledged, have sold, assigned, set over, transferred, delivered and conveyed, and by these presents we, Ben Holladay & Co., do sell, assign, transfer, set over, deliver and convey unto said Oregon Central Railroad Company, of Salem, Oregon, all sawmills and machinery connected therewith, all machinery, tools, implements, apparatus of every name and description, all live stock, horses, mules, cattle, work oxen, carts, drays, wagons, gearing-tackle, and all leases and all property of every name and nature now owned by us, in the possession of Ben Holladay & Co., all of such prop-

erty being in the state of Oregon, principally in Multnomah and Clackamas counties, and same being the mills, machinery, tools, implements, apparatus, live stock, horses, mules, cattle, carts, drays, wagons, gearing-tackle, railroad ties, iron rail spikes and other railroad materials now and heretofore used by us in the construction of the Oregon Central Railroad Company. It being the intention of this conveyance to transfer to said Oregon Central Railroad Company all property real and personal of every name and nature now owned or possessed by the undersigned in the state of Oregon.

"To have and to hold the said property and every part thereof unto the said Oregon Central Railroad Company, of Salem, Oregon, its successors and assigns, absolutely and forever.

"In witness whereof, we have hereto set our hands and seals this 28th day of March, A. D. 1870.

"[Five-cent United States stamp canceled.]

"Ben Holladay.

"C. Temple Emmet, by Ben Holladay, Atty. in Fact.

"Ben Holladay & Co., by Ben Holladay."

That alleged instrument is the real basis of the present suit, but was, according to the averments of the bill, lost, mislaid, or destroyed. The bill further alleges that on the same day, to wit, March 28, 1870, the Oregon Central Railroad Company entered into the possession of all the property described in the instrument above set out, including the lands described in the bill, and that on the next day, to wit, March 29, 1870, the Oregon Central Railroad Company, for a valuable consideration conveyed to the complainant the same property, including the said lands, which latter conveyance was duly recorded April 18, 1870, in the records of Clackamas county, and that thereafter and on the same day, to wit, March 29, 1870, the complainant entered into the exclusive possession of the said lands and has so remained ever since. The bill also alleges that the Oregon & California Railroad Company subsequently paid the taxes assessed against the said lands. The bill alleges various other matters (the most important of which will be hereinafter referred to) intended to prove the execution and delivery of the instrument of March 28, 1870, above set out in full, and intended to prove that the said instrument was intended by the parties thereto as a conveyance of the lands here in controversy and specifically described in the bill, as well as the other property therein described, to the Oregon Central Railroad Company. The bill also alleges in substance that neither the firm of Ben Holladay & Co. nor the said Ben Holladay ever claimed any interest in the lands in controversy at any time after the making of the alleged instrument of March 28, 1870; that the said Holladay died testate in Multnomah county, Or., on or about July 8, 1887, leaving various heirs, and among others the defendant to the present bill, Maria de Grubissich, née Maria de Pourtales, who as residuary legatee now claims to be the owner of the lands in question; that the said will was admitted to probate in the proper probate court; and that neither in the will nor in any of the probate proceedings was any claim made on behalf of Holladay or on the part of his estate to the lands in question.

The defendant by her answer denied, among other things, the execution or delivery of the said instrument of March 28, 1870, and denied that any such instrument ever existed. She also denied that the Oregon Central Railroad Company was ever the owner of the lands in

question or was ever in possession of any part thereof, or ever at any time conveyed or agreed or intended to convey any portion thereof or any right therein to the Oregon & California Railroad Company, and denied that the latter company ever at any time entered into the possession of any portion of the said lands, or did any act or thing adverse to the title and possession and right of possession thereto of the defendant and her predecessors in interest, and alleged that the only improvement of any kind made upon the lands by any person or corporation was a wire fence constructed around the premises in March, 1905, which the defendant alleged upon information and belief was constructed by a corporation called Oregon & California Land Company, for the sole purpose of "attempting to seize and hold actual possession of said land continuously for ten years and to thereby obtain title thereto by adverse possession as against this defendant." The defendant in her answer also set up that whatever taxes were paid by the Oregon & California Railroad Company upon the property in question were paid voluntarily and without right or obligation on its part.

Taking the case as made by the bill, it is clear that if the complainant is entitled to prevail in this suit it must be by virtue of the alleged lost instrument of March 28, 1870, considered as a conveyance of the lands described in the bill or as creating such an equity as entitled the complainant's grantor to a conveyance of the legal title thereto.

It is conceded by the counsel for the appellant that there is no direct evidence of the execution or delivery of the document of March 28, 1870, or even any direct evidence that it ever existed; but, in order to prove that such was the fact, the complainant offered, among other things, certain entries in the minute book of the Oregon Central Railroad Company, which entries are too voluminous to be here set out in full, but which show the cancellation of the construction contracts held by Holladay & Co. and a purported copy of the alleged instrument hereinbefore set out as the basis of the present suit, and also certain subsequent agreements between the Oregon Central Railroad Company and the complainant company, culminating in a conveyance by the Oregon Central Railroad Company to the complainant of whatever property, if any, it acquired from Holladay & Co. The court below held that the entries in the minutes of the Oregon Central Railroad Company were not proof of the execution or existence of a conveyance from Holladay & Co. to the Oregon Central Railroad Company of the lands in question; but I am of the opinion that the true solution of the case does not depend upon that question. The real question, as I view it, is whether, in view of all of the evidence, the execution of such conveyance is not to be presumed. In addition to the facts already referred to, the evidence shows that upon the execution of the conveyance from the Oregon Central Railroad Company to the complainant in March, 1870, the latter company followed up the constructive possession that passed with the deed by such acts of actual possession as the nature of the lands, which were wild, uncultivated, wooded, and brush lands, required; that it caused its agents to look after the lands, and from time to time sold cordwood and gravel

therefrom, and, in the year 1905, caused a wire fence to be built around them; and that every year since 1873 it has paid the taxes on the lands, although in the year 1880 they were assessed to Ben Holladay, and from 1902 to 1910 were assessed in the name of Ben Holladay & Co.

It thus appears from the evidence that for more than 40 years the complainant has claimed the property in question under the proceedings above indicated, asserting the acts of ownership thereof that have been mentioned, and that during the same long period the appellee, defendant below, asserted no claim of any character to the property until the bringing of her action of ejectment in 1911, nor did Holladay, through whom she claims, nor the firm of Holladay & Co., in which, according to the evidence, he was the principal owner. On the contrary, the evidence discloses a number of instances in which Holladay expressly admitted his knowledge of the alleged lost conveyance, once under oath by affidavit made by him on the 22d day of June, 1871, in a suit brought by John Nightengale and Simon G. Elliott against the Oregon Central Railroad Company et al., in the United States Circuit Court for the District of Oregon, and in the answer filed by the Oregon Central Railroad Company in that suit, signed by Holladay as president of the company, and to which answer was annexed as an exhibit a purported copy of the alleged lost instrument. Moreover, after the death of Holladay, at no time during the administration of his estate was any claim made by the representatives of his estate or by any of his heirs or devisees to any portion of the lands in question. So that we have here a case where for more than 40 years the complainant has claimed ownership of the lands now in dispute, under a deed executed to it by the Oregon Central Railroad Company pursuant to an asserted written conveyance to it from the true owner, a purported copy of which was admitted as genuine by one of the grantors under oath nearly 40 years before the commencement of the present litigation. Under such circumstances the execution of the alleged original lost conveyance may, in my opinion, be well presumed.

In the case of *Fletcher v. Fuller*, 120 U. S. 534, 7 Sup. Ct. 667, 30 L. Ed. 759, the trial court charged the jury in effect that in order to presume a lost deed the jury must be satisfied that such a deed had in fact actually existed. In holding the instruction erroneous the Supreme Court said, among other things:

"In such cases, 'presumptions,' as said by Sir William Grant, 'do not always proceed on a belief that the thing presumed has actually taken place. Grants are frequently presumed, as Lord Mansfield says (*Eldridge v. Knott*, Cowp. 215), merely for the purpose, and from a principle of quieting the possession. There is as much occasion for presuming conveyances of legal estates; as otherwise titles must forever remain imperfect, and in many respects unavailable; when from length of time it has become impossible to discover in whom the legal estate (if outstanding) is actually vested.' *Hillary v. Waller*, 12 Ves. 239, 252.

"The owners of property, especially if it be valuable and available, do not often allow it to remain in the quiet and unquestioned possession of others. Such a course is not in accordance with the ordinary conduct of men. When, therefore, possession and use are long continued, they create a presumption of lawful origin; that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the

property. It may be, in point of fact, that permission to occupy and use was given orally, or upon a contract of sale, with promise of a future conveyance, which parties have subsequently neglected to obtain, or the conveyance executed may not have been acknowledged, so as to be recorded, or may have been mislaid or lost. Many circumstances may prevent the execution of a deed of conveyance, to which the occupant of land is entitled, or may lead to its loss after being executed. It is a matter of almost daily experience that reconveyances of property, transferred by the owners upon conditions or trusts, are often delayed after the conditions are performed or the trusts discharged, simply because of the pressure of other engagements, and a conviction that they can be readily obtained at any time.

"The death of parties may leave in the hands of executors or heirs papers constituting muniments of title, of the value of which the latter may have no knowledge, and therefore for the preservation and record of which may take no action; and thus the documents may be deposited in places exposed to decay and destruction. Should they be lost, witnesses of their execution, or of contracts for their execution, may not be readily found, or, if found, time may have so impaired their recollection of the transactions that they can only be imperfectly recalled, and of course imperfectly stated. The law, in tenderness to the infirmities of human nature, steps in and by reasonable presumptions, that acts to protect one's rights, which might have been done, and in the ordinary course of things generally would be done, have been done in the particular case under consideration, affords the necessary protection against possible failure to obtain or to preserve the proper muniments of title, and avoids the necessity of relying upon the fallible memory of witnesses, when time may have dimmed their recollection of past transactions; and thus gives peace and quiet to long and uninterrupted possessions.

"The rule of presumption, in such cases, as had been well said, is one of policy, as well as of convenience, and necessary for the peace and security of society. 'Where one uses an easement whenever he sees fit, without asking leave and without objection,' says the Supreme Court of Pennsylvania, 'it is adverse, and an (un) interrupted adverse enjoyment for 21 years is a title which cannot afterward be disputed. Such enjoyment, without evidence to explain how it began, is presumed to have been in pursuance of a full and unqualified grant.' *Garrett v. Jackson*, 20 Pa. 331, 335. The same presumption will arise whether the grant relate to corporeal or incorporeal hereditaments. As said by this court in *Ricard v. Williams*, 7 Wheat. 59, 119 [5 L. Ed. 398], speaking by Mr. Justice Story: 'A grant of land may as well be presumed as a grant of a fishery, or of common, or of a way. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession.'

"It is not necessary, therefore, in the cases mentioned, for the jury, in order to presume a conveyance, to believe that a conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed and that its existence would be a solution of the difficulties arising from its nonexecution."

In the same case the Supreme Court approved the rulings in the cases of *Casey's Lessee v. Inloes*, 1 Gill (Md.) 430, 503, 39 Am. Dec. 658, and *Williams v. Donell*, 2 Head (Tenn.) 695, 697, in the former of which cases the Court of Appeals of Maryland held that, where there had been a continuous possession of land for 20 years or upwards by a party or persons claiming under him, the court was authorized to instruct the jury, in the absence of a deed to such party, to presume that one had been executed to him. It also approved the refusal of the court below to instruct the jury that before they could find a title in the defendants, or any one of them, by presumption of a

grant by the plaintiff or those under whom he claims, they must believe on their consciences and find as a fact that such grant was actually made; and in the latter case the Supreme Court of Tennessee, speaking on the same point, said:

"It is not indispensable, in order to lay a proper foundation for the legal presumption of a grant, to establish the probability of the fact that, in reality, a grant ever issued. It will afford a sufficient ground for the presumption, to show that, by legal possibility, a grant might have issued. And this appearing, it may be assumed—in the absence of circumstances repelling such conclusion—that all that might lawfully have been done to perfect the legal title was in fact done, and in the form prescribed by law."

In line with the foregoing are the decisions of the Supreme Court in the cases of *United States v. Chavez*, 175 U. S. 520, 20 Sup. Ct. 159, 44 L. Ed. 255, and *Holtzman v. Douglas*, 168 U. S. 284, 18 Sup. Ct. 67, 42 L. Ed. 466, in which latter case the court said:

"Payment of the taxes, as described in the above statement of facts, is very important and strong evidence of a claim of title; and the failure of the plaintiffs' predecessors to make any claim to the lot or to pay the taxes themselves is some evidence of an abandonment of any right in or claim to the property. In *Ewing v. Burnet*, 11 Pet. 41 [9 L. Ed. 624], it was held by this court that the payment of taxes on land for 24 successive years by the party in possession was powerful evidence of the claim of right to the whole lot upon which the taxes were paid."

The doctrine of the foregoing cases applied to the record in the present case requires, in my opinion, a reversal of the judgment appealed from, and I therefore think the judgment should be reversed, and the cause remanded to the court below, with directions to enter judgment for the complainant, with costs.

EVERITT et al. v. DUSS et al. †

(Circuit Court of Appeals, Third Circuit. June 20, 1913.)

No. 1,717.

ASSOCIATIONS (§ 25*)—COMMUNISTIC SOCIETY—DISSOLUTION—RIGHTS OF HEIRS OF DECEASED MEMBER.

About 1805 the Harmony Society, a religious and communistic association, was formed in Pennsylvania; George Rapp being the leader. From time to time articles of agreement were signed by the members which constituted the constitution of the society and by which each member and any one subsequently subscribing thereto surrendered his property into one common stock for the mutual benefit of all during their joint lives. They further provided that a withdrawing member, or the heirs of a deceased member, should not be entitled to anything from the society as matter of right, but might be given an allowance as a donation in the discretion of the governing body. Title to all property of the society was vested in trustees, who were given power by instruments duly recorded to buy, sell, and convey the same. In 1847, Rapp died intestate, leaving a daughter and granddaughter, both of whom died without issue, having remained members of the society. The granddaughter, who died last, made a will by which she bequeathed any interest she might have in the community property to the society, to be held under the articles of association. In 1905, the society was voluntarily dissolved and the prop-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied August 2, 1913.

erty was divided between the remaining members. Thereafter complainants, claiming to be the next of kin of George Rapp, brought suit to recover an interest in the property by virtue of some right remaining in Rapp as founder of the society. *Held*, that the suit could not be maintained, because: (1) There was no evidence to show how much, if any, property was contributed by him; and (2) if he had any right of property, contingent or otherwise, capable of transmission, it became at his death subject to the intestacy laws of the state and passed to his daughter and granddaughter as his next of kin, and afterwards to his granddaughter alone, and was disposed of by her will, in which complainants have no beneficial interest.

[Ed. Note.—For other cases, see Associations, Cent. Dig. § 47; Dec. Dig. § 25.*]

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, District Judge.

Suit in equity by Ada J. Everitt and another against John S. Duss and another. Decree for defendants, and complainants appeal. Affirmed.

For opinion below, see 197 Fed. 401.

Franklin T. Nevins, of Pittsburgh, Pa., Charles E. S. Simpson, of Jersey City, N. J., and John Cadwalader, Jr., of Philadelphia, Pa., for appellants.

Agnew Hice, of Beaver, Pa., and H. F. Stambaugh and D. T. Watson, both of Pittsburgh, Pa., for appellees.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. Early in the nineteenth century a company of German immigrants organized a community in the western part of Pennsylvania that bore several names at one time or another but in the end was commonly called the Harmony Society. It was based upon certain religious and certain economic beliefs, and for a time prospered exceedingly. Afterwards it dwindled and came to know adversity, but it lasted for 100 years, and did not come to an end until 1905. The two plaintiffs, Ada Everitt and Louisa Tryon, never were members, and contributed nothing to its assets, either in money or other property, or in services. For the purposes of this case we shall assume them to be among the next of kin of George Rapp, who was the originator and one of the earliest members; their claim to share in the assets undoubtedly rests upon George Rapp's relation to the society and to its property. That the plaintiffs are not solitary in their claim of kinship will appear by turning to George Rapp's Est., 12 Pa. Co. Ct. R. 609. Judge Wickham's opinion (delivered in 1893) refuses for the second time the application of 109 similar claimants, who were then asking the register of Beaver county to grant letters of administration to them upon George's estate. Their previous application had been refused in 1885.

In a sense Rapp was the founder of the society; that is, he was the first among its members to be dominated by the underlying religious and economic ideas that were afterwards adopted; he propagat-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ed these ideas with zeal, he convinced others of their truth, he persuaded the converts to try them in practice, and there is no doubt that he was by common consent the trusted and venerated leader of the arduous experiment. Apparently also his supremacy was complete; perhaps it may sometimes have been autocratic, but although it did not always pass unchallenged it continued with little dispute or abatement during the 40 years that preceded his death. But in another sense—the sense that is more important in the present inquiry—no one knows who was the founder of the society; that is, who was the person (if there was only one) that furnished the money to give it the needed start, to buy its home in Pennsylvania, to begin its equipment, and to establish and sustain its membership while they were taking the first painful steps in an untried path. In this sense there is little evidence worth considering that George Rapp was the founder; almost certainly, he was not the only original giver, and there is nothing to point him out as better furnished for beneficence than others of the early members. As will be seen in a few moments, this lack of evidence is not accidental; the members themselves deliberately destroyed such writings as might have disclosed the persons of the first givers and the size of the respective gifts. The only evidence concerning Rapp's financial ability that has been laid before us is the so-called "passport" dated April 7, 1804. This paper was executed by certain officials in Würtemberg, and makes several declarations concerning the personal status of George Rapp and his family. It is entitled "Geburtsbrief," describes itself as "an authenticated certificate of his legitimate birth and freedom from bondage," and among other statements contains the following: "With regard to his property the same amounts to 2000 fl. two thousand gulden." This sum we understand to have been the equivalent of, say, \$800; and, if we suppose that all his "property" was in cash, the utmost effect that can be given to the statement is that in April, 1804, George Rapp was the possessor in Germany of \$800. What he did with this sum, we have no means of knowing; there is not a scrap of evidence to show how much, if anything, was spent out of it for the expenses of the voyage, or to show how much, if anything, was used in the purchase of land or in supplying other early needs of the society. Nearly all we can affirm with confidence is that George Rapp was in the United States in 1804—perhaps having been here before—that other persons came with him or followed him, and that in February, 1805, the following fundamental agreement was entered into and signed by all the persons then engaged in the common enterprise (how many signers there were, we do not find in the record, but the plaintiffs' brief says [page 2] that "a large number of persons" were induced to emigrate before 1805):

"Be it hereby known to all who need to know it, that the following agreement has this day been made and concluded between us, the subscribers of the one part and George Rapp and his associates of the other part:

"Article 1. We the subscribers, on our part and on the part of our heirs and descendants, deliver up, renounce and remit all our estate and property consisting of cash, land and chattels, or whatever it may be, to George Rapp and his associates, in Harmony, Butler county, Pennsylvania, as a free gift or donation, for the benefit and use of the community there, and bind ourselves on our part, as well as on the part of our heirs and descendants, to

make free renunciation thereof, and to leave the same at the disposal of the superintendents of the community as if we never had nor possessed it.

"Art. 2. We do pledge ourselves jointly and severally to submit to the laws and regulations of the community, and to show due and ready obedience toward those who are appointed and chosen by the community as superintendents in such a manner that not only we ourselves endeavor, by the labor of our hands, to promote the good and interest of the community, but also to hold our children and families to do the same.

"Art. 3. If, contrary to our expectation, the case should happen, and we jointly or severally could not stand to it in the community, and we would within a few or more years break our promises, and withdraw from the community, for whatever cause it may be, never to demand any reward, either for ourselves or children, or those belonging to us, for any of our labors or services rendered, but whatever we jointly and severally shall or may do we will have all done as a voluntary service for our brethren.

"In consideration whereof George Rapp and his associates adopt the subscribers jointly and severally as members of the community, whereby each of them obtains the privilege to be present at each religious meeting; not only they themselves, but also their children and families, shall and will receive the same necessary instructions in church and school which is needful and requisite for their temporal good and welfare as well as eternal felicity.

"Art. 4. George Rapp and his associates promise to supply the subscribers jointly and severally with all the necessities of life, as lodging, meat, drink and clothing, etc., and not only during their healthful days, but also when one or more of them become sick or otherwise unfit for labor, they shall have and enjoy the same support and maintenance as before, and if, after a short or long period, the father or mother of a family should die, or be otherwise departed from the community and leave a family behind, they shall not be left widows or orphans, but partake of the same rights and maintenance as long as they live or remain in the community, as well in sick as healthful days, the same as before, or as circumstances or necessity may require.

"Art. 5. And if the case should happen as stated above, that one or more of the subscribers after a short or long period, should break their promise and could or would not submit to the laws and regulations of the church or community, and for that or any other cause would leave Harmony, George Rapp and his associates promise to refund him or them the value of his or their property brought in, without interest, in one, two or three annual installments, as the sum may be, large or small; and if one or more of them were poor and brought nothing in the community they shall, provided they depart openly and orderly, receive a donation in money, according to his or their conduct while a member, or as he or their circumstances and necessities may require, which George Rapp and his associates shall determine at his or their departure.

"In confirmation whereof both parties have signed their names,

"Done in Harmony, February 15, 1805."

The home of the society thus constituted was in Butler county, Pa., and within a few years its membership became respectable in number, and its landed property grew to be respectable in size. For in June, 1814, more than 400 persons, who describe themselves as "members of the Association of Harmonie and the villages thereto appurtenant, commonly known by the name George Rapp and associates," signed a power of attorney in which they declare that they are "desirous of selling all the real property and estate whatsoever belonging to or claimed, and in the tenure and occupation, of us or either of us, or of the said George Rapp and associates, * * * containing by estimate 9,000 acres, be the same more or less"; and they empower Frederick Rapp to sell and convey all or any part of the estate. About this

time or shortly afterwards the society migrated to Indiana, where another article of agreement was entered into on January 20, 1821:

"Be it hereby known that to-day (20th January, 1821) in the year of our Lord one thousand eight hundred and twenty-one, the present agreement, treaty and alliance was made and concluded between us, the following persons, to wit, N. N., etc., of the one part and George Rapp and his association of the other part.

"After the aforesaid persons became sufficiently acquainted with the principles, rules and regulations of the community of George Rapp, and his association, by virtue of their religious principles, they have after long and mature reflection, out of their own free will, determined to join the community of said George Rapp and his association, in Harmony, Posey county, state of Indiana; to that purpose the aforesaid persons bind themselves and promise solemnly by these presents to comply with the ordinances, rules and regulations of the community and render due obedience to the superintendents ordained by the community, and to perform as much as possible all occupations and labors to which they are ordered, and help to promote the benefit, happiness and prosperity of the community. And if the case should happen that the aforesaid persons, jointly or singly after a short or long period of time, leave the community for any cause whatever, they hereby bind themselves jointly and each for himself separately never and in no case to bring any account, nor make any claim, either against the association or any individual member thereof, for their labor and services rendered; also, never to make any demand, ask or claim any other payment, under any name and description whatsoever, but will do and have done all things out of Christian love for the good and benefit of the community, or else take it as a gift if George Rapp and his association willingly give them something.

"However, George Rapp and his association in return adopt the aforesaid persons into their community, whereby they obtain prerogative to partake of all meetings for divine services, by which they receive in church and school the necessary instructions, requisite and needful for their temporal benefit and happiness and eternal felicity. George Rapp and his association bind themselves further to supply the aforesaid persons with all the wants and necessities of life, to wit, meat, drink and clothing, etc., and indeed not only during their healthful days, but also if all or any of them get sick or otherwise infirm and unable to work, they shall, as long as they remain members of the community, receive and enjoy the same support as before, during their better days, or as their circumstances may require.

"In confirmation of the presents we, both parties, have hereunto set our hands and seals. Done in Harmony the day and year above stated."

In May, 1824, having apparently become dissatisfied with their new home in what was then the far West, "the undersigned persons, members of an association of Harmony, Ind., commonly known by the name of George Rapp and associates," as owners of real and personal property in Indiana and Illinois, executed another power of attorney to Frederick Rapp to sell or otherwise dispose of their property—evidently in view of the society's contemplated return to Pennsylvania. This was accomplished soon afterwards, for in 1827 we find them again in Pennsylvania (this time in the county of Beaver, where they remained to the end), and there is now a membership larger than 500. In March of that year they executed another set of articles, declaring the purposes of the society, and defining "the rights and privileges and duties of every individual therein":

"Whereas, by the favor of Divine Providence, an association or community has been formed by George Rapp and many others upon the basis of Christian fellowship, the principles of which being faithfully derived from the sacred Scriptures includes the government of the patriarchal age, united to the community of property and adopted in the days of the Apostles, and wherein the

single object sought is to approximate, as far as human imperfection may allow, to the fulfillment of the will of God, by the exercise of those affections, and the practice of those virtues which are essential to the happiness of man in time and throughout eternity;

"And whereas, it is necessary to the good order and well-being of said association that the condition of membership should be clearly understood, and that the rights and privileges and duties of every individual therein should be so defined as to prevent mistake or disappointment on the one hand and contention or disagreement on the other:

"Therefore, be it known to all whom it may concern: That we, the undersigned citizens of Beaver county, in the commonwealth of Pennsylvania, do severally and distinctly, each for himself, covenant, grant and agree to and with the said George Rapp and his associates as follows, to wit:

"Article 1. We, the undersigned, for ourselves, our heirs, executors and administrators, do hereby give, grant and forever convey to the said George Rapp and his associates and their heirs and assigns, all our property, real, personal and mixed, whether it be lands and tenements, goods and chattels, money or debts due to us, jointly or severally, in possession, or in remainder, or in reversion, or in expectancy, whatsoever or wheresoever, without evasion or qualification, or reserve, as a free gift or donation, for the benefit and use of the said association or community; and we do hereby bind ourselves, our heirs, executors and administrators to all such other acts as may be necessary to vest a perfect title to the same in the said association, and to place the said property at the full disposal of the superintendents of the said community without delay.

"Art. 2. We do further covenant and agree to and with the said George Rapp and his associates that we will severally submit faithfully to the laws and regulations of the said community, and will at all times manifest a cheerful and ready obedience toward those who are or may be appointed as superintendents thereof, holding ourselves bound to promote the interests and welfare of the said community, not only by the labor of our own hands, but also that of our children or families and others who now are or hereafter may be under our control.

"Art. 3. If, contrary to our expectations, it should so happen that we could not render the faithful obedience aforesaid, and should be induced from that or any other cause to withdraw from the said association, then and in such case we do expressly covenant and agree to and with the said George Rapp and his associates that we will never claim or demand either for ourselves, our children, or for any one belonging to us, directly or indirectly, any compensation, wages or reward whatever, for our or their labor or services rendered to the said community, or to any member thereof; but whatever we or our families jointly or severally shall or may do all shall be held and considered as a voluntary service for our brethren.

"Art. 4. In consideration of the premises, the said George Rapp, and his associates, do by these presents adopt the undersigned, jointly and severally, as members of the said community, whereby each of them obtains the privilege of being present at every religious meeting, and of receiving not only for themselves, but also for their children and families, all such instructions in church and school as may be reasonably required, both for their temporal good and for their eternal felicity.

"Art. 5. The said George Rapp, and his associates further agree to supply the undersigned severally with all the necessities of life, as clothing, meat, drink, lodging, etc., for themselves and their families; and this provision is not only limited to their days of health and strength but when any of them shall become sick, infirm, or otherwise unfit for labor, the same support and maintenance shall be allowed as before, together with such medicine, care and attendance and consolation as their situation may reasonably demand. And if at any time after they have become members of the association the father or mother of a family should die or be otherwise separated from the community, and shall leave their family behind, such family shall not be left orphans or destitute, but shall partake of the same rights or maintenance as before so long as they remain in the association, as well in sickness as in health, and to such extent as their circumstances may require.

"Art. 6. And if it should happen as above mentioned that any of the undersigned should violate his or her agreement and would or could not submit to the laws and regulations of the church or community, and for that or any other cause should withdraw from the association, then the said George Rapp, and his associates, agree to refund to him or them the value of all such property as he or they may have brought into the community in compliance with the first article of this agreement, the said value to be refunded without interest in one, two or three annual installments, as the said George Rapp and his associates shall determine. And if the person or persons so withdrawing themselves were poor, and brought nothing into the community, notwithstanding if they depart openly and regularly, they shall receive a donation in money, according to the length of their stay, and to their conduct, and to such an amount as their necessities may require, in the judgment of the superintendents of the association.

"In witness whereof, and in testimony that the undersigned have become members of the said community, upon the conditions aforesaid, they have hereunto severally and each for himself set their hands and seals on the 9th day of March, in the year 1827."

A few years afterward, probably in 1832, trouble and dissension sprang up and a secession from the society took place, one result of which was the payment of more than \$100,000 to the seceders, the Count De Leon and his associates. Perhaps as a result of this experience, a supplementary article was entered into in October, 1836, and this was signed by the 391 members then remaining:

"Whereas, the Harmony Society, consisting of George Rapp and many others, now established in the town of Economy, in Beaver county, Pennsylvania, did, on the 9th of March, 1827, enter into certain articles of association of which the sixth in number is as follows, viz.:

"And it would so happen as above mentioned, that any of the undersigned should violate his or their agreement, and would or could not submit to the laws and regulations of the church or community, and for that or any other cause should withdraw from the association, then the said George Rapp and his associates agree to refund to him or them the value of all such property as he or they may have brought into the community, in compliance with the first article of this agreement, the said value to be refunded without interest in one, two or three annual installments, as the said George Rapp and his associates shall determine.

"And if any person or persons so withdrawing themselves were poor, and brought nothing into the community, yet if they depart openly and regularly, they shall receive a donation of money, according to the length of their stay and to their conduct, and to such amount as their necessities may require in the judgment of the superintendents of the association."

"And whereas, the provisions of the said sixth article, though assented to at the time, manifestly depart from the great principle of a community of goods and may tend to foster and perpetuate a feeling of inequality at variance with the true spirit and objects of the association;

"And whereas, the principle of restoration of property, besides its pernicious tendency, is one which cannot now be enforced with uniformity and fairness, inasmuch as the members of the association in the year 1818, under a solemn conviction of the truth of what is above recited, did destroy all record and memorial of the respective contributions up to that time;

"And whereas, continued happiness and prosperity of the association, and a more intimate knowledge of each other have removed from the minds of all members the least apprehension of injustice and bad faith:

"Now, therefore, be it known by these presents, that we, the undersigned, with a view to carry out fully the great principles of our union, and in consideration of the benefits to be derived therefrom, do hereby solemnly enter into covenants, and agree with each other as follows:

"First. The said sixth article is entirely annulled and made void, as if it had never existed; all others remain in full force as heretofore.

"Second. All the property of the society, real, personal or mixed, in law or in equity, and howsoever contributed or acquired, shall be deemed now and forever joint and indivisible stock. Each individual is to be considered to have finally and irrevocably parted with all his former contributions, whether in land, goods, money or labor; and the same rule shall apply to all future contributions whatever they may be.

"Third. Should any individual withdraw from the society, or depart this life, neither he, in the one case, nor his representatives in the other, shall be entitled to demand an account of said contributions, whether in land, goods, money or labor, or to claim anything from the society as matter of right. But it shall be left altogether to the discretion of the superintendent to decide whether any, and if any, what allowance shall be made to such member or his representatives as a donation.

"Invoking the blessing of God on this sacrifice of all narrow and selfish feelings to the true purposes of the association and to the advancement of our own permanent prosperity, we have signed the foregoing instrument, and affixed hereunto our respective seals, at Economy, this 21st day of October, 1836.
[Signed by 391 members.]"

All the foregoing writings were signed by George Rapp on a common footing with the other members, and they would be of great, perhaps of conclusive, weight in determining by what title the society held its property, and incidentally what interest (if any) Rapp had therein. To some extent also they have a bearing on the interest of the plaintiffs, although their interest is more decisively affected by other considerations, to be referred to immediately. Rapp died August 7, 1847, intestate, leaving to survive him as his sole heirs and next of kin a daughter Rosina (who died in 1849, intestate, unmarried, and without issue), and a granddaughter, Gertrude Rapp, the only daughter of a deceased son, John Rapp, who thus succeeded (on Rosina's death) to all her grandfather's rights of property. Gertrude was a member of the society, and on August 14, 1847, she joined the other members in signing another set of articles:

"Articles of Association of the Harmony Society, Entered 14th of August, 1847.

"Whereas, by the decree of God, the venerable patriarch and much-beloved founder and leader of the Harmony Society, George Rapp, has departed this life, whereby its members are deprived of his Christian fellowship and religious ministry, and of his superintendence in their temporal affairs, and whereas, in consequence of this deeply afflicting dispensation it has become necessary to the good order and well-being of the association that some plan should be agreed upon to regulate its future affairs, promote its general welfare, and preserve and maintain it upon its original basis:

"Therefore, be it known to all whom it may concern, that we the undersigned, surviving and remaining members of the Harmony Society, and constituting the same, do severally and distinctly, each for himself, covenant, grant and agree to and with all the others thereof, and with those who shall hereafter become members, as follows: That is to say.

"Article 1. We do hereby solemnly recognize, re-establish and continue the articles of our association (the sixth section excepted) entered into at Economy on the 9th day of March, A. D. 1827, in the presence of John H. Hopkins and Charles L. Voltz, and the supplement thereto, adopted at the same place on the 31st day of October, A. D. 1836, in the presence of Charles L. Voltz and William P. Baum, except so far as the same are affected by the death of the said George Rapp, or hereinafter altered or modified, and to this extent we declare the said articles to remain in full force.

"Art. 2. We hereby ordain and establish a Board of Elders, which shall consist of nine members of the Harmony Society and their successors, to be chosen as hereinafter provided: John Stahl, John Schnabel, Adam Nach-

trieb, Matthew Scholle, Joseph Hoerle, John Eherle, Romulus L. Baker, Jacob Henrici, Jonathan Lenz shall be the first board.

"Art. 3. The board of elders shall have and exercise the following powers, to wit: First. To regulate and manage exclusively the internal temporal concerns of the Harmony Society; to appoint and remove superintendents in the several departments of industry; to make regulations and give orders in relation to their business operations, and generally to take care that the members perform the duties assigned to them. Second. To determine all disputes and misunderstandings amongst the members of the society; to advise if necessary, reprove any member who may be in fault or found delinquent in his duty. Third. To admit new members into the society and to expel them therefrom. New members when admitted shall subscribe this agreement as the evidence of their membership, and of the rights acquired by, and the duties imposed upon them. Fourth. To establish regulations for the maintenance and improvement of the morals of the society and for the instruction of its members. Fifth. To appoint one or more of its members spiritual leaders and instructors with such authority in relation to church discipline as shall be conferred by the board. Sixth. To remove from office any members of the board of elders and to declare his seat vacated; also to remove from office either or both of the trustees hereinafter appointed for the management of the external affairs and their successors in office. Seventh. To fill all vacancies in the board of elders occasioned by the death, resignation or removal from office of any of its members and their successors, and so as often as a vacancy shall occur, to fill all vacancies in the office of trustee, when either or both of the trustees or their successors shall die, resign his office or be removed from the same, and so often as a vacancy shall occur. Eighth. The concurrence of six members of the board of elders shall be deemed the act of the board and a legal exercise of any of the powers hereinbefore conferred on the said board. Ninth. A record book shall be kept in which the board of elders shall enter all proceedings that they shall consider of sufficient importance to be preserved. In all controversies, judicial or otherwise, in which the society or any of its members may be a part, such record shall be full and absolute evidence of the facts and proceedings therein contained, and the affirmation of any elder shall be competent evidence of the identity of the said record.

"Art. 4. We do further ordain and establish a Board of Trustees for the exclusive management of the external business and affairs of the society, which board shall consist of two persons, who shall be members of the board of elders, and their successors who shall be appointed as hereinbefore provided. Romulus L. Baker and Jacob Henrici shall be the first board of trustees.

"Art. 5. The said trustees shall jointly and severally have and exercise the powers following, to wit: First. In their own names or that of either of them, or otherwise, to purchase and sell, deal, barter, exchange and traffic, make all contracts and bargains in the prosecution of the business, to invest the funds in stocks and other securities, and make transfers and assignments, to collect debts, receive and pay out moneys, settle claims, compromise disputes, institute legal proceedings, appoint and dismiss agents, clerks and attorneys in fact, and at law, and generally to transact all the external business and affairs of the society. Second. To make donations to seceding and excluded members and to the representatives of those who are deceased, and for such benevolent and charitable purposes as they may deem prudent and fit. Third. The said trustees shall have power jointly to purchase real estate in their own names and also in their joint names, to grant, bargain, sell and convey all or any of the lands and tenements now or hereafter owned by or belonging to the said society, and for this purpose to execute deeds of conveyance in fee simple or otherwise in their joint names, but the proceeds of all such sales shall be held in trust for the society. Fourth. For the purpose of providing an effectual and convenient remedy in law for all injuries to the property of the society, real and personal, by trespass, ouster, detention, conversion or otherwise. The said trustees are hereby invested with the rights of possession, entry and of action in their own names as fully and to all intents and purposes as do and may exist in the said society, and to

effectuate this object more completely and in consideration thereof we grant and transfer to the said trustees all such title and interest in the said property as shall be necessary therefor. The proceeds of all suits to be brought shall be in trust for the society. Fifth, The powers hereby vested in the said trustees shall extend to and embrace all the property of said society, real, personal or mixed, whether standing, or held in the name of the late Frederick Rapp, or said George Rapp, or in any other name or form whatsoever.

"Art. 6. It is hereby distinctly and absolutely declared and provided that all the property, real, personal and mixed, which now or hereafter shall be held or acquired by any trustee or trustees or persons under them, is and shall be deemed the common property of said society, and each trustee now or hereafter appointed hereby disclaims all personal interest in the present resources and future earnings of the society, other than that of a member thereof, according to the articles of association hereby re-established and continued, and according to the present agreement.

"In witness whereof, we, the undersigned members of the Harmony Society, who constitute the said association, have to these articles executed in English and German, hereunto set our hands and seals at Economy, in Beaver county, this 12th day of August, A. D. 1847.

"Read over to and signed and sealed by the several persons whose names are subscribed in the presence of us. W. P. Baum and Others."

[Duly acknowledged and recorded.]

So far as appears, no other papers were executed by the members of the society during Gertrude Rapp's lifetime. If her grandfather George Rapp at the time of his death owned any interest whatever, present or future, vested or contingent, in real or personal property, such interest passed in full to her by the intestate laws of Pennsylvania (after Rosina's death) and it was capable of transfer by the foregoing instrument of August, 1847. If that instrument did transfer it, the society thereby became the owner of George Rapp's interest; but, if for any reason his interest was not transferred by the articles of 1847, it continued to belong to Gertrude Rapp, and would inevitably pass at her death either by will or by the intestate law of the state. She decided to make a will, giving as her reason the existence of rumors "that some persons representing themselves to be the heirs of said George Rapp, my grandfather, now make claim to an estate of which they allege he died seised and possessed"; and accordingly on December 2, 1885, she executed the following testamentary instrument:

"I, Gertrude Rapp, of Economy, Beaver county, state of Pennsylvania, daughter of John Rapp, who died at Harmony, Butler county, state aforesaid, and who was the son of George Rapp the founder of the Harmony Society, being of sound and disposing mind, memory and understanding, do declare, will and direct as follows:

"I am a member of the Harmony Society approving of and devoted to its principles, both in spiritual and religious matters, as taught by its founders and members, and in temporal matters, its community of property, and management of its affairs, and therefore do not claim a separate and undivided interest in or right to any part of the property, real or personal, of the said Society, believing that all rights and property of any and every kind that at any time belonged to my grandfather George Rapp, and my father John Rapp, my mother, Joanna Rapp, or any others who were members of the Harmony Society became and is the property of and belongs to said society as such by virtue of the intentions, wishes, acts, transfers and contracts of them the said George Rapp, John Rapp, Rosina Rapp, and the others who were members of the said society, and that therefore no part of the same descended, or came or was intended by them to descend or come to their children or descendants, or those who as collateral relatives might under other circumstances represent them or their heirs. But it having been rumored

that some persons representing themselves to be the heirs of said George Rapp, my grandfather, now make claim to an estate of which they allege he died seised and possessed, and I being his only grandchild, and direct descendant and representative (my father John Rapp, and my aunt Rosina Rapp being the only children of said George Rapp, and she the said Rosina having died unmarried and without issue, and my father John Rapp having died leaving to survive him his widow, Joanna Rapp, my mother, now also dead, and myself, his only child) and therefore entitled to and owner of any and all property or estate of which the said George Rapp may have died seised or possessed, and which for any reason was not or is not fully and legally vested in and belonging to the Harmony Society, and intending and desiring hereby to dispose of any and all property, real or personal, wheresoever the same may be found or situated of which I may die seised or possessed, or which I might at my decease be in any way entitled, from whatever source the same may be derived, do make and publish this my last will and testament, in reference thereto, that is to say: I give, bequeath and devise, to the Harmony Society at Economy, Pennsylvania, of which society Jacob Henrici and Jonathan Lenz are the present trustees, any and all estate, rights and property of every kind real and personal, of which I may die seised or possessed, or to which I may then be in any way entitled, for the use and benefit of said society, in the manner and according to the articles of association or the compact existing between the members of said society, forever. My will and desire being that any and all the estate I may have or leave at my decease shall go to and be enjoyed by those who are the members of the said Harmony Society and who survive me, and be for their joint and common use and benefit, and that of their heirs and assigns forever.

"And lastly, I do hereby nominate, constitute and appoint Jacob Henrici and Jonathan Lenz, of Economy, and members and trustees of said Harmony Society, to be the executors of this my last will and testament, with full power to do, execute and perform any and all acts, matters and things necessary in carrying out and administering what estate I may leave according to the terms hereof.

"In witness whereof, and that the foregoing is my last will and testament, I have hereunto subscribed my hand and seal this second day of December, A. D. eighteen hundred and eighty-five.

"[Duly witnessed.]

Gertrude Rapp. [Seal.]"

She died in 1889, unmarried and without issue, and the foregoing will was duly proved in Beaver county.

We complete the record by stating what took place after her death. About a year afterwards, 45 persons, declaring themselves to be "the surviving and present members of the Harmony Society at Economy aforesaid and all the present members of said society," executed the following agreement on April 30, 1890:

"Agreement, Ratification and Confirmation of and by the Members of the Harmony Society, at Economy, Beaver County, Pa. Recorded July 31st, 1890, Deed Book 125, Page 415, Beaver County.

"Whereas, after the death of George Rapp, the founder and leader of the Harmony Society, to wit: On the 12th day of August, A. D. 1847. All the then members of the said society, by articles and a compact in writing of that date, duly executed in Economy, in the county of Beaver, state of Pennsylvania, in the presence of William P. Baum, Francis Le Goulain and Andrew Bimber, and subsequently recorded in the office for recording deeds, in and for the county of Beaver, in Deed Book vol. 25, page 121, etc., adopted and established a system and plan for the regulations and government of the society, the management of their internal affairs, as also for the management and transaction of their external affairs, and business in and by which articles John Schnabel (and 8 others) were appointed and constituted the first board of elders therein established; and Romulus L. Baker and Jacob Hen-

rici, two members of the society and of the board of elders, aforesaid, were therein appointed and constituted the members of the board of trustees of said society; provided for and established, which board of elders as thus constituted, and their successors, duly appointed, under the authority and in the manner therein granted and provided, have managed the internal temporal affairs of the society as therein directed until the present time, the present board of elders being constituted and consisting of Jacob Henrici (and 8 others); and Romulus L. Baker and Jacob Henrici, the trustees aforesaid, and their successors, were in and by said articles authorized and empowered, jointly and severally in their own names, or that of either of them, to make all contracts, purchase and sell, invest the funds of the society, collect debts, receive and pay moneys, compromise and settle claims and disputes, appoint and discharge attorneys in fact and at law, institute and conduct legal proceedings and generally to manage and transact all the external business and affairs of the society, to make donations to withdrawing members and for charitable purposes, etc. Also jointly in their own names to purchase real estate and in their joint names to grant, bargain, sell and convey all or any of the lands, tenements and real estate then or thereafter owned or belonging to the society, and for this purpose to execute deeds of conveyance in fee simple or otherwise, in their joint names, etc., as by reference to said articles recorded as aforesaid will more fully appear;

"And whereas, Romulus L. Baker and Jacob Henrici accepted said trust, acted as trustees of said Harmony Society, managing and transacting their business and affairs under the authority aforesaid, until the death of the said Romulus L. Baker, on the 11th day of January, 1868, whereupon in pursuance of the authority conferred by and according to the terms and provisions of said articles recorded as aforesaid, Jonathan Lenz, a member of said society, and of the board of elders, aforesaid, was duly appointed and constituted a member of the board of trustees, to fill the vacancy occasioned by the death of said Romulus L. Baker, and thereafter the external business and affairs thereof were managed and conducted and transacted by the said Jacob Henrici and Jonathan Lenz as trustees, the same being managed, conducted and transacted under and in accordance with the authority given and conferred by the articles aforesaid until the death of said Jonathan Lenz, on the 21st day of January, 1890, whereupon the board of elders, consisting of the members last hereinbefore named and mentioned as constituting said board, in pursuance of the authority and direction of the articles aforesaid, appointed and constituted Ernest Woelfel (also a member of said society and of said board of elders) a trustee, to fill the vacancy thus occasioned in the said board of trustees, and the said Jacob Henrici and Ernest Woelfel have since that time conducted and transacted the business and affairs of the society according to the terms and provisions of the articles aforesaid;

"And whereas, more than forty years have elapsed since the execution of the articles and compact aforesaid, adopting and establishing the system and plan for the regulation of the government of the internal affairs of the society, and the management, control and transaction of the external business and affairs thereof, and many changes have taken place in the membership of the society, most of the then members having since died, and others embracing part of the undersigned having been admitted and become members thereof in accordance with the terms and provisions of said articles, all of the members of the board of elders, except said Jacob Henrici, designated and appointed in the said articles, having died, as also their successors in said board, and all of whom, as members of said board, managed the internal affairs of the society, as above recited, and two of those who have been members of the board of trustees, and actively engaged in the management and transaction of the external business of the society, under the authority of the articles aforesaid, either severally and in their own names as trustees, or jointly with their cotrustee, Jacob Henrici, still surviving, and in their joint names as such trustees, making contracts, purchasing and selling personal property, investing, collecting, receiving and paying moneys of the society, settling claims, purchasing real estate, selling real estate of the society, exe-

cuting and delivering deeds, assignments, transfers and releases and generally managing and transacting all the external business and affairs of the society, have also since died;

"And whereas said society, and the undersigned, the present members thereof, have received and enjoyed, and do now enjoy, the benefits and advantages resulting from the management and regulation of the internal affairs thereof by the board of elders as aforesaid, as also the benefits and profit of the external business and affairs thereof, managed and transacted by those who constituted the board of trustees as aforesaid, and it is deemed right and proper that we, the undersigned surviving members of the society, who entered into the articles and compact aforesaid, and the others who have since become members as aforesaid, should recognize, approve and reaffirm said articles, and approve and confirm what has been done for and on behalf of the society, under and in pursuance thereof:

"Now, therefore, be it known to all whom it may concern, that we, the undersigned, the surviving and present members of the Harmony Society, at Economy, aforesaid, and all the present members of said society, do severally, and each for himself or herself, covenant, grant and agree to and with the others, and each and all the other members aforesaid, and signers hereof and with those who shall hereafter become and be members as follows, that is to say:

"First. We do hereby solemnly recognize, approve, reaffirm and continue the articles of agreement and compact of our association entered into at Economy, on the 12th day of August, 1847, and recorded in the recorder's office of Beaver county, and set forth in the preamble hereto and declare the same to be in full force, as a whole and all parts thereof, including the agreements and compacts mentioned and designated in the first article thereof, as fully and to the same extent as said mentioned agreements were recognized and established by said first article.

"Second. We do hereby approve and confirm any and all acts, matters and things done and transacted by the board of elders of the Harmony Society, as the same was from time to time constituted, since the date of the articles aforesaid, establishing said board, and we hereby ratify and confirm the appointment of the present board of elders, to wit: Jacob Henrici (and 8 others).

"Third. We do also hereby approve, ratify and confirm all acts, matters and things done, transacted and performed by the board of trustees of the Harmony Society, constituted first of Romulus L. Baker and Jacob Henrici, until January 11th, 1868; afterwards, and from that date until January 21st, 1890, of Jacob Henrici and Jonathan Lenz, and since the last-mentioned date, of Jacob Henrici and Ernest Woelfel, hereby ratifying, confirming, holding, declaring as good and effectual in law and in equity, all acts, matters and things done, transacted and performed by each and all of said trustees in the purchase and sale of personal property, and in the making of contracts, investment of funds, purchase, sale and transfer of stocks, bonds and other securities, loaning or borrowing money, collection and payment of moneys, settlement or compromise of claims or disputes, in the institution and prosecution of legal proceedings, in the employment and discharge of attorneys in fact and at law, in the making of donations, in the purchase of real estate, in the sale thereof, in the execution and delivery of deeds, conveyances, transfers and assignments, whether of and pertaining to real or personal estate, in the execution or delivery of notes or obligations of any kind, and generally all acts heretofore done by said trustees, in the conducting, managing and transacting of the business of the society, and whether done by said trustee or either of them, severally and in his own name as trustee, or jointly in the joint names of himself and his cotrustee.

"Fourth. We do also hereby ratify, approve and confirm the acts of the board of elders in the appointment of Ernest Woelfel, as cotrustee with Jacob Henrici, and declare said Jacob Henrici and Ernest Woelfel, the present board of trustees, authorized and empowered to do, perform and transact any and all business of the society, and to the full extent of the powers and authorities mentioned and designated in and conferred on the board of trustees, in

and by the articles hereinbefore mentioned, made and entered into August 12th, 1847, and recorded as aforesaid.

"In witness whereof we have hereunto set our hands and seals this 30th day of April, A. D. 1890."

[Duly signed and acknowledged.]

Two years later, in December, 1892, a supplementary article was executed by 37 persons declaring themselves to be "the present members of this society and association," and declaring also that "no other person or persons than those above named is a member thereof":

"Whereas, the undersigned, being all the members of the Harmony Society, at Economy, Beaver county, state of Pennsylvania, deem it proper and desirable that there be some suitable, proper and certain evidence of membership in said society, and that the rights and powers of the trustees of said society should be more clearly defined and understood:

"Now, therefore, while we do hereby ratify and confirm the articles of agreement and compacts of our association entered into at Economy on the 12th day of August, 1847, and those of April 30th, 1890, confirmatory of the former and ratifying the acts of the boards of elders and boards of trustees, both of which articles of agreement are recorded in the recorder's office of Beaver county, and are hereby reaffirmed, we and each of us, present members of the said Harmony Society, do hereby state and declare that this declaration, agreement and grant of power is, and is to be taken and considered as supplementary to the agreements, compacts and articles above mentioned, to wit:

"First. The present members of this society and association are Jacob Henrici (and 36 others), and no other person or persons than those above named is a member thereof, and that for the future it is agreed that before any person can become a member of the Harmony Society, he or she shall sign or make his or her mark to his or her name on the roll of membership, which shall always be kept in the record book of the society, which book was established by the aforesaid agreement of 1847, and is the same in which are entered copies of said articles above mentioned; and shall also sign a written agreement in said book binding himself or herself to the observance and performance of all and singular the declarations, stipulations and agreements of the members of the society as contained in the several written articles, and the book aforesaid containing said roll of membership shall be the sole and exclusive proof of membership in the society.

"Second. It is hereby declared and agreed that the present board of elders of said society are Jacob Henrici (and 8 others), and the present board of trustees of said society are Jacob Henrici and John S. Duss. And we do hereby grant and assign to said trustees and their successors, and do hereby agree and declare that the legal title to any and all the property, real and personal, owned or possessed by said society, wherever the same is situated or found, is, and is to be taken and considered as fully vested in the said trustees, Jacob Henrici and John S. Duss, above named, and held by them in trust for the society, but with full and complete power and authority in said trustees, their survivors and successors, at such time or times as they may deem advisable and for the best interests of the society to sell and dispose of the same, or any part or parcel of the same, and for this purpose to make assignments or bills of sale of said property, personal estate and to execute and deliver deeds in fee simple, or for any less estate, for any or all said real estate thus sold. This declaration and power to apply to and embrace any and all lands wherever situated now or hereafter belonging to said Harmony Society, or held in trust for said society, the title of which may be, or stand, in the name of Frederick Rapp, or George Rapp, or of R. L. Baker and Jacob Henrici, trustees; Jacob Henrici and Jonathan Lenz, trustees; Jacob Henrici and Ernest Woelfel, trustees; Jacob Henrici and John D. Duss, trustees, or any or either of them and their successors, and any board of trustees hereafter appointed.

"Third. To remove any possible doubt or misunderstanding as to their right and power in reference thereto, we hereby give and grant to said trustees above named, Jacob Henrici and John S. Duss, and to either of them and

their survivors and successors, full power from time to time, and at such times as they, or either of them may deem for the true interest of the society to borrow such sum or sums of money for such length of time, at such rates of interest and upon such other terms as the said trustees, or either of them or their survivors or successors may deem advisable; and jointly or severally to give notes, bills of exchange, bonds, due bills or other evidence of debt therefor, and to secure such loan or loans of money, bonds, notes, due bills or other evidences of debt by pledge or assignment of any stocks, bonds, or other personal property of any kind now belonging, or that may hereafter belong to said society, and by mortgage or mortgages upon, or deeds of trust of, all or any part of the real estate and leaseholds of real property, which said society now own or possess, or hereafter may own or possess, and for this purpose the said trustees above named, or either of them, their survivors or successors, shall have full power and authority to make, execute and deliver any and all such instruments and conveyances as may in their judgment be reasonably necessary to enable them, or either of them, to carry the foregoing powers into full effect.

"And in the execution of any instruments or conveyances in writing or otherwise that may be or so become reasonably necessary in the exercise or execution of any of the powers hereinbefore granted, either of said trustees, their survivors or successors, may execute the same, and for that purpose may sign the joint names of said trustees, as in the following form: 'Jacob Henrici and John S. Duss, trustees,' or 'Henrici and Duss, trustees,' by (name of trustee executing) 'trustee.'

"In witness whereof, we have hereunto set out hands and seals this day of December, A. D. 1892."

A further supplementary article was executed on February 15, 1897, by the 10 persons who were then "all the members of and constituting the Harmony Society":

"Entered Feb. 15th, 1897.

"Supplementary Articles of Association of the Harmony Society.

"Whereas, since 1847 the board of trustees of the Harmony Society has consisted of two members, and for some time past John S. Duss has been senior trustee and Gottlieb Reithmueller has been junior trustee; and

"Whereas, the said Gottlieb Reithmueller died on the 10th day of February, A. D. 1897, leaving the said John S. Duss as sole surviving trustee:

"Now, we, the undersigned, being all the members of and constituting the Harmony Society, do hereby ratify and confirm our articles of association, dated August 12th, 1847, and also those dated April 30th, 1890, and those dated December 21st, 1892, except that from this date our board of trustees shall consist of one member only, and to the said sole trustee for the time being we do hereby give, grant, convey and confer each and every power, privilege, right and discretion, and also all the property, real, personal and mixed, heretofore given, granted, conveyed to or conferred upon the said board of trustees, or either or both of the said trustees, by the said recited agreements of 1847 and 1890 and 1892, of which in any way whatever may have been obtained, or procured, or purchased by the said trustees, or either of them, while acting in such capacity; such sole trustee shall, however, and he does by the acceptance of the office of trustee, assume the duties, trusts and obligations imposed upon the said board of trustees by the said recited agreements.

"And we do hereby nominate and appoint John S. Duss, our present senior trustee, to be such sole trustee.

"In witness whereof, we have hereunto set our hands and seals this 13th day of February, A. D. 1897."

[Duly signed and acknowledged.]

In April, 1903, only eight persons were left, and on the 16th of that month they signed the following additional articles:

"Whereas, on the 30th day of April, A. D. 1890, the then members of the Harmony Society executed a certain article of agreement of ratification and confirmation, whereby they reaffirmed and readopted the contracts of mem-

bership theretofore existing between said members, and which fixed the rights and duties and obligations of the several members of the said society; and also ratifying and confirming each and every act, matter and thing which had been done and transacted for and on behalf of the said society by its board of elders and by its board of trustees, as the said several boards had from time to time been constituted prior to the said 30th day of April, 1890, which said article of agreement is recorded in the office for recording deeds, etc., in and for the county of Beaver, in Deed Book Vol. 125, page 415; and

"Whereas, subsequently, to wit, on the 13th day of February, A. D. 1897, by reason of divers changes in membership and the deaths of divers members, it became advisable to modify said articles of agreement so that the powers, rights and duties theretofore vested in and exercised and performed by the board of trustees should be vested in a sole trustee, and John S. Duss was duly declared that sole trustee; and

"Whereas, since the execution of the said articles of ratification and confirmation on the 30th day of April, A. D. 1890, the said Harmony Society has been involved in long and serious litigation, which has terminated under a decree of the Supreme Court of the United States in a manner favorable to and upholding the rights of the said society, and during that period, by reason of said litigation and otherwise, it has been necessary for the trustees and trustee to negotiate divers sales of property, real and personal, and purchases thereof, and to borrow divers sums of money and make payment thereof, and to make settlements with divers parties sustaining business relations with said society; and

"Whereas, by reason of death, the membership of said society has been reduced to eight members, viz., Karoline Molt, Katherine Nagel, Johanna Hermansdoerfer, Christina Hall, Barbara Bosch, Franz Gillman, John S. Duss and Susie C. Duss, wherefore it has become advisable to further alter and add to the said articles of agreement; and

"Whereas, there has been read over and fully explained to the Harmony Society, and each of its members, the accounts of the said John S. Duss, as trustee, from the time of his appointment to this date, said accounts showing on their face all the money and property acquired by said Duss, as trustee, and all the moneys and property by him paid out, sold or conveyed, and the purposes for which, in each instance, the same were sold, paid out and conveyed; and there has also been explained and made fully known to us the present financial condition of the said society and what its assets and property consists of, and what its debts and liabilities are:

"Now therefore, be it known to whom it may concern, that we, the undersigned and surviving and present members of the Harmony Society, do severally, and each for himself or herself, covenant, grant and agree to and with the others, and each and all of the others as aforesaid, and signers hereof, and with those who shall become members hereafter, as follows:

"First. We hereby expressly affirm and declare the existence of the Harmony Society as a society.

"Second. We do hereby approve, ratify and confirm each and all of the several articles of agreement and compacts heretofore executed by the members of the Harmony Society, including that executed on the 13th day of February, 1897, excepting the sixth clause of the article of agreement executed on the 9th day of March, A. D. 1827 (the said sixth clause having been annulled and abrogated by an agreement executed on the 31st day of October, 1836), and we do declare that the said several agreements (excepting the said sixth clause) are in full force and effect, and constitute the contract of membership, by which the several rights, duties and obligations of the members of our society are to be determined, except in so far as the said articles are hereinafter modified.

"Third. We do hereby approve, ratify and confirm any and all acts, matters and things done and transacted by the board of elders, as the same has been constituted prior to the date hereof, whether the said board has at any time consisted of the entire number of members fixed by the several articles of agreement hereinabove ratified and confirmed, or of a less number.

"Fourth. We do hereby approve, ratify and confirm each and all of the acts, matters and things done, transacted and performed by the board of trustees,

as the same was constituted prior to the 13th day of February, 1897, and as the same has been constituted since that date, consisting of John S. Duss, as sole trustee, and including herein all matters directly and indirectly connected with the litigation of the society; the settlement of claims against the society; the adjustment and settlement of its several liabilities growing out of any business transaction or business enterprises in which the society has, at any time, been interested. And we further ratify, approve and confirm in every respect all the items and the whole of the said accounts of the said John S. Duss, trustee, and each and every act of his in reference to the assets, property and business of the society.

"Fifth. From and after the execution hereof, the board of elders of the Harmony Society shall consist of two members and their successors, chosen in the manner provided by the articles of agreement hereinbefore ratified and approved, and from and after the date hereof the said board of elders shall be John S. Duss and Franz Gillman.

"In witness whereof, we have hereunto set our hands and seals this 16th day of April, A. D. 1903, as members of and constituting said Harmony Society, and also as the members of and constituting the board of elders of said society."

[Duly signed and acknowledged.]

In May, 1903, four persons remained, and they appointed Susie C. Duss as sole trustee:

"Appointment of Susie C. Duss as sole trustee of the Harmony Society, entered May 18, 1903, in Article Book 17, page 497.

"Whereas, on the 12th day of May, A. D. 1903, John S. Duss, sole trustee of the Harmony Society, at Economy, did resign his trust, which resignation was duly accepted, he having the same day withdrawn from fellowship in said society where upon due consideration, and in pursuance of the power in them vested, the board of elders did constitute and appoint Susie C. Duss the successor in trust of the said John S. Duss, as sole trustee of the said the Harmony Society, at Economy, and it is proper that sufficient evidence of such appointment, and of the acceptance of the trust thereunder, be entered of record in the office of the recorder of deeds in and for said county of Beaver, in which county most of the lands of the said society are situate, and in such other places as the business of said society may require:

"Now therefore, it is hereby witnessed that Franz Gillman and Susie C. Duss, the now members of the board of elders of the Harmony Society, in pursuance of the power in them vested by and under the several agreements and contracts existing between the members of the said society, do hereby make, constitute and appoint Susie C. Duss, a member of said society, and of its board of elders, sole trustee of the said society.

"To have, hold and exercise all the rights and powers conferred and to discharge and perform all and singular the duties imposed upon and required of such sole trustee, in and by the several articles of association, and compacts of the members of said society, as executed and adopted by them, and recorded in the recorder's office of Beaver county.

"And Christina Schoeneman Ball and Barbara Borsch, who, with the said Franz Gillman and Susie C. Duss, are all the now members of said society, and constitute the same, do hereby unite herein for the purpose of signifying their approval of the appointment of the said Susie C. Duss as hereinbefore set forth.

"In witness whereof we have hereunto set our hands and seals this 12th day of May, A. D. 1903."

[Duly signed.]

And finally in December, 1905, the membership having been still further reduced by death, the following agreement was signed by Franz Gillman and Susie C. Duss, the two remaining members:

"Whereas, the Harmony Society has been in existence for a period of about one hundred years, and the members thereof have been, and are now, mutually bound by the covenants and stipulations contained in certain instruments

in writing which have from time to time been executed, ratified, adopted or accepted by the membership of the society and by the undersigned, who are all the present members of the said society, and do constitute the same; and

"Whereas, the undersigned believe it is no longer feasible to continue the society on the basis of the several contracts and agreements under which it has existed, and the parties thereto have determined by their mutual consent to dissolve said society and to cancel, annul, and make void all the several contracts and covenants, whereby they now stand bound to each other as members of said society:

"Now, therefore, be it known that we, the undersigned, being the members of and constituting the Harmony Society, do hereby mutually covenant, grant and agree to and with each other as follows:

"First. Each and all of the mutual bonds, covenants and obligations existing between us by reason of all and every the articles of agreement and compacts which we have heretofore executed, recognized, adopted or accepted, viz., the article of agreement executed at Harmony, Butler county, Pennsylvania, on the fifteenth day of February, 1905, the article of agreement executed at Harmony, in Posey county, Indiana, on the twentieth day of January, 1821, the article of agreement executed at Economy, Beaver county, Pennsylvania, on the ninth day of March, 1827, the article of agreement executed at Economy aforesaid on the twenty-first day of October, 1838, the article of agreement executed at Economy aforesaid on the fourth day of August, 1847, the article of agreement executed at Economy aforesaid on the thirteenth day of April, 1890, the article of agreement executed at Economy aforesaid on the twentieth day of December, 1892, the article of agreement executed at Economy aforesaid on the thirteenth day of February, 1897, the article of agreement executed at Economy aforesaid on the 16th day of April 1903—and each and every article of agreement, covenant or compact mentioned or referred to in any and all of the above mentioned articles of agreement, covenants and compacts, and thereby adopted, ratified, declared or accepted by us, or any of us, are hereby cancelled, annulled, and from henceforth made void and of no effect, and each of the parties hereto doth hereby release, exonerate and discharge each and every of the parties hereto from any and all obligations or requirements created, arising from or existing under the said covenants and agreements, or any of them.

"Second. We hereby agree to divide the property and assets belonging to us, as the Harmony Society and as its members, into equal parts, one part for each of the parties hereto, and we do hereby declare that such division has been made by us at the time of the execution hereof, and that each of us has received and taken unto himself, and into his or her own several possession a full and equal part of the said assets and property.

"In witness whereof, we have hereunto set our hands and seals the 13th day of December, A. D. 1905."

[Acknowledged.]

Gillman was examined briefly as a witness, but he is not a party to the bill.

At the risk of being tedious, we have thought it worth while to set forth these proceedings at length, because they disclose with much clearness the objects, the constitution, and (to some extent) the operations, of the society. Additional light, especially upon the society's operations, may be obtained by examining the reports of several lawsuits in which the community has been involved. We shall not dwell upon them in detail, but it may be convenient to refer to them in passing.

The first case is *Schriber v. Rapp*, 5 Watts (Pa.) 351, 30 Am. Dec. 327, decided by the Supreme Court of Pennsylvania in October, 1836. The point decided appears in the syllabus:

"An association by which each surrendered his property into one common stock for the mutual benefit of all, during their joint lives, with the right of

survivorship, reserving to each the privilege to secede at any time during his life, is not prohibited by law. And that right of secession is not transmissible to the personal representative of a party to such agreement, so as to enable him to recover the property of his intestate, so put into the common stock."

The agreements of 1805 and 1827 are considered by the court, and the testimony contains some reference to the business enterprises in which the society was then engaged.

The next case is *Nachtrieb v. Harmony Settlement*, Fed. Cas. No. 10,003, decided in 1855, in which Mr. Justice Grier, sitting at circuit, held that the plaintiff had been unjustly expelled from the society and was entitled to a proportionate share of the common property. The reporter has a good deal to say concerning the history of the society, and the case is of interest for that reason, but the decree was reversed by the Supreme Court (*Baker v. Nachtrieb*, 60 U. S. [19 How.] 126, 15 L. Ed. 528) on the ground that the defendant's unjust exclusion from the society had not been proved. In the opinion of the Supreme Court, the evidence showed that he had received a sum of money from the society as a donation, and had withdrawn and ceased to be a member.

Then came *Speidell v. Henrici*, 15 Fed. 753, decided by the Circuit Court in 1883, in which the plaintiff sought to recover the value of his labor during a period of 12 years. But as the period had ended in 1831, when he gave up his membership and withdrew from fellowship, Judges McKennan and Acheson held that his laches for 50 years had barred the claim, and in this conclusion the Supreme Court agreed. (1887), 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718. Twelve years later, in 1899, a bill was filed (*Schwartz v. Duss* [C. C.] 93 Fed. 528) asking for a distribution of the society's assets among the persons legally entitled thereto; the plaintiffs claiming to be included in the number because they were heirs of persons who had formerly been members and had continued to be members until their voluntary withdrawal or death. Circuit Judge Acheson decided (to quote the syllabus):

"Written agreements, signed by the members of a voluntary society from time to time, which form the constitution of the society, and which provide for the community of property, and that neither a withdrawing member nor the representatives of one deceased shall have any claim on the society or its property on account of the contributions of such member thereto, constitute valid contracts, and no claim so arising is enforceable so long as the society continued in existence."

Holding that the society was still in existence in 1899, he dismissed the bill; his decree being afterwards affirmed by the Court of Appeals (103 Fed. 561, 43 C. C. A. 323), and by the Supreme Court (187 U. S. 8, 23 Sup. Ct. 4, 47 L. Ed. 53). And finally, in the case now before the court, Judge Orr has delivered a careful opinion reported in (D. C.) 197 Fed. 401, in which he holds, *inter alia*, that:

"* * * The property was held under a joint tenancy with the right of survivorship, and hence the heirs of the founder (have) no standing to assert a dissolution of the society and claim a share of its assets on the theory of a resulting trust."

The opinions delivered in the foregoing cases take more or less note of the nature of the title by which the common property was held for

a century; but we do not feel obliged to examine that subject closely in the pending controversy. We think the dispute now before the court is controlled by other considerations, and we shall confine ourselves to these aspects of the subject; our opinion being that as the present plaintiffs have failed to prove George Rapp's special relation to the society's property, and as they appear to have no title of any kind, the bill cannot be maintained. It is clear that their claim rests upon the proposition that they have succeeded to some kind of property right that remained in George Rapp after he had taken his original part in organizing the society. And they are claiming under him as a "founder" in a special sense—as the chief financial benefactor of a charity that has now ceased to exist. If we assume for the moment that such a property right might exist in a "founder," even in the case of a society such as this—which both parties agree was not a charity at all—we are at once confronted with the failure of the plaintiffs to prove that the right did in fact exist. In other words, they have not proved that he was in fact a "founder," except as he was a guide and leader. If we might indulge in conjecture, we should not think it unreasonable to suppose that George Rapp did contribute some money or other property to the infant enterprise; but this would be conjecture merely, for no evidence of such a contribution is presented, and the matter is therefore left unproved. The agreement of 1836 recites that "all record and memorial of the respective contributions up to" 1818 were deliberately destroyed, and this may account for the lack of evidence on the subject now under examination; but, however it be accounted for, the fact cannot be escaped that we have no knowledge concerning George Rapp's financial contribution. In 1804 while he was in Würtemberg he had "property" amounting to \$800, but no one knows what became of it. It was suggested in argument that he might have prepared for the projected enterprise by buying land in Pennsylvania before his associates came over; no doubt this might have happened, and it is also true that he may have had other resources; but there is no evidence that he made the purchase or had the additional means. It is easy to conjecture on either side of the question. For example, it may be equally reasonable to suppose that his prominence and leadership, conspicuous as they evidently were, may have been accepted by his associates as the equivalent of a money contribution; guidance, temporal and spiritual, was certainly as much needed as money; but of course there is no evidence on this point either, and we only suggest it as an illustration of what we might suppose if the need for proof did not hamper us in trying to find the truth. Without multiplying guesses, it is enough to say that we are left wholly in the dark as to the amount, either actual or proportional, that George Rapp may have contributed to put the society into operation; and without evidence upon this subject it seems to us that the case of the plaintiffs lacks the necessary support. How could we possibly determine the rule by which to measure their share in the assets to which they lay claim? Where is the evidence from which we may learn how many persons contributed, and how large was each gift? And how can we discover of what character the contributions were—whether money, or property, or services?

But there is another reason why the plaintiffs cannot prevail; they have never had a title of any kind. If George Rapp ever owned anything to which they might have succeeded, this something could hardly be described as property at all if it had not been capable of transmission. How indeed do the plaintiffs themselves claim to have acquired it? They have been at pains to prove that they are among George Rapp's next of kin, and this must be because they are compelled to stand upon the proposition that they succeeded to something at his death. And this means that if George Rapp were alive to-day he could successfully make the claim put forward by their bill. If he could do this, he would be obliged to put his case on the ground that he had always owned a contingent interest of some kind, and that this had now ripened into a vested right. But certainly, if he ever had such an interest, the plaintiffs' theory requires us to suppose that it disappeared mysteriously at his death, because it was not capable of being handed on to another person. But unless this interest were capable of being transmitted by the usual methods, it would offer us the spectacle of a peculiar estate indeed—one that is not unfairly described in the defendants' brief as a metaphysical conception, something that the plaintiffs somehow received in 1905 and not before, obtaining it then because of George Rapp's merits, but contending nevertheless that it was something George Rapp in his lifetime never had. We do not find it necessary to decide precisely what kind of a valuable interest George Rapp may have had in the society's property when he died in 1847. If he had any interest at all, we need not discriminate between a resulting trust and a base fee, nor do we need to explore other regions in the law of real property; this much at least seems clear: The interest could only have been contingent, but (if it existed at all) it was real enough to be capable of transfer. Call it what we will—a contingent right, a somnolent capacity, a budding estate, or any other fanciful name—it must at least have been alive at his death if it has developed since into a full-grown right, and if it were alive then we may safely conclude that it did not evade the intestate laws of Pennsylvania. *Scheetz v. Fitzwater*, 5 Pa. 126, *Harris v. McElroy*, 45 Pa. 216, *Slegel v. Lauer*, 148 Pa. 236, 23 Atl. 996, 15 L. R. A. 547. These statutes act upon every property right of every name, nature, and description, and, if this particular possibility was then a part of George Rapp's possessions, it passed at his death to his daughter and his granddaughter as his next of kin, and afterwards to his granddaughter alone; and, as she disposed of it by a last will and testament in which the plaintiffs have no beneficial interest, they cannot maintain the present bill. They must themselves claim under the intestate laws of Pennsylvania as George Rapp's next of kin, but the claim must fail, because they were *not* his next of kin at the time of his death. It was then that his property rights passed—if he had any—and not 60 years afterward.

The decree is affirmed, with costs.

WOLF BROS. & CO. v. HAMILTON-BROWN SHOE CO. †

(Circuit Court of Appeals, Eighth Circuit. May 20, 1913.)

No. 3,758.

Per Van Valkenburgh, District Judge.

1. APPEAL AND ERROR (§ 1097*)—SUIT FOR UNFAIR COMPETITION—SECOND APPEAL—QUESTIONS CONCLUDED.

A determination by the Circuit Court of Appeals, based on the evidence in the record on an appeal, that the defendant was chargeable with unfair competition, should be reopened, if at all, on a subsequent appeal taken after an accounting, only upon convincing evidence that the original conclusion was wrong.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427; Dec. Dig. § 1097.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 93*)—UNFAIR COMPETITION—EVIDENCE OF INTENT.

In cases of unfair competition, the fraudulent intent is often inferred from the facts, sometimes against the sworn protestations of the defendant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104-106; Dec. Dig. § 93.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 98*)—SUIT FOR UNFAIR COMPETITION—MEASURE OF DAMAGES.

In patent and strict trade-mark cases, the infringer is held to account for profits accruing because of the unauthorized use of the property right; and unfair competition in trade may, under proper conditions, entitle the injured party to the same measure of relief.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. § 98.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNFAIR COMPETITION.

A manufacturer of shoes, which stamped upon the soles a trade-name so nearly resembling that used by a competitor as to be calculated to confuse purchasers, did not avoid a charge of unfair trade by placing its name as maker conspicuously on the carton in which each pair of shoes was sold to the retail dealer.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

5. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNFAIR COMPETITION.

If a manufacturer or wholesale dealer willfully puts up goods in such way that the ultimate purchaser will be deceived into buying them as the goods of another, it is no defense that he does not deceive and has no intention of deceiving the retailer, to whom he himself sells the goods; but the question is whether he has or has not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchaser.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

6. TRADE-MARKS AND TRADE-NAMES (§ 93*)—SUIT FOR UNFAIR COMPETITION—MEASURE OF DAMAGES.

In such cases the complainant in a suit for the unfair competition will not be held to specific proof that ultimate purchasers were deceived, and limited to loss of profits thus established; but it will be presumed that sales made by defendant were the result of the unlawful invasion of his rights, especially when it appears that the unlawful use of the name

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied September 22, 1913.

was one of the causes, and it is impossible to apportion between that and other causes the credit for such sales.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104-106; Dec. Dig. § 93.*]

7. TRADE-MARKS AND TRADE-NAMES (§ 97*)—UNFAIR COMPETITION—CONSTRUCTION OF INJUNCTION.

An injunction restraining a defendant from using the name "American Lady," as applied to its shoes for women, "when not accompanied with other matter clearly indicating that such shoes are of its own manufacture," was not violated where its own name, surrounding in belt form the name "American Lady," was stamped on the soles of the shoes, and the name "American Lady," with its own name in belt form surrounding the word "Makers," on the top facing of one shoe of each pair. (Smith, Circuit Judge, dissenting.)

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. § 97.*]

Per Hook, Circuit Judge.

8. TRADE-MARKS AND TRADE-NAMES (§ 98*)—SUIT FOR UNFAIR COMPETITION—MEASURE OF DAMAGES.

In a successful suit for unfair competition, the relief to which complainant is entitled, in addition to an injunction, is limited to the recovery of compensatory damages for past injury to his business, which are not, as in patent and strict trade-mark cases, measured by the profits made by defendant, but should be based on proof, and in proper cases a consideration of general conditions, such as the relation of the parties to the trade and to each other, including their respective trade areas.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. § 98.*]

Unfair competition in use of trade-mark or trade-name, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in equity by Wolf Bros. & Co., a corporation, against the Hamilton-Brown Shoe Company. From the final decree (192 Fed. 930), complainant appeals. Reversed.

Simeon M. Johnson and Lawrence Maxwell, both of Cincinnati, Ohio (Percy Werner, of St. Louis, Mo., on the brief), for appellant.

H. S. Priest, Paul Bakewell, and Luke E. Hart, all of St. Louis, Mo., for appellee.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge. Appellant Wolf Bros. & Co., complainant below, is a corporation engaged in the manufacture of women's shoes at Cincinnati, Ohio. Appellee is a corporation and a large manufacturer and jobber of shoes at St. Louis, Mo. Appellant and its predecessors manufactured and sold a woman's shoe which it called "The American Girl." This name was registered as a trade-mark. Some years later the appellee adopted and registered as a trade-mark the term "American Lady," and manufactured, advertised, and sold women's shoes under that name. January 29, 1906, appellant filed its bill charging the appellee with infringing its said

trade-mark "The American Girl," and with unfair trade by the use of the name "American Lady," together with certain catch-phrases and numerals theretofore adopted and used by appellant, and praying an injunction and accounting. Proofs were taken, and upon the hearing the Circuit Court dismissed appellant's bill, and the case was brought to this court on appeal.

Upon consideration thereof this court held that the term "The American Girl" was not the subject of valid trade-mark, but that the record did disclose conduct on the part of appellee amounting to unfair competition in trade. Accordingly the decree was reversed, with directions to the Circuit Court to enter a decree "enjoining the defendant from using the name 'American Lady,' as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of complainant's, and from using in connection with such name, as applied to its shoes for women, the numerals mentioned or the catch-phrase 'With the character of the woman,' or any other phrase in simulation of the phrase 'A shoe as good as its name'"; also granting an accounting, which was limited to the time since the commencement of the suit. The opinion of this court is found in 165 Fed. 413, 91 C. C. A. 363. The facts upon which it was based are stated therein, and will not be unnecessarily repeated here.

Pursuant to the direction of this court, the Circuit Court on November 15, 1909, entered the following decree:

"The defendant, Hamilton-Brown Shoe Company, its servants, agents, officers, and employes, are perpetually enjoined from using the name 'The American Lady,' as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of the manufacture of the plaintiff, Wolf Bros. & Co., and from using in connection with such name, as applied to its shoes for women, the numerals 403, 404, 407, 408, or 397, or the catch-phrase 'With the character of the woman' or any other phrase in simulation of the phrase 'A shoe as good as its name.' The costs up to and including the entry of this decree are adjudged against the defendant, and execution therefor is awarded. This case is referred to H. H. Denison, Esq., as master, upon the evidence already taken in this case, and the exhibits in evidence in this case, and such further evidence as may be offered before the master by the parties to this action, to ascertain and report the damages, since the commencement of this suit, which the plaintiff has suffered, and the profits, since the commencement of this suit, for which the defendant may be liable, said accounting of damages and profits to be limited to shoes sold by the defendant since the filing of the bill in this case, and which were marked with the name 'The American Lady,' and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company."

Extended proofs were taken before the master. In his report he finds that during the period to which the accounting was limited appellee sold American Lady shoes, which, because of differences in marking, are divided into three classes:

Class 1. 974,016 pairs of shoes which bore no impression or distinguishing mark, except the words "American Lady" stamped upon the sole with a metal die. The profits upon these were found to be \$254,401.72.

Class 2. 961,607 pairs of shoes marked as follows: The words "Hamilton-Brown Shoe Company" in belt form, with the words "American Lady" in the center, stamped upon the sole of each shoe, and in the top facing no mark, except, perhaps, in some cases, the name of a retail dealer in the facing of one shoe. The profits upon these to appellee were found to be \$190,909.83.

Class 3. 593,872 pairs of shoes marked as follows: Upon the sole the same stamping as in class 2, and in the top facing of one shoe the name "American Lady" and the words "Hamilton-Brown Shoe Company" in belt form surrounding the word "Makers." The profits upon these to appellee were found to be \$132,740.77.

The master recommended that a judgment be entered in favor of appellant in the sum of the profits accruing from the first two classes, aggregating \$445,311.55. For the profits accruing from the third class he held that appellant was not entitled to recover under the opinion of this court and the decree entered in accordance therewith. Both parties filed numerous exceptions. Upon hearing below the court overruled complainant's exceptions, sustained defendant's exceptions, adjudged a recovery of \$1 nominal damages against defendant, and taxed the costs against complainant.

The contentions of appellant are: First, that a decree should have been rendered in its favor upon the first two classes of shoes sold, as recommended by the master; second, that that decree should have included the profits upon the third class of American Lady shoes sold, which was denied by the master; third, that the master erred in allowing too large credits to the expense of producing and selling the American Lady shoes, whereby appellee's net profits were improperly diminished.

Defendant, appellee, contends: First, that four elements must be made manifest in appellant's case before it can be entitled to recover, a failure of proof in any one of which constituent grounds must result in a failure in judgment: (a) A design to defraud; (b) the adoption of means reasonably calculated to make the design effective; (c) that the design and means were effective; (d) reasonably certain injury to complainant—material damage. Second, that a different rule in the assessment of damages prevails in cases of unfair competition from that obtaining in those involving strict trade-mark; that in the latter a property right is taken, and the infringer must respond for the profits upon all goods sold through an unauthorized use of the mark; that in the former it must be shown that actual damages have accrued from loss of profits diverted. Third, that in this case the name "American Lady," as applied to the shoes sold, was actually accompanied with other matter clearly indicating that such shoes were of defendant's own manufacture, and therefore not of complainant's. Fourth, that the master adopted an erroneous method of computing the items of expense for which appellee should have received credit in the manufacture and sale of American Lady shoes, whereby the net profits arrived at were unduly increased. These contentions will be considered in their order.

[1] 1. With respect to elements "a" and "b," this court, in directing an accounting on the former appeal, found that there was a design to defraud and that the means adopted were reasonably calculated to make that design effective. It found that appellant was first in the field with the words "The American Girl" adopted as a trade-name to designate its shoes; that in connection with this name it used the catch-phrase, "A shoe as good as its name," and in its catalogue certain numerals to designate different styles of such shoes; that thereafter the appellee adopted the trade-name "American Lady" and the catch-phrases, "The shoe deserves its name," and "With the character of the woman," as also the identical numerals used by appellant; that later appellant adopted an additional numeral, 397, and directly thereafter appellee went back and adopted the same numeral. The court further found that the words "The American Girl" and "American Lady" are so similar as to cause confusion, and that such confusion had resulted; that all this was done by appellee with knowledge that it was following appellant, and that such acts were not consistent with innocence and good faith; further, that appellee acted with notice and knowledge of the infringement through correspondence; hence an injunction and accounting was granted as heretofore stated. This court at that time had before it evidence showing that the name "American Lady" was adopted by the appellee at an assembly of its traveling salesmen and resulted from suggestions made by them. These salesmen came from the same territory in which appellant's shoes were most largely sold. The original suggestion came from a salesman who traveled in Texas; another Texas salesman and one from Arkansas were also present. It was disclosed in the testimony that the largest sale of The American Girl shoes was among the negroes and illiterate whites in the South; also that in this very territory actual confusion, which worked greatly to the disadvantage of appellant, existed among purchasers. The adjudication made was upon the merits, and should be reopened, if at all, only upon convincing evidence that the original conclusion, which led to the injunction and to this accounting, was wrong. *De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co.* (C. C.) 159 Fed. 292; *In re Potts*, 166 U. S. 263-267, 17 Sup. Ct. 520, 41 L. Ed. 994; *Chicago Wooden Ware Co. et al. v. Miller Ladder Co.* (C. C. A.) 133 Fed. 541, 66 C. C. A. 517; *Fairbank Co. v. Windsor et al.* (C. C. A.) 124 Fed. 200, 61 C. C. A. 233; *Fourniquet et al. v. Perkins*, 16 How. 82, 14 L. Ed. 854. Nothing was adduced at the second hearing to alter the situation originally presented, and we adhere now to the conclusion reached then.

[2] That conclusion also involves, to a certain degree, elements "c" and "d," namely, that the design and means were effective, and that reasonably certain injury and material damage resulted to appellant. It appears from the record that the appellant, through one of its salesmen, enjoyed an annual business of \$75,000 from the sale of The American Girl shoes in the state of Illinois. This salesman was hired by the appellee, and appellant's business in that state was practically destroyed. When appellee entered the field with its rival trade-name, appellant's business immediately fell off. Actual confusion in the mind of the

consuming public was shown, and damage to appellant is legitimately to be presumed. The injury to its business was at least reasonably certain. And even though these deductions may not necessarily be drawn from the prior conclusion reached by this court, nevertheless the same results are now sufficiently apparent from an examination of this record. In cases of unfair competition, the fraudulent intent is often inferred from the facts, sometimes against the sworn protestations of the infringer. *Fairbank Co. v. Windsor et al.* (C. C. A.) 124 Fed. 200, 61 C. C. A. 233; *Florence Mfg. Co. v. Dowd et al.* (C. C. A.) 189 Fed. 44, 110 C. C. A. 608. And so this court held on the former appeal (165 Fed. loc. cit. 416, 91 C. C. A. 363).

[3] 2 and 3. In strict trade-mark cases the infringer is held to account for profits accruing because of the unauthorized use of the property right; and unfair competition in trade may, under proper conditions, entitle the injured party to the same measure of relief. *Regis et al. v. Jaynes et al.*, 191 Mass. 245, 77 N. E. 774; *Gulden v. Chance et al.* (C. C. A.) 182 Fed. 303-320, 105 C. C. A. 16; *Merriam Co. v. Saalfeld* (C. C. A.) 198 Fed. 369, 117 C. C. A. 245; *Reed Cushion Shoe Co. v. Frew et al.* (C. C.) 158 Fed. 552-556; *Fairbank Co. v. Windsor et al.* (C. C.) 118 Fed. 96; *Atlanta Milling Co. v. Rowland et al.* (C. C.) 27 Fed. 24; *Lever v. Goodwin*, L. R. 36 Ch. Div. 1. Following the analogy of the patent cases. *Westinghouse Co. v. Wagner Mfg. Co.*, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Root v. Railway Co.*, 105 U. S. 189, 26 L. Ed. 975.

However, appellee submits that this accounting must fail for the following reasons: First, because it claims that the cartons in which its American Lady shoes were sold displayed accompanying matter clearly indicating that such shoes were of its own manufacture, and therefore not of appellant's; second, because it conclusively appears that it did not deceive the retailers, to whom alone it made sales; third, because it denies any responsibility for the ultimate consumers, who buy at retail, and asserts that there is no direct proof that any such were deceived into buying appellee's shoes for those manufactured by appellant.

[4] It was stipulated at the hearing that every pair of American Lady shoes issued by appellee to its retail dealers were sold and delivered in cartons, each of which cartons bore prominently on the lid thereof in white letters on a black background at the head of said lid the words "Hamilton-Brown Shoe Co.'s" and at the foot of said lid, equally prominent, the name "American Lady," making the lettering upon the lid read, "Hamilton-Brown Shoe Co.'s American Lady;" that on the front end of each carton appeared the name "American Lady" and the belt trade-mark of the Hamilton-Brown Shoe Company, which consisted of a black strap, in the center of which was a red background, the words "Hamilton-Brown Shoe Co." appearing in white letters on the black strap, and the word "Makers" appearing in white letters on the red background. Appellee claims that this was matter accompanying the use of the words "American Lady," as applied to

the shoes, sufficient to conform to the requirement made by this court; and this was the opinion of the trial court. With this we cannot agree.

In the first place, it is abundantly shown in the testimony that it is a common practice of shoe dealers, for their own purposes of advertisement, as well as for that of maintaining a uniform stock appearance in their stores, to remove shoes from the cartons in which they are purchased and place them in other cartons of uniform appearance and markings, irrespective of the source from which they came. In the next place, it is not only disclosed by the testimony, but it is a matter of common knowledge, that the purchaser of shoes rarely, if ever, sees the carton in which they are incased upon the shelves—much less that in which they come from the manufacturer. The purchaser takes his seat at a point removed from the stock, and makes known his wishes as to the character of shoe, and its size, with which he desires to be fitted; the salesman brings the shoe—often but one—taking it from the box, which he leaves upon the shelf, and the purchaser forms his opinion of the shoe from its appearance, and from the marks that appear upon the shoe itself. Therefore the carton, in which the shoe is originally contained, or afterwards placed, has practically no influence upon the ultimate purchase. Furthermore, if the name "American Lady" be placed upon the shoe itself, as the evidence shows it was, the spirit as well as the letter of the court's requirement would be that this name there placed should be accompanied by such matter as would clearly disclose the identity of the manufacturer.

This defense also involves the claim that the name "Hamilton-Brown Shoe Company," stamped upon the shoe, either upon the sole, with the name "American Lady," or in the top facing, with the same distinctive name, constituted a sufficient disclosure of the identity of the manufacturer. This by no means follows. The practice of retailers, as well as jobbers, of placing their names upon articles which they have for sale, but do not manufacture, is well known; and in the present case the testimony discloses that the appellee is a jobber as well as a manufacturer of shoes, and that its name is stamped upon all the shoes it puts forth, whether of its own manufacture or that of another. It is the characteristic trade-name which strikes the attention of the would-be purchaser, and, as was shown in evidence, the name "The American Girl" was constantly confused in the minds of such purchasers with that of "American Lady."

These same cartons were before the court on the last appeal. It must be presumed that the retail merchant, receiving the shoes in these cartons, knew what shoes he was buying, and from whom. He would have known this in the absence of any carton. The appellee conceives that it has discharged its duty and obligation to the appellant, and to the public, if it has used means which would excuse it from the charge of having deceived its own customers. It says:

"We are not concerned with what the retailer does; we are concerned with how the Hamilton-Brown Shoe Company sells the shoes."

[5] Such is not the law. If a manufacturer or wholesale dealer willfully puts up goods in such a way that the ultimate purchaser will be deceived into buying the goods of another, it is no defense that he

does not deceive and has no intention of deceiving the retailer, to whom he himself sells the goods. The question is whether the defendants have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchaser. *Scheuer v. Muller et al.* (C. C. A.) 74 Fed. 225, 20 C. C. A. 161; *Dennison Mfg. Co. v. Thomas Mfg. Co.* (C. C.) 94 Fed. 651; *National Biscuit Co. v. Baker et al.* (C. C.) 95 Fed. 135; *Fairbank Co. v. Bell Mfg. Co.*, 77 Fed. 869, 23 C. C. A. 554; *Revere Rubber Co. v. Consolidated Hoof Pad Co.* (C. C.) 139 Fed. 151; *Lever v. Goodwin*, L. R. Ch. Div. 1; *Gulden v. Chance et al.* (C. C. A.) 182 Fed. 303, 105 C. C. A. 16.

[6] In such cases the complainant will not be held to specific proof that ultimate purchasers were deceived, and limited to loss of profits thus established. Loss will be presumed. In *Merriam Co. v. Saalfeld*, 198 Fed. 369, 117 C. C. A. 245, the rule is thus stated by the Court of Appeals for the Sixth Circuit:

"Where the title was not qualified as the law and the decree required (if such cases appear), and it further appears, by direct proofs or by necessary inference, that it is impossible to determine whether this unlawful title use was the inducing cause of the sale—in other words, when it appears that such title was one of the causes, and it is impossible to apportion between that and other causes, the credit for the sale—then (and if we are to adopt the analogy of the patent cases) there must be a presumption that the sale results from the unlawful use of the name. The defendant has confused the marking and dress, which he had a right to use, with those which, as against complainant, he has no right to use. The latter part is a material, if not the major, part of the whole. If the history of the sale cannot be more definitely ascertained and followed, and so it is impossible to say which part of the dress exercised the predominant influence, then under the principle of *Westinghouse Co. v. Wagner Co.*, the defendant must respond."

We have here a case in which the appellee, with a design to appropriate appellant's trade, has devised a trade-name strikingly similar to that used by appellant. It did this deliberately, and adopted many expedients, all of which were calculated to help along the deception and enable it to accomplish its purpose. It fortifies itself by certain formulas in dealing with its direct purchasers, through which it expects to escape responsibility for the ultimate results of its acts. It invades the territory in which appellant is doing business, and which covers all the states of the Union except two, and particularly the Southern states, in which appellant's trade is largest. It makes use of its own prestige, its great resources and advertising facilities, with which to break down the trade of a smaller business competitor, and to confuse the public with which that competitor has already established a business reputation. Having accomplished its aim, which was to avail itself of the pioneer work of appellant, it is willing to submit to an injunction and to nominal damages, but insists, as a condition to substantial recovery, that appellant accomplish the well-nigh impossible task of establishing specifically the number of ultimate consumers who have been thus deceived in the purchase of shoes. Neither considerations of equity nor the decided cases sustain this contention. The property rights of complainant have been invaded in such manner that the rules long recognized in patent and strict trade-mark cases should be applied. Wrongs of this nature cannot be perpetrated,

and the courts be helpless to extend substantial relief. The recovery in this case is large; but that is because the transactions involved were large. The principle is in no wise affected by this consideration. If the judgment seems harsh, it is no more so than defendant's own acts have made it. The court cannot do otherwise than rule in accordance with those just principles which must govern and control its action. It should be steadfast in its purpose both to relieve against unlawful encroachment and to promote commercial honesty and fair dealing.

[7] 4. No special damages apart from profits are shown. The method of computation adopted by the master was essentially fair, and the profits found substantially accurate. The use of the word "Makers" in the third class of American Lady shoes, while not placed upon the sole in such position as to call especial attention to it, was nevertheless used upon the shoes themselves, and therefore this class was properly excluded by the master. It follows that the court below rightly overruled complainant's exceptions. It should likewise have overruled those of defendant.

The decree must be reversed, with directions that defendant's exceptions to the master's report be overruled, that the report of the master be confirmed, that a decree be entered against defendant for the amount recommended by him, and that the costs be taxed against defendant.

It is so ordered.

HOOK, Circuit Judge. [8] For the most part I agree with the above opinion, but am doubtful about the measure and amount of recovery. This is not a case of patent or trade-mark, but one of unfair competition, and, though it has been said to be analogous to infringement of a trade-mark, it seems to me there may be distinctions which are important in this litigation. The plaintiff offered no proof of damage, but is held entitled to defendant's profits aggregating \$445,-311.55. It does not appear plaintiff was deprived of such a large amount of profits, but simply that defendant made them. Nor does it appear that there was confusion or impossibility to segregate or distinguish between plaintiff's damage and defendant's gain, because, as stated, plaintiff offered no proof of the former. From choice, not necessity, it stood on its right to defendant's profits. In this situation I am not clearly persuaded that defendant's profits, as such, are recoverable. But, if they are, it then seems to me the recovery should have been more closely confined to the profits resulting from actual unfair competition, as distinguished from that which is constructive or theoretical. It does not seem right that there should be a recovery of the profits on all shoes insufficiently marked, without reference to the effect, extent, place, or circumstance of the competition.

The court has applied the rule which obtains in cases of patent and trade-mark. There is a reason for the rule in those cases, which is not applicable to unfair competition. Patents and trade-marks are in themselves a sort of special property, of which the owner is given a monopoly by statute. He has the exclusive right of use everywhere.

An infringer carries off the property, as it were, and makes gains and profits from a use which belongs to the owner. Those gains and profits are recoverable in equity (not at law, *Burdell v. Denig*, 92 U. S. 716, 23 L. Ed. 764) according to the rule applied to a trustee who has wrongfully used trust property to his own advantage (*Root v. Railway*, 105 U. S. 189, 26 L. Ed. 975). In unfair competition the plaintiff has no such property right in his trade-name, symbol, or dress of goods. Any one can use them by making it clear to the ordinary purchaser that the articles to which they are applied are his, not plaintiff's. A wrongful use of them is a tort injurious to plaintiff's business, but it is not an appropriation of a property right of which he has a monopoly. For a wrongful injury to business damages is the ordinary rule, and compensation the ordinary measure of recovery. The books are full of instances in which the recovery is so limited. When more than compensation is demanded, the reason must be found in statute or special circumstances; and when the latter are relied on they should be closely examined, especially when, as here, the doctrine is not fully settled in the law, but is argued upon analogy. It is not enough to say unfair competition is analogous to infringement of a trade-mark and profits are recoverable for the latter. Unfair competition is a subject of modern origin, and its development, which has been rapid, should proceed along lines of principle. Upon what theory is a plaintiff entitled to more than an injunction and compensatory damages for injury sustained—a loss in his business? Disapprobation excited by defendant's conduct will not suffice. As was said in *Livingston v. Woodworth*, 15 How. 546, 559, 14 L. Ed. 809:

"We are aware of no rule which converts a court of equity into an instrument for the punishment of simple torts."

Nor will a supposed impossibility of proving the damage. Proof of damage to a business may be difficult, but it is not impossible. No higher degree of certainty is required than the nature of the case admits, and the scope and extent of the inquiry are well settled. Nor can it be that defendant's profits are an element of plaintiff's damage, upon the presumption that the sales of the former would otherwise have been made by the latter. There is no such presumption, even in a case of patent. *Seymour v. McCormick*, 16 How. 480, 14 L. Ed. 1024. Unfair competition may also be said to be analogous to a trespass upon the good will of a business. Indeed, a trade-name or symbol is an incident to the good will. *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 548, 11 Sup. Ct. 625, 35 L. Ed. 247. A transfer of the business by sale or succession may embrace the good will; a vendor may also covenant not to engage in competition. The rights so acquired, like the right of the plaintiff here, may be protected in equity by injunction. *Trego v. Hunt*, 65 L. J. Ch. 1; *Hedge v. Lowe*, 47 Iowa, 137; *Pomeroy*, Eq. Juris. § 934. It is difficult to distinguish the principle of such cases from that of ordinary unfair competition, yet I would be surprised, had the courts awarded the injured party all the profits of the wrongful competitor up to the time of the injunction.

It is true there is some authority for the award of profits in unfair competition, but in most of the cases relied on it rests largely on unnecessary dicta or brief statements of an analogy to trade-marks and patents. *Regis v. Jaynes & Co.*, 191 Mass. 245, 77 N. E. 774, is frequently cited on this proposition, but it seems to have been a case of technical statutory trade-mark (see 185 Mass. 458, 70 N. E. 480), and the mention of the rule in unfair competition a passing reference *arguendo*. In support of the reference the following cases were cited: *Fairbank Co. v. Windsor*, 118 Fed. 96, in which the Circuit Court relied mainly upon an analogy to the infringement of a trade-mark, saying:

"The remedy for the enforcement or protection of a trade-mark right or against unfair competition involves the same mode of procedure, and ends in the exercise of the restraining power of a court of equity, and the award of such damages as may have been sustained, or the profits of the wrong-doer it is presumed would have accrued to the person whose rights were invaded."

Walter Baker & Co. v. Slack, 130 Fed. 514, 65 C. C. A. 138, in which the rule was assumed, rather than decided, and the discussion was from a different angle. *Williams v. Mitchell*, 106 Fed. 168, 45 C. C. A. 265, in which the trial court denied complainants "a reference to determine the damages sustained them by reason of past unfair competition," and the Court of Appeals merely said:

"The complainants are entitled, upon proper proof, to compensation to the extent of the invasion."

And, finally, *Lever v. Goodwin*, 36 Ch. Div. 1. This last case is frequently cited to sustain the doctrine, and it does, though rather by way of assumption, since the matter for decision was defendant's contention that he sold only to dealers, not to final purchasers, and therefore there was no evidence he had injured plaintiffs at all. Ten years later Justice Kekewich followed it as by obligation in *Saxlehner v. Apollinaris Co.*, 66 L. J. Ch. 533, 1 Ch. 893, but took occasion to say:

"I venture to doubt whether the propriety of directing such an account in a case like the present has ever been fully considered. It seems to have been assumed that the right to use and protect what is styled a common-law trade-mark, to distinguish it from a registered trade-mark, is a species of property carrying with it all the rights and remedies incidental to property, and that therefore the account of profits follows the injunction as a matter of course, as it does when a successful plaintiff asks it in a patent case. * * * If at liberty to express an opinion, I should wish to say that, if there be no property in such a trade-mark, the right to an account of profits does not necessarily follow the injunction, and the consequences of directing an account here are so serious that I should be unwilling to do it unless compelled by authority."

Atlantic Milling Co. v. Rowland (C. C.) 27 Fed. 24, was a case of trade-mark. *Reed Cushion Shoe Co. v. Frew* (C. C.) 158 Fed. 552, is also cited to sustain the rule; but the Circuit Court said that it rests entirely upon the "fraud by a defendant and the loss of business by acts," and no accounting was allowed, because under the peculiar circumstances "it would be difficult to satisfactorily establish that the purchasers" would not have bought from defendant with full knowledge of the facts. In *Gulden v. Chance*, 182 Fed. 303, 105 C. C. A.

16, there was no discussion, and but brief reference to the measure of recovery. The trial court had held with defendants on the question of unfair competition, and in reversing it on that ground the Court of Appeals merely added:

"The complainant is also entitled to recover all profits and damages lost and sustained by him by reason of all sales by the defendants," etc.

Profits lost by a plaintiff on all defendant's sales may be proper element in his compensation, but they do not necessarily equal all defendant's profits. In *Florence Mfg. Co. v. Dowd*, 189 Fed. 44, 110 C. C. A. 608, the question was that of difficulty in accounting, and defendant's liability for his gains and profits was assumed, not discussed. Perhaps the fullest discussion is found in *Merriam Co. v. Saalfeld*, 198 Fed. 369, 117 C. C. A. 245. It was there held that plaintiff could recover defendant's profits on each sale, where it was made to appear the purchaser was misled, and also, by analogy to *Westinghouse Co. v. Wagner Co.*, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653, where it was impossible to determine the influencing cause; that is, to apportion the credit for the sale. There are other cases upon the subject, but for the most part less definite than the above. On the other hand, Judge Putnam, in *Merriam Co. v. Ogilvie*, 170 Fed. 167, 95 C. C. A. 423, said in speaking for the court:

"Under some circumstances, it has been held that the profits to be accounted for would be the entire profits of publication; but the Supreme Court has never had occasion to consider a rule so harsh as this, and, following the analogy of the practice established in suits for infringements of patents for inventions, we are led to the conclusion that it would never go to that extent."

Again, the court said, doubtless having in mind the difficulty which beset Justice Kekewich in *Saxlehner v. Apollinaris Co.*, supra:

"The cases where there has been no division of profits, but the whole profits have been allowed, are probably trade-mark cases, in which, the defendant having used a trade-mark proper, the presumption was that the goods would not have been sold without that use. * * * The present case, however, does not fully take on that feature. The substantial offense of Ogilvie did not consist in availing himself of a Merriam Company's trade-mark, because both this court and the Circuit Court have expressly found that there was no trade-mark. It consisted in dressing up his publications unlawfully. Therefore there is no concrete thing which belongs to the Merriam Company, the value of which can be substantially determined in this connection."

But, even if gains and profits are recoverable, the amount awarded here seems to me far beyond what can be justified upon sound reason or principle. I think it should have been more closely confined to the extent of the interference with plaintiff's business, to the results of the actual unfair competition, as distinguished from that which is inferred or theoretical. No rule in equity is good which, based on abstract considerations, ignores relevant conditions and inflicts a grievous punishment beyond the real extent of the wrong or the deserts of the complaining party. If it be conceded that a defendant, who has used the trade-name, symbol, or dress of another, should be held to have in-

tended deception, and to bear the burden of disproving it in each case of sale, or, failing in it, as he must, to yield to plaintiff all the profits of the unfair competition, should the inquiry end with the amount of his sales and the gains therefrom? Should it not be broader, and embrace the conditions of the trade, the markets, the relations of the parties to them and to each other, etc., so that the real effect of defendant's conduct may appear, and plaintiff may not make an unmerited gain by recovering exaggerated damages in a court of equity? A., having applied a trade-name to an article which he has sold only in Maine, might possibly have an injunction against B., who, thinking it attractive, uses it on a like article in Nebraska, because the potential expansion of A.'s business might be affected; but we would hardly expect him to recover all B.'s gains and profits. That is an extreme instance; but in actual affairs cases cover the entire range from such extremes to close hand to hand competition. Nor, if A. had made a few sales in Nebraska, and B.'s had run into the millions, would it appear equitable that the former should have all the gains and profits of the latter? In a patent case, that rule of recovery would be clear; but to apply it to unfair competition seems like using a yardstick to weigh sugar.

Again, if both sell largely in the same territory, it might nevertheless clearly appear that defendant, with a much larger capital and many times the outlay for enlarging his business, acquired an enormous trade, much greater than plaintiff would ever have had under any circumstances. It must be borne in mind that plaintiff can be fully protected for the future by injunction which leaves him in the undisturbed enjoyment of his rights in the trade designations. What we are concerned with here is the past, whether plaintiff should be compensated or rewarded, and, if the latter, whether extravagantly or temperately, according to rules which can be generally applied to all cases of the kind. The award in this case does not proceed along the above lines.

The suit was begun January 29, 1906. Between December 11, 1908, and the close of the period of accounting, defendant sold 961,607 pairs of shoes on the soles of which were stamped the words "Hamilton-Brown Shoe Company" in belt form with the words "American Lady" in the center. Each pair was in a carton having prominent labels showing the contents were Hamilton-Brown Shoe Co.'s American Lady shoes and that that company was the maker. On neither cartons nor shoes was any phrase or arbitrary number in simulation of those of the plaintiff. As to these shoes the sole criticism is the absence of the word "Maker" on the shoes and the similarity of the name "American Lady" to the plaintiff's "American Girl." There was nothing else to mislead the ultimate purchaser. On these shoes defendant made a profit of \$190,909.83, and it is included in the award to the plaintiff. I agree with the court in what it says about the ignorance of the ultimate purchaser of the labels on the cartons, and also that defendant should have more definitely indicated on the shoes themselves that it was the maker, and therefore inferentially that plaintiff was not. But I think the omission was sufficiently cured by injunction, and did not

call for the punishment imposed. The markings which were made showed an honest, but ineffectual, attempt to observe plaintiff's rights, and in such a case there should be no recovery of profits, if, indeed, any pecuniary recovery at all.

An injunction is not necessarily followed by an accounting. It frequently occurs that the former is granted, and the latter refused, and sometimes for the lack of fraudulent intent.

SMITH, Circuit Judge. I fully concur in most of the opinion by Judge VAN VALKENBURGH. I am of the opinion, however, that Wolf Bros. & Co. is entitled to a decree for \$132,740.77 in excess of that awarded it on account of the shoes embraced in what is called class 3. The interlocutory decree entered in the Circuit Court upon the mandate of this court contains this provision:

"(2) The defendant, Hamilton-Brown Shoe Company, its servants, agents, officers, and employes, are perpetually enjoined from using the name 'The American Lady,' as applied to its shoes for women, when not accompanied with other matter clearly indicating that such shoes are of its own manufacture, and therefore not of the manufacture of the plaintiff, Wolf Bros. & Co. * * *

There has been no suggestion that this decree was too broad, or exceeded the directions given by this court. The parties do not agree, however, as to the construction of it. Substantially, the respondent says the Hamilton-Brown Shoe Company was enjoined from using the name "The American Lady," as applied to its shoes for women, unless the shoes were accompanied with the other matter described. The complainant contends it was the words "The American Lady" which were required to be so accompanied.

Substantially the court has adopted the contention of the complainant, and I think that clearly, where the words "The American Lady" were stamped on the sole of a shoe, they were not accompanied with the explanatory words required, if they appeared on the inside of one of the shoes.

I think the complainant's exceptions to the finding of the referee should have been sustained, but fully concur that defendant's exceptions should have been overruled.

JOHNSON v. NORTH STAR LUMBER CO. et al.
(Circuit Court of Appeals, Ninth Circuit. July 14, 1913.)

No. 2,234.

1. COURTS (§ 371*)—JURISDICTION OF FEDERAL COURTS—REMEDIES GIVEN BY STATE STATUTES.

A suit brought by one not in possession to quiet title to lands in Oregon not in possession of another, authorized by L. O. L. Or. § 516, may be maintained in a federal court in that state, where the requisite diversity of citizenship exists between the parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 907, 972-976; Dec. Dig. § 371.*

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullaghan, 27 C. C. A. 298.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. JUDGMENT (§ 489*)—COLLATERAL ATTACK—WANT OF JURISDICTION.

A judgment rendered by a court having no jurisdiction either of the parties or the subject-matter is a mere nullity and may be attacked collaterally.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 924, 925; Dec. Dig. § 489.*]

3. PROCESS (§ 96*)—SERVICE BY PUBLICATION—SUFFICIENCY OF AFFIDAVIT.

An affidavit made in another state but not authenticated as required by B. & C. Comp. Or. § 819, which provides that such affidavits must be certified by a commissioner for the state or by the judge of a court having a clerk and seal and attested by the clerk under the seal of the court, is a nullity for any purpose in Oregon and cannot be made the basis of an order for service by publication upon a defendant, under section 56 of such Codes.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 108-120; Dec. Dig. § 96.*]

4. JUDGMENT (§ 497*)—JURISDICTION OF COURT—SERVICE BY PUBLICATION.

A recital in an order for service on a defendant by publication that "it appearing to the satisfaction of the court" that the defendant cannot be found within the state is not an adjudication or finding that it has been shown to the satisfaction of the court by affidavit that the "defendant after due diligence cannot be found within the state" which, under B. & C. Comp. Or. § 56, is essential to the acquiring of jurisdiction by such service which will sustain a judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. § 497.*]

5. JUDGMENT (§ 17*)—PROCESS TO SUSTAIN JUDGMENT—ATTACHMENT.

Under the law of Oregon, as settled by decision, an attachment is merely auxiliary to the main action, and the issuance and levy of an attachment does not give the court jurisdiction to render any judgment in the action without a valid service upon, or appearance by, the defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33; Dec. Dig. § 17.*]

6. ATTACHMENT (§ 211*)—VALIDITY—PROOF OF DEFENDANT'S OWNERSHIP.

To sustain the jurisdiction of a court to levy upon and sell property under an attachment against a nonresident defendant, it must be alleged and proved that the property was owned by such defendant, and, where at the time of the levy of the attachment the record title was in another, it is not sufficient evidence to prove such ownership that a deed thereto made by the defendant and containing a covenant of title was dated prior to the levy, where it was not delivered until afterward and on the same date as the delivery of a deed from the record owner conveying the property to him, since a deed speaks only from the date of its delivery.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 706-721; Dec. Dig. § 211.*]

Appeal from the District Court of the United States for the District of Oregon; R. S. Bean, Judge.

Suit in equity by the North Star Lumber Company and others against John W. Johnson and others. Decree for complainants, and defendant Johnson appeals. Affirmed.

For opinion below, see 196 Fed. 56.

This is a suit brought in the United States Circuit Court for the District of Oregon by the North Star Lumber Company, a Minnesota corporation, against John W. Johnson and two others, all citizens of the state of Washington. The action is to quiet title to certain lands described as the north-west quarter of section 10, township 21 south, range 7 west of the Willamette

meridian, situate in Douglas county, state of Oregon. None of the parties to the action are citizens of the state of Oregon. The land in controversy is vacant, unoccupied timber land, not in the possession of either party to the action or any other person. The appellant alone appeared, filed an answer and cross-bill, and defended the action; the other two defendants defaulting.

The tract of land in controversy was originally a part of the public domain. It was conveyed to Aaron Johnson by the United States by patent dated September 10, 1906. The patent was preceded by a sale of the land to Aaron Johnson by the United States under the provisions of the act of Congress of June 3, 1878, entitled "An act for the sale of timber lands in the states of California, Oregon, Nevada and Washington Territory." The sale was evidenced by a certificate of sale dated February 18, 1902. While holding this certificate of sale from the United States, Aaron Johnson conveyed the land to one Andrew Johnson by deed dated May 21, 1904, recorded June 7, 1904. The title to the land acquired by purchase and patent remained in Andrew Johnson until by a deed dated April 8, 1907, delivered April 12, 1907, and recorded April 24, 1907, it passed to Aaron Johnson. The latter, by deed dated February 21, 1907, acknowledged March 8, 1907, delivered April 12, 1907, and recorded April 24, 1907, conveyed the land to the plaintiff. The deed from Andrew Johnson to Aaron Johnson was delivered on April 12, 1907, and on the same date Aaron Johnson delivered his deed to the plaintiff, and both deeds were recorded on the same day. Pending these proceedings, and on April 1, 1907, the defendant John W. Johnson commenced an attachment suit in the circuit court of the state of Oregon for Douglas county against Aaron Johnson and Eline Engebretson, and caused the land in controversy, then standing of record in the name of Andrew Johnson, to be attached in said action and on said day as the property of the two defendants therein named. It is not claimed that the defendant Eline Engebretson ever had any interest in the land in dispute. We have, therefore, no further concern in the relation of this defendant to the case. Andrew Johnson was not a party to the attachment suit.

In the attachment suit the plaintiff, on the 7th day of September, 1907, made an affidavit, subscribed and sworn to before one Charles W. Hodgdon, a notary public for Washington, residing at Hoquiam, Wash., in which the plaintiff undertook to allege certain facts concerning the residence of the defendant as the basis for an order of the court directing publication of the summons in the case. The statute of Oregon in force at this time respecting affidavits was contained in section 819 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon, as follows: "An affidavit or deposition taken in another state of the United States or a territory thereof, the District of Columbia, or in a foreign country, otherwise than upon commission, must be authenticated as follows, before it can be used in this state: (1) It must be certified by a commissioner, appointed by the Governor of this state, to take affidavits and depositions in such other state, territory, district, or country; or (2) it must be certified by a judge of a court having a clerk and a seal to have been taken and subscribed before him at a time and place therein specified, and the existence of the court, the fact that such judge is a member thereof, and the genuineness of his signature shall be certified by the clerk of the court, under the seal thereof." Charles W. Hodgdon, the notary public in the state of Washington before whom plaintiff's affidavit was taken, was not a commissioner appointed by the Governor of the state of Oregon to take affidavits in the state of Washington, nor was he otherwise qualified to take plaintiff's affidavit for use in the state of Oregon. Upon this affidavit of the plaintiff an order of publication was made by the court; but no publication was then made.

On October 11, 1907, the plaintiff's attorney made and filed an affidavit with the court, alleging that by inadvertence he had neglected and omitted to have the summons published, and that the summons had not been published; that letters addressed to the defendant at Hoquiam, Wash., had been returned unopened and uncalled for; that the address of either of the defendants was unknown to the plaintiff and could not be ascertained with reasonable diligence; that due and strict inquiry had been made to ascertain such addresses from former friends of said defendants living at Hoquiam, Wash., by the

plaintiff and his attorneys at Hoquiam, Wash., and that no one could be found who knew their addresses. An affidavit of one Evelyn Johnson, dated September 10, 1907, was also filed, in which it was alleged that on the 10th day of September, 1907, at Roseburg, Or., affiant deposited in the United States post office, inclosed in an envelope securely sealed and with the postage fully prepaid, a copy of the complaint and summons, directed to be published in the action, duly certified to be such by the attorney for the plaintiff, plainly addressed to the defendant, Aaron Johnson, at Hoquiam, Wash.

Upon these affidavits the court, on October 11, 1907, made a second order of publication, reciting that, "it appearing to the satisfaction of the court that neither of the defendants above named" (Aaron Johnson and Eline Engebritson) "can be found within the state of Oregon, and that a cause of action exists against both of said defendants, and that both of said defendants are proper parties to the above-entitled action; and it appearing to the satisfaction of the court that the post office address of neither of the defendants is known and cannot be found with reasonable diligence, it is ordered," etc.

The law of Oregon relating to publication of summons is contained in section 56, Lord's Oregon Laws, and in section 56, Bellinger & Cotton's Annotated Codes and Statutes of Oregon, as follows: "When service of the summons cannot be made as prescribed in the last preceding section" [personal service in this case], "and the defendant after due diligence cannot be found within the state, and when that fact appears by affidavit to the satisfaction of the court or judge thereof, * * * or justice of the peace in an action in a justice's court, and it also appears that a cause of action exists against the defendant, or that he is a proper party to an action relating to real property in this state, the court or judge thereof * * * shall grant an order that the service be made by publication of a summons in either of the following cases: * * * (3) When the defendant is not a resident of the state, but has property therein, and the court has jurisdiction of the subject of the action."

Neither of the defendants appeared in the action, and a default judgment was entered on May 16, 1908, in which the land attached on April 1, 1907, was ordered to be sold to pay the judgment, amounting to the sum of \$315, with interest at 8 per cent. per annum from May 16, 1908, the further sum of \$30 attorney's fees, all in gold coin of the United States of America, and plaintiff's costs and disbursements, taxed at \$14.50, and that execution issue to enforce the judgment. The land was sold to the plaintiff, John W. Johnson, for the sum of \$380.04, and the sale was subsequently confirmed by the court. Thereafter, no redemption having been made of the premises, the sheriff of Douglas county, Or., delivered to John W. Johnson, the plaintiff and judgment creditor, the deed for the land described in the complaint and order of sale in that cause. It is under this deed that the defendant claims title to the land in controversy in this case.

In the present suit by stipulation of the parties the records and files of the Circuit Court of the state of Oregon in the attachment suit were introduced in evidence as the evidence of the defendant's title to the land in controversy. Upon the conclusion of the evidence, the court below directed a decree to be entered in favor of the plaintiff the North Star Lumber Company, and against the defendant, John W. Johnson, the court holding that the judgment in the attachment suit under which the defendant claimed title to the land was void; that the affidavit upon which the order of publication of summons was made in the attachment suit was not authenticated as required by law, and was, therefore, a nullity, and the order of publication of the summons based thereon was ineffective for any purpose.

Morgan & Brewer, of Hoquiam, Wash., and John Van Zante, of Portland, Or., for appellant.

James N. Davis and Veazie & Veazie, all of Portland, Or., for respondents.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

MORROW, Circuit Judge (after stating the facts as above). [1] 1. In Oregon, a person claiming an interest or estate in real property, not in the possession of another, may maintain a suit in equity to remove the cloud or to quiet title, without being in actual possession of the premises. Section 516, Lord's Oregon Laws; *McLeod v. Lloyd*, 43 Or. 260, 272, 71 Pac. 795, 74 Pac. 491; *Holland v. Challen*, 110 U. S. 15, 17, 3 Sup. Ct. 495, 28 L. Ed. 52. In such a suit, where a diversity of citizenship exists as it does here, the Circuit Court of the United States for the district of Oregon had jurisdiction of the controversy, and, the action being local to that district, the court had jurisdiction over the subject-matter. Section 8, Act March 3, 1875, c. 137, 18 Stat. 470 (U. S. Comp. St. 1901, p. 513); *Dick v. Foraker*, 155 U. S. 404, 410, 15 Sup. Ct. 124, 39 L. Ed. 201. Further, the defendant, by answering the bill of complaint on the merits, and by filing a cross-bill submitting his title to the jurisdiction of the court and praying for affirmative relief, waived any objection he might otherwise have had to the jurisdiction of the Circuit Court of the District of Oregon. *Western Loan Co. v. Butte & Boston Min. Co.*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101.

[2] 2. Plaintiff's title to the land in controversy must prevail in this action, unless it is defeated by the title acquired by the defendant under the judgment in the attachment suit against Aaron Johnson. This judgment is assailed by the plaintiff on the ground of lack of jurisdiction in the state court of Oregon to enter the judgment: (1) Because the court never acquired jurisdiction of the person of Aaron Johnson, the defendant in that case; (2) because the court never had jurisdiction over the land attached in that case and sold to the defendant under the judgment entered therein.

"A judgment rendered by a court having no jurisdiction either of the parties or the subject-matter is a mere nullity, and will be so held and treated whenever and for whatever purpose it is sought to be used or relied upon as a valid judgment." 23 Cyc. 681.

[3] 3. With respect to the jurisdiction of the court over the person of the defendant, Aaron Johnson, the objection is that the defendant was a nonresident; that he was not found or served with summons in the state of Oregon; that he never appeared or answered in the action; and that the service by publication of the summons is void and ineffectual for the reason that the defendant had no property in the state; and that it was never made to appear to the court by affidavit to the satisfaction of the court, or to any judge thereof, that the defendant could not after due diligence be found in the state of Oregon; that no affidavit showing or attempting to show such fact was filed in said court; that, the court having no evidence before it by affidavit that the defendant could not after due diligence be found in the state of Oregon, it had no jurisdiction to make any order for service of the summons by publication.

It is further objected that the only evidence which tended to prove the facts required by the statute to be established was a paper purporting to be an affidavit signed by the plaintiff on the 7th day of September, 1907, in which it was stated that the defendant was not a resident

of the state of Oregon; that the defendant was not in the state of Oregon at the time of the making of the supposed affidavit, so as to be served with the summons personally in the state of Oregon; and that he could not be personally served in the state of Oregon. This paper appears to have been signed in the state of Washington, before a notary public of that state, who was not authorized by the laws of Oregon to take affidavits for use in the latter state. It was therefore a nullity for any purpose in the state of Oregon.

[4] It is contended, however, that the sufficiency of the allegation in the affidavit to prove that the defendant, after due diligence, could not be found within the state of Oregon was a matter for the adjudication of the trial court, and a recital of such adjudication in the order or judgment (nothing to the contrary of such recital appearing in the record) was conclusive evidence of the fact in this collateral proceeding. But the objection in this case is that the court made no adjudication upon the subject. The recital in the order of publication is:

"It appearing to the satisfaction of the court that neither of the defendants above named can be found within the state of Oregon. * * *"

There is no adjudication upon the question whether "the defendant after due diligence could not be found within the state," and this was a question jurisdictional in the publication of the summons. And there is the further subordinate objection that it appears from the record that the court had no affidavit before it upon which to make such adjudication, and no finding was made that such affidavit was before it, and, further, it appears from the record that there was no proof before the court of any character that "the defendant, after due diligence, could not be found within the state," and no such finding of fact was made by the court. It follows that as the only jurisdiction that the court had over the person of the defendant, Aaron Johnson, was the publication of the summons calling him into court, and the court having no jurisdiction to order the publication of summons in the case, and not finding the facts upon which such jurisdiction could be based, or upon which to adjudicate upon the jurisdictional question, the court acquired no jurisdiction over the person of the defendant, Aaron Johnson.

It would seem that the citation of authorities would be unnecessary to support this conclusion; but the leading case of *Galpin v. Page*, 85 U. S. (18 Wall.) 350, 25 L. Ed. 959, is so directly in point that we cannot omit reference to the discussion in that case of the question of jurisdiction acquired by service of summons by publication. That action was brought in the Circuit Court of the United States in California to recover possession of certain real property situated in the city and county of San Francisco. The plaintiff claimed title through a conveyance authorized by the probate court of the state, which administered upon the estate of the deceased former owner of the premises, and the defendant claimed title through a purchaser who bought at a commissioner's sale held under a decree of the district court of the state, rendered in an action brought to settle the affairs of a copartnership between the decedent and others. It was admitted in the United States Circuit Court that the plaintiff had the title, unless it

had passed to the purchaser at the commissioner's sale made under the decree in the state district court. Whether the title had so passed depended upon the question whether the district court had acquired jurisdiction over the person of a nonresident heir to the estate by publication of summons. The nonresident heir was the posthumous child of the decedent, who was made a party by a supplemental bill which contained the prayer that a guardian ad litem might be appointed for the child. The statute of the state which authorized constructive service by publication provided:

"When the person on whom the service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, * * * and the fact shall appear by affidavit to the satisfaction of the court or a judge thereof, * * * and it shall in like manner appear that a cause of action exists against the defendant, in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may grant an order that the service be made by the publication of the summons."

An order had been made by the district court directing publication of summons. In the order was a recital as in the present case "that it appeared to the satisfaction of the court" that the defendant resided out of the state, and that she was a necessary party to the action, etc. It was not stated in the order in what way the facts recited appeared, and no affidavit was found of record in the case. It seemed probable that the court might have acted upon the statement contained in the supplemental bill. But it appeared in the record that the summons was published as required by the order and as provided by the statute, and that thereupon the court appointed a guardian ad litem for the child who appeared and filed an answer in her behalf.

In the Circuit Court, with this record before it (*Galpin v. Page*, 3 Sawy. 93, Fed. Cas. No. 5,206), it was held that the recital in the order of publication of the jurisdictional fact, there being nothing in the record to the contrary, was conclusive evidence in a collateral proceeding of the determination of the fact upon sufficient evidence, although the evidence did not appear in the record. In the Supreme Court of the United States the decree of the Circuit Court was reversed upon the ground that this statement of the law was error. In speaking of the presumptions in support of judgments, the court said:

"The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law. The tribunals of one state have no jurisdiction over the persons of other states, unless found within their territorial limits; they cannot extend their process into other states, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy. * * * Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process; and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. This is so obvious a principle, and its observance is so essential to the protection of parties without the territorial jurisdiction of a court,

that we should not have felt disposed to dwell upon it at any length had it not been impugned and denied by the Circuit Court. It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear, and has been offered an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered. When, therefore, by legislation of a state, constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, not a citizen of the state nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions. And such has been the ruling, we believe, of the courts of every state in the Union."

The court accordingly held that the sale of property under the judgment against the nonresident defendant was void for lack of jurisdiction over the person of such defendant.

The law of this case was followed by the Supreme Court of Oregon, in *Goodale v. Coffee*, 24 Or. 346, 354, 33 Pac. 990, 992, where the court said:

"It is well settled that statutes which provide for the service of process by publication are in derogation of the common law, and must be strictly construed. *Odell v. Campbell*, 9 Or. 298. The affidavit is the complaint upon which the judgment order for service is based, and must state every jurisdictional fact required by the statutes. *McMillen v. Reynolds*, 11 Cal. 372. If the affidavit be insufficient, the court acquires no jurisdiction over the defendant, and the judgment is void. *Brady v. Seaman*, 30 Cal. 610."

In *McDonald v. Cooper*, 32 Fed. 745, the United States Circuit Court for the district of Oregon had before it a judgment in the state court wherein it was claimed that a nonresident defendant had been brought into court by publication of a summons. Against this judgment it was objected that the state court had not acquired jurisdiction over the person of certain nonresident defendants, or the property which was the subject of the action: First, because the facts stated in the affidavit did not tend to show that any diligence was used to find the defendants within the state, or they could not have been found and served therein; and, second, because the facts stated did not tend to show that the defendants or either of them then had any property within the state. The statement of the affidavit was:

"They [the defendants] cannot be found within the state of Oregon, but both reside in San Jose, California, and that is their post office address."

As to whether the defendants or either of them had any property within the state at the time of the commencement of the suit, the statement of the affidavit was that the plaintiff therein "has a good cause of suit against the defendants to foreclose a certain mortgage on real property situate * * * in Oregon, executed, etc." Commenting upon the insufficiency of this affidavit, the court said:

"That diligence has been used to find the defendant within the state must appear from the affidavit, and a mere statement or assertion therein that the party is a nonresident thereof is not sufficient. Nor is such statement or assertion that diligence has been used a compliance with the statute. The affidavit must contain some evidence of the ultimate fact, besides the assertion of the affiant, on which the judicial mind may act in granting the order. And however slight and inconclusive this evidence may be, if it has a legal

tendency to prove the diligence, and that the defendant could not be found within the state, it is sufficient to give the court jurisdiction, and sustain the order against a collateral attack. But where there is no evidence of such diligence except the bald assertion of the fact, or that of nonresidence, the order is void, and the court does not acquire jurisdiction. * * * It must also appear from the affidavit that the defendant has 'property' in this state. The bare assertion that the defendant has such property is not sufficient. Some fact or facts must be stated tending to establish this conclusion on which the judicial mind may act."

It appears that the insufficiency of the affidavit in these respects was admitted by the defendant; but it was contended that the suit was to foreclose a mortgage, and that it was a suit in rem, and, as in the case now before this court (as we shall presently see), it was contended that the jurisdiction of the court did not depend upon the validity of the proceedings to authorize the publication of the summons, but on the fact that the property was within the state, and that the plaintiff had a lien thereon. The Circuit Court did not take this view of the proceeding, but held that the order of publication was void upon both of the grounds stated, and the subsequent proceedings thereon, including the sale to the defendant's predecessor in interest, were null and of no effect.

We conclude that in the present case it is clearly established that the state court never acquired jurisdiction over the person of Aaron Johnson in the attachment suit.

[5] 4. The defendant further contends that the attachment of the real property in controversy, and its subsequent sale under the judgment in the attachment suit, gave the court a jurisdiction over it that is not subject to attack in a collateral proceeding; in other words, that the attachment suit was a proceeding in rem, and the right to adjudicate upon the issues involved in the suit was acquired by the attachment of the defendant's property. The case of *Cooper v. Reynolds*, 77 U. S. (10 Wall.) 308, 319, 19 L. Ed. 931, is cited by the defendant in support of this doctrine. But this is not the law of Oregon. In *Bank of Colfax v. Richardson*, 34 Or. 518, 525, 54 Pac. 359, 361 (75 Am. St. Rep. 664), it was held that in that state:

"An attachment is merely auxiliary to the main action, and there is no difference in the proceedings thereon in an action brought against a nonresident, upon whom service is necessarily made by publication, and in one brought against a resident of the state, in which personal service is had. In either case the proceedings in attachment have nothing to do with the merits of the cause of action or the jurisdiction of the court to try and determine the controversy between the parties. If personal service is had, the cause becomes a mere action in personam, with the added incident that the property attached remains liable for any judgment the plaintiff may recover. But, if service is had by publication, and there is no appearance for the defendant, the action is practically a proceeding in rem against the attached property, the only effect of which is to subject it to the payment of the amount which the court may find due the plaintiff. Where no personal service is had, the res is brought within the power and control of the court by a seizure under a writ of attachment; but the right to adjudicate thereon is acquired only by the publication of the summons. It is the substituted service, and not the seizure, which gives the court jurisdiction to establish by its judgment a demand against the defendant, and to subject the property brought within its custody to the payment of that demand."

[6] But there is an equally conclusive objection to the judgment in the attachment suit, that no property of the defendant, Aaron Johnson, was ever attached or brought within the jurisdiction of the court. It is not alleged in the complaint in the attachment suit that the defendant in that action had any property in the state of Oregon, nor is there such an allegation in the affidavit for the attachment. In the paper signed and subscribed by the plaintiff in that action before the notary public in the state of Washington, on the 7th day of September, 1907, for the publication of summons, it was stated that the sheriff of Douglas county, Or., had, on the 1st day of April, 1907, served the writ of attachment by levying upon the real estate in controversy, and that said property, on the 1st day of April, 1907, belonged to the defendant, Aaron Johnson. But, as we have already determined, this paper was a nullity for any purpose in the state of Oregon. It was ineffectual to establish any fact in the case; but if it had been effectual for that purpose, it was contradicted by the county records of the county in which the land was situated. On the 1st day of April, 1907, the defendant, Aaron Johnson, was not in possession of the property and had no title to it of record in Douglas county, Or.; the title to the real estate in controversy standing at that time in the name of Andrew Johnson in the records of that county. The only basis for claiming that the defendant, Aaron Johnson, owned the attached property on the 1st day of April, 1907, is the fact that on the 12th day of April, 1907, Andrew Johnson delivered to Aaron Johnson a deed for the property, and on the same day the latter delivered a deed to the plaintiff herein for the same property. Both of these deeds were recorded on April 24, 1907. There is no evidence in the record of the case of any ownership of this property other than that disclosed by the recorded deeds.

The only claim of title in the defendant, Aaron Johnson, on the 1st day of April, 1907, is the fact that the deed of Aaron Johnson to the plaintiff, the North Star Lumber Company, dated February 21, 1907, contains a covenant on the part of Aaron Johnson:

"That he is well seized in fee of the lands and premises aforesaid, and has a good right to sell and convey the same in manner and form aforesaid."

The title at that time, as has been stated, was in Andrew Johnson. The consideration for the deed to the plaintiff is stated to be the sum of \$2,000, paid to Aaron Johnson by the North Star Lumber Company, receipt of which is acknowledged by Aaron Johnson. Is the covenant of seisin contained in this undelivered deed such evidence of title to the land in Aaron Johnson, on February 21, 1907, the date it was signed, or on March 8, 1907, the date it was acknowledged, that the land was subject to attachment as his property on April 1, 1907, notwithstanding that during all this time the title was in Andrew Johnson? Furthermore, Andrew Johnson and Emma Johnson, his wife, executed a deed to Aaron Johnson, dated April 8, 1907, whereby the latter acquired title to the land upon the delivery of the deed, and in this deed the grantors covenanted:

"That they are the owners in fee simple absolute of all and singular the above-granted and described premises, and the appurtenances; that they have good and lawful right to sell and convey the same."

If the covenant in the first deed is evidence of title in Aaron Johnson at any time prior to the delivery of the deed, so is the covenant in the latter evidence of title in Andrew Johnson, and the latter contradicts and nullifies the first, but with the decided advantage in favor of the title in Andrew Johnson, who had the record title from May 21, 1904, down to the time of these transactions. But the plain fact is that both of these conveyances and their covenants had relation to the delivery of the deeds, and upon delivery became effective, and not before.

A deed speaks as of the date of its delivery to or for the grantee.

"Delivery of a deed is essential to the transfer of the title," and, "to constitute such delivery the grantor must part with possession of the deed or the right to retain it." *Younge v. Guilbeau*, 70 U. S. (3 Wall.) 636, 641, 18 L. Ed. 262.

"Nothing passes by a deed until it is delivered." *Parmelee v. Simpson*, 72 U. S. (5 Wall.) 81, 85, 18 L. Ed. 542.

"Delivery is essential to the validity of a deed." *Fain v. Smith*, 14 Or. 82, 84, 12 Pac. 365, 58 Am. Rep. 281.

"No instrument is executed until it is delivered." *Howard Insurance Co. v. Silverberg*, 94 Fed. 921, 922, 36 C. C. A. 549.

We know of no exception to this rule. There has been some question as to what constitutes delivery of a deed, and there has been some diversity of legislation and opinion upon that subject; but that question is not material here. Under this rule the title did not pass from Andrew Johnson to Aaron Johnson until the delivery of his deed on April 12, 1907, and on the same day, and not before, the title passed to the plaintiff.

Our conclusion is that there is no evidence in the record that Aaron Johnson was the owner of the land in controversy when the attachment was levied on April 1, 1907, and, as the validity of the judgment depended upon that fact, it follows that the judgment was invalid for the reason that the defendant was not at the time of the levying of the attachment the owner of the land.

That this conclusion is in accordance with the substantial equities of the case is supported by a stipulation entered into by the parties at the conclusion of the trial of this case in the court below, to the effect that a witness called on behalf of the plaintiff should be deemed to have testified that the plaintiff had no knowledge of the fact that the attachment suit had been brought or that the real property in controversy had been attached, or that any judgment had been rendered therein or any sale made thereunder, until about 30 days prior to the commencement of the present action. The plaintiff was, therefore, a purchaser for a valuable consideration, without any notice of defendant's claim of title.

It follows that the state court never had jurisdiction over the land attached in the attachment suit, and that the judgment in that case was void and of no effect.

The decree of the lower court in favor of the plaintiff was correct, and it is affirmed.

CAROLINA GLASS CO. v. MURRAY et al.

(Circuit Court of Appeals, Fourth Circuit. July 10, 1913.)

No. 1,156.

COURTS (§ 305*)—ACTION AGAINST STATE—NECESSARY PARTY—REAL PARTY IN INTEREST.

Where county dispensary boards purchased supplies for the sale of intoxicating liquor as authorized by Act S. C. Feb. 16, 1907 (25 St. at Large, p. 463), and regulated by Act S. C. Feb. 23, 1910 (26 St. at Large, p. 876), the title to such supplies vested in the state, so that, the board having paid the proceeds of sales to other designated officers of the state as required by law, an action by a creditor, having furnished supplies, to recover therefor on a quasi contract, was one to which the state was a necessary party, within Const. U. S. Amend. 11, providing that the judicial power of the United States shall not be construed to extend to any suit at law or in equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 844, 844½, 986; Dec. Dig. § 305.*]

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. M. Smith, Judge.

Action by the Carolina Glass Company against W. J. Murray and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. B. S. Lyles and D. W. Robinson, both of Columbia, S. C. (Lyles & Lyles and J. T. Seibels, both of Columbia, S. C., on the brief), for plaintiff in error.

W. F. Stevenson, of Cheraw, S. C., and B. L. Abney, of Columbia, S. C. (C. C. L. Prince, of Cheraw, S. C., on the brief), for defendants in error.

Before PRITCHARD, Circuit Judge, and KELLER and CONNOR, District Judges.

PRITCHARD, Circuit Judge. This was an action at law, instituted by the Carolina Glass Company, plaintiff in error (hereinafter referred to as plaintiff), against W. J. Murray, John McSween, A. N. Wood, Avery Patton, and J. S. Brice, defendants in error (hereinafter referred to as defendants), to recover the sum of \$19,084.38 alleged to be due plaintiff by the several county dispensary boards of South Carolina. When the case came on for trial the parties by written stipulation waived a jury trial, and the facts were found by the court below as follows:

"The complaint is in the nature of an action against the individual defendants for moneys by them had and received, and which moneys they ought *ex æquo et bono* to refund to the plaintiff as its property. The defendants were at one time members of the State Dispensary Commission, appointed under the act approved February 16, 1907 (Stats. S. C. vol. 25, p. 463), and as such received a sum of money under the following circumstances, as appears by the testimony in the case, viz:

"By an act approved February 16, 1907 (Stats. S. C. vol. 25, p. 463), the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

General Assembly of South Carolina enacted that wherever at the election in the act provided for any county voted in favor of the sale of alcoholic liquors and beverages it should be lawful that the same should be sold in such county, and that thereupon a board should be appointed, to be known as the 'County Dispensary Board,' who were authorized and required to establish dispensaries in the county for the sale of alcoholic liquors and beverages under the forms and limitations prescribed in the act. The act also provided:

"'Sec. 6. The members of the said county dispensary board are hereby declared to be county officers, and are hereby authorized and empowered, under the authority and in the name of this state, to buy in any market and retail within the state, liquors and beverages as provided herein: Provided, that the state shall not be liable upon any contract for the purchase thereof beyond the actual assets of the dispensary for which the purchase is made.'

"'Sec. 11. Each dispenser shall daily deposit to the credit of the county board, in a bank designated by the board, all moneys received by him from sales.'

"'Sec. 13. All sales shall be for cash and at a profit to be determined by the board.'

"By section 18 it is provided that the county dispensary board should quarterly in each year make a sworn statement of the profits, and at the same time divide and pay out the profits as so ascertained in the proportion fixed by the act of various public county purposes.

"The act appointed a State Dispensary Commission, although a separate act was approved on the same day as this last-mentioned act providing for county dispensary boards, viz., February 16, 1907. Under the act of February 16, 1907, creating the State Dispensary Commission, the commission so created was directed to close out the entire business of the State Dispensary as carried on by the state prior to the 16th of February, 1907, collect all debts due, and pay all just liabilities of the state growing out of the said business. The commission was given full power and authority to investigate the past conduct of the affairs of the dispensary. This act of 1907 was amended in 1908, so as to give the commission full power to pass upon, fix, and determine all claims against the state growing out of dealings with the dispensary and to pay for the state any and all just claims which have been submitted to and determined by it, and no other. Stats. S. C. vol. 26, p. 1293.

"The plaintiff in this case had furnished the state with bottles and demijohns used in the business of the State Dispensary as carried on prior to February 16, 1907, and had a claim therefor against the state for \$23,013.75. This claim the plaintiff presented to the State Dispensary Commission, who, after investigation, found that, in pursuance of a conspiracy between some of the directors of the State Dispensary and some of the plaintiff's officers or agents to defraud the state, the latter had paid the plaintiff on glassware purchased between 1902 and April, 1906, a price exceeding the fair market value thereof by \$51,432.94. Therefore, allowing plaintiff's claim of \$23,013.75, the commission found that plaintiff was indebted to the state in the sum of \$28,419.24, the difference between the amount of its claims and the sum it had fraudulently collected from the state prior to April, 1906.

"From this decision of the commission an appeal was taken under the provisions of the act of 1907 to the Supreme Court of South Carolina. This appeal was heard by that court, which on the 17th of November, 1910, rendered its decision, holding that the plaintiff had no claim against the state. That court held further:

"'The findings of the commission, however, are controlling only in its determination of the nonliability of the state upon appellant's claim. They have not the force or effect of a judgment, concluding appellant in any other proceeding—such, for instance, as the state might institute in the proper court to recover the amount found by the commission to be due it by appellant.'

"And again: 'So long, therefore, as the action of the commission was confined to the investigation of all dealings, past and present, with the dispensary, and the determination of the just liabilities of the state growing out of them, it was, as we have seen, based upon constitutional authority, and was valid and binding. But we find no authority in the Constitution for the Legislature to provide by law how claims of the state against others shall be established

or adjusted, except through the courts. We conclude, therefore, that in so far as the act of 1910 attempts to confer upon the commission power to pass final judgment upon the claim of the state against the plaintiff it is unconstitutional, null, and void.' *Carolina Glass Co. v. State of S. C.*, 87 S. C. 270 [69 S. E. 391.]

"In the meantime, and after the creation of the county dispensary board under the act of February 16, 1907, the plaintiff from time to time furnished the county dispensary board for Richland county glassware under purchases made from it by that board, and on the 23d of February, 1910, there was admittedly due to the plaintiff for these purchases the sum of \$4,963.13. On the 23d of February, 1910 (Stats. S. C. vol. 26, p. 876), by an act of the General Assembly of South Carolina approved that day, it was provided:

"Sec. 6. In any and all cases where the State Dispensary Commission has heretofore found any amount due the state by any person, firm or corporation on account of dealings with the State Dispensary, the several county dispensary boards now existing, and all boards and other officer or officers in charge of any money due any such person, firm or corporation on account of any dealings with any and all county dispensaries heretofore existing, shall, upon demand, pay to the state Dispensary Commission a sufficient amount, or so much thereof as may be on hand, to cover the amount so found to be due the state.'

"Subsequent to the 23d of February, 1910, and between that date and the 13th of December, 1910, the plaintiff delivered to the county dispensary board for Richland county additional supplies of glassware for which there was admittedly due to plaintiff \$12,586.64, which added to the \$4,963.13 due on the 23d of February, 1910, made a total of \$17,550.07 admittedly due to plaintiff on December 13, 1910.

"On that day, viz., December 13, 1910, the county dispensary board for Richland county paid the sum of \$17,550.07 to the State Dispensary Commission under the circumstances stated in the receipt given for the same, viz:

"Columbia, S. C., Dec. 13, 1910.

"Received from the Richland County Dispensary Board the sum of seventeen thousand five hundred and fifty 07-100 (\$17,550.07) dollars, being the amount in the hands of the Richland County Dispensary Board to the credit of the Carolina Glass Company for goods and merchandise bought by the Richland County Dispensary Board from the Carolina Glass Company, which amount is paid to the State Dispensary Commission upon its demand made in pursuance of the provisions of the act of the General Assembly entitled "An act to further provide for winding up the affairs of the State Dispensary," approved 23d day of February, 1910, and in pursuance of the judgment of the Supreme Court in the case of *Carolina Glass Company v. Dr. W. J. Murray et al.*

"State Dispensary Commission,

"\$17,550.07.

By W. J. Murray, Chairman.'

"On the 22d of November, 1910 (after the filing of the opinion of the Supreme Court of South Carolina in *Glass Co. v. State of S. C.*), the plaintiff in this case gave the defendants personal notice that they would be held personally liable for any funds due to plaintiff by any county dispensary board which the defendants should hold and not pay over to the plaintiff.

"On receiving this amount of \$17,550.07 the defendants held it until March 27, 1911, when they turned it over to the persons who had been appointed as members of the State Dispensary Commission in succession to the present defendants who had ceased to be such.

"The contention of plaintiff is that this amount of \$17,550.07 was a fund to which plaintiff is and was entitled, and it came into the hands of the defendants on December 13, 1910, under circumstances which fully notified the defendants that *ex aequo et bono* they were bound to pay it to plaintiff and that the action of defendants in turning it over on March 27, 1911, to their successors in office, was tortious and unlawful after the notice of November 22, 1910, and leaves defendants personally responsible for the amount.

"The jurisdiction of this court is invoked on the ground that the act of February 23, 1910, is in contravention of section 10, art. 1, of the United

States Constitution, as impairing the obligation of the contract whereby, under the act of February 16, 1907, the county dispensary board was bound to pay to plaintiff the amount admittedly due for the glassware furnished by it, and is further in contravention of the fourteenth amendment of the United States Constitution, in that it seeks without due process of law to take the amount of \$17,550.07 admittedly due to plaintiff and arbitrarily apply it to the payment of a contested claim made by the state, not yet judicially established, for \$28,419.24 against the plaintiff."

The court below, after having found the facts, also discussed at some length the merits of the case, but at the same time reached the conclusion that this was a suit against the state, and dismissed the same for want of jurisdiction.

There are seven assignments of error. However, in view of the action of the lower court in dismissing the same for want of jurisdiction, we only deem it necessary to consider the fifth, which is in the following language:

"That the court erred in ruling as a matter of law, upon the undisputed facts, that this suit is a suit against the state of South Carolina and to which the said state is a necessary party, and so is within the express prohibition of the eleventh amendment of the Constitution of the United States. Whereas, the court should have ruled that the suit is one brought by plaintiff to recover money illegally confiscated and redress grievances illegally inflicted by the individual defendants, claiming to act as the State Dispensary Commission by virtue of the authority given them by section 6 of the act of 1910, when the said act is and always has been null and void, because of section 10 of article 1, and the fourteenth amendment of the Constitution of the United States, and therefore afforded no protection or color of authority for the illegal acts of the defendants."

In order to determine whether this is a suit against the state, we must ascertain to whom the fund of \$17,550.07 belonged, both before and after it reached the hands of the defendants.

Section 6 of the act of 1907 authorizes and empowers county boards, in the name and under the authority of the state, to buy in any market, and to retail within the state, liquors and beverages. If the liquor and beverages were purchased by the dispensary board in pursuance of this act, it necessarily follows that in so doing such boards were acting for and on behalf of the state, and any purchases made, or funds realized from the sale of the same in pursuance thereof, hereby became the property of the state and subject to its control as such. The fact that the county dispensary boards are declared to be county officers in no wise affects the ownership of the state of any property that may have been purchased by such boards. The state has as much right to constitute county officers its agents as it would to employ any other person or persons to act in its behalf in the transaction of its business, and this is precisely what it did in this instance. The mere designation of these officials as county officers could not deprive the state of any right to property which it may have purchased through them while they were acting in pursuance of authority granted by the state. A careful examination of the Constitution as well as the act of South Carolina, as respects the dispensary, clearly shows that it was the policy of that state to retain complete control over the purchase and sale of liquors, as well as the title to the same.

Among other things, it is provided by the act in question that the

state shall not be liable beyond the actual assets of the dispensary for which the purchases are made. The foregoing clearly indicates that, while the state stands back of the dispensary board in the purchase of goods, yet it is not liable for any debts that such boards may have incurred in excess of the actual assets of the dispensary.

This was a precautionary measure, intended to protect the state in cases where the board should attempt to contract debts beyond the amount of assets, and was notice to the world that the state would only pay such debts as were not in excess of the assets of the dispensary.

These provisions clearly indicate that it was the purpose of the Legislature to make the dispensary board subordinate to and under the control of the state in all particulars and at all times, so long as they continued in business; and among other things it is provided that after certain expenses are paid, and the proportion allotted to the county was set apart for that purpose, that any net profits were to be accounted for to the state, and retained by it as its property.

The Supreme Court of the state of South Carolina, in construing section 6 of the act of 1907, held that these county dispensaries were conducted under the authority, and in the name of the state. This question was before the Supreme Court of that state in the case of *State v. Dispensary Commission*, 79 S. C. 325, 60 S. E. 931, the court, among other things, said:

"The General Assembly may require the public funds or any part of them to be put in any place or with any person it sees fit; and there is no limit to its power in imposing conditions and conferring discretion on its fiscal agent as to the disbursement of these funds to its creditors."

And also in the case of *State v. Dispensary Commission*, 79 S. C. 326, 60 S. E. 928, the Supreme Court of that state quoted with approval the ruling of the Supreme Court of the United States in the case of *Buchanan v. Alexander*, 4 How. 20, 11 L. Ed. 857, in which that court said that:

"So long as money remains in the hands of a disbursing officer, it is as much the money of the United States as if it had not been drawn from the treasurer."

The Supreme Court of the United States, in the case of *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 29 Sup. Ct. 458, 53 L. Ed. 742, referring to the provisions of the Constitution and statute of that state as respects the dispensary question, said:

"If we consider as an original question the provisions of the Constitution of South Carolina on the subject and the terms of the statutes of that state establishing the dispensary system, we think it is apparent that the purchases which were made by the state officers, or agents, of liquor for consumption in South Carolina, were purchases made by the state for its account, and, therefore that the relation of debtor and creditor arose from such transactions between the state and the persons who sold the liquor. And this irresistible conclusion, arising from the very face of the Constitution and statutes, is removed beyond all possible controversy by the decision of this court in *Vance v. Vandercook*, No. 1, *supra* [170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100], and by the construction given by the Supreme Court of South Carolina to the state statute prior to the commencement of this litigation, in *State v. Farnum*, *supra* [73 S. C. 165, 53 S. E. 83], as well as by the convincing opinion

expressed by that court in reviewing the state statutes in the mandamus case already referred to as reported in 79 S. C. 316 [60 S. E. 928]. We could not, therefore, sustain the exercise of jurisdiction by the Circuit Court without in effect deciding that the state can be compelled by compulsory judicial process to perform a contract obligation. It is certain that, at least by indication, the bills of complaint sought to compel the state to specifically perform alleged contracts with the vendors of liquor by paying for liquor alleged to have been supplied. But it is settled that a bill in equity to compel the specific performance of a contract between individuals and a state cannot, against the objection of the state, be maintained in a court of the United States. Thus, in *Hagood v. Southern*, 117 U. S. 52 [6 Sup. Ct. 608, 29 L. Ed. 805], where, in suits brought in a court of the United States against officers and agents of the state of South Carolina, the holders of certain revenue scrip of the state endeavored to enforce the redemption thereof according to the terms of the statute, in pursuance of which the scrip was issued, which statute was alleged to constitute an irrevocable contract, the court said: "Though not nominally a party to the record, it [the state] is the real and only party in interest; the nominal defendants being the officers and agents of the state, having no personal interest in the subject-matter of the suit, and defending only as representing the state. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the state. The state is not only the real party to the controversy, but the real party against which relief is sought by the suit; and the suit is, therefore, substantially within the prohibition of the eleventh amendment of the Constitution of the United States, which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." * * * The absence in the winding-up act of a provision conferring authority to review in the ordinary courts of justice the action of the commission concerning claims, instead of supporting the contention that the state had abandoned all property right in the funds placed in the hands of the commission, tends to a contrary conclusion, since it at once suggests the evident purpose of the state to confine the determination of the amount of its liability to claimants to the officers or agents chosen by the state for that purpose. And it is elementary that, even if a state has consented to be sued in its own courts by one of its creditors, a right would not exist in such creditor to sue the state in a court of the United States. *Smith v. Reeves*, 178 U. S. 436 [20 Sup. Ct. 919, 44 L. Ed. 1140], and cases cited; *Chandler v. Dix*, 194 U. S. 590 [24 Sup. Ct. 766, 48 L. Ed. 1129]. The situation, therefore, was not changed as a result of the subsequent act of February 24, 1908, giving the creditors of the state, whose claims might be adversely acted upon by the commission, the right to a review in the Supreme Court of the state."

We have carefully considered the authorities relied upon by plaintiff, but are of the opinion that they do not apply to the case at bar. In view of the decisions of the Supreme Court of South Carolina, as well as the decision of the Supreme Court of the United States, we are impelled to the conclusion that the state is a necessary party to this action. Such being the case, the ruling of the lower court in dismissing the same for want of jurisdiction was eminently proper.

For the reasons stated, the judgment of the lower court is affirmed.
Affirmed.

UNITED STATES v. WEISBERGER et al.

(Circuit Court of Appeals, Ninth Circuit. August 4, 1913.)

No. 2,244.

UNITED STATES (§ 67*)—CONTRACTS—BREACH—ACTION ON BOND.

Where a contract for government work in connection with an irrigation project provided that the Secretary of the Interior might suspend the contract, take over the work, and complete the same at the cost of the contractor, and it appeared that the work contracted for was a novel undertaking, neither the government nor the contractor knowing a great deal concerning its feasibility, and the Secretary of the Interior under such provision terminated the contract, and undertook to do the work itself, because it appeared that the work done in accordance with the specifications would not fulfill the desired results, and the government finished the same at an excess cost by performing it in a substantially different manner from that specified, it was not entitled to recover the excess from the contractor and his surety.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

In Error to the District Court of the United States for the Southern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Action by the United States of America against Theodore Weisberger and others. Judgment for defendants, and the United States brings error. Affirmed.

The government brought this suit in the court below upon a contract entered into between it and the defendant Weisberger, and upon a bond given by the defendants for the faithful performance by the contractor of the provisions of his contract. The contract related to the construction of certain portions of the Tieton main canal of the Yakima-Tieton reclamation project of the United States Reclamation Service in the state of Washington. The portions of the work undertaken to be constructed by Weisberger were designated in the contract as "Schedule 6—A" and "Schedule 7—A," the first of which covered the manufacturing of concrete shapes for the canal and tunnel linings and for flumes, and the second covered the placing of the shapes in excavated canals and joining them together, so as to form a continuous solid concrete canal. By the original contract the entire work of the contractor was to be completed by March 31, 1908—the completion of that specified in Schedule 6—A being later extended to August 1, 1908, and that embraced by Schedule 7—A to October 15, 1908. The specifications contained these provisions, among others:

"8. Engineer.—The word 'engineer,' used in these specifications or in the contract, unless qualified by the context, means the Chief Engineer of the Reclamation Service. He will be represented on the work by assistants and inspectors, with authority to act for him and direct the work. Upon all questions concerning the execution of the work, the classification of the material in accordance with the specifications, and the determination of costs, the decision of the Chief Engineer shall be binding on both parties."

"11. Local Conditions.—Bidders must satisfy themselves as to all local conditions affecting the work, and no information derived from the maps, plans, specifications, profiles, or drawings, or from the engineer or his assistants, will in any way relieve the contractor from any risk or from fulfilling all the terms of his contract. The accuracy of the interpretation of the facts disclosed by borings or other preliminary investigations is not guaranteed. Unless the bidder or his representative has visited the site of the

*For other cases see same topic & § NUMBER in Dec. & Am.Digs. 1907 to date, & Rep'r Indexes
206 F.—41

work and made himself familiar with the conditions his bid on work depending on local conditions will not be considered."

"22. Suspension of Contract.—Should the contractor fail to begin the work within the time required, or fail to begin the delivery of material as provided in the contract, or fail to prosecute the work or delivery in such manner as to insure a full compliance with the contract within the time limit, or if at any time the contractor is not properly carrying out the provisions of his contract in their true intent and meaning, notice thereof in writing will be served upon him; and should he neglect or refuse to provide means for a satisfactory compliance with the contract within the time specified in such notice, the Secretary of the Interior in any such case shall have the power to suspend the operation of the contract. Upon such suspension the Secretary of the Interior may take possession of all machinery, tools, appliances, and animals employed on any of the works to be constructed under the contract, and may appropriate all materials and supplies of any kind, shipped or delivered by or on account of the contractor for use in connection with the work, and he may use the same for the completion of the work, either directly by the United States or by other parties for it; or the Secretary of the Interior may employ other parties to carry the contract to completion, substitute other machinery or materials, purchase the material contracted for in such manner as he may deem proper, or hire such force and buy such machinery, tools, appliances, materials, supplies, and animals at the contractor's expense as may be necessary for the proper conduct of the work and for the completion thereof. Any excess of cost arising therefrom over and above the contract price will be charged against the contractor and his sureties, who shall be liable therefor. In the determination of the question whether there has been such noncompliance with the contract as to warrant the suspension thereof, the decision of the Secretary of the Interior shall be binding on both parties."

"25. Changes in Quantities.—The Secretary of the Interior reserves the right to make such changes in the quantities of work or material as may be deemed advisable, without notice to the surety or sureties on the bond given to secure compliance with the contract, by adding thereto or deducting therefrom, at the unit prices of the contract. These changes will include modifications of shapes and dimensions of canals, dams, and structures of whatsoever nature, particularly foundation work, to suit conditions disclosed as the work progresses. Should any change be made in a particular piece of work after it has been commenced, so that the contractor is put to extra expense, the engineer will make reasonable allowance therefor, which action shall be binding on both parties. Extra work or material will be paid for as hereinafter provided."

"27. Changes at Contractor's Request.—Should the contractor, by reason of conditions developing during the progress of the work, find it impracticable to comply strictly with the specifications, and apply in writing for a modification of structural requirements or methods of work, such change may be authorized by the engineer, provided it be not detrimental to the work and be without additional cost to the United States."

The canal as projected was about 11 miles in length. The government advertised for bids for the construction of the various divisions into which the engineers had divided the work by schedules, but no bids were received for any portion except that of Weisberger for that portion covered by Schedules 6—A and 7—A. The contract provided, among other things, that before it should be necessary for the contractor to begin construction under the contract the United States would build a wagon road in the Tieton Cañon to the dam planned for the diversion of the water from the river, and that the concrete shapes should be manufactured by Weisberger at various points in the bottom lands of the cañon at places theretofore selected by the government engineers for the purpose. There was evidence given tending to show that before the contract with Weisberger was actually signed he had been notified by the government engineer that the contract would be awarded to him, upon receiving which notice he at once commenced assembling the necessary material and preparing the necessary plant for the manufacture of the shapes. No other bid than Weisberger's having been made, the govern-

ment undertook to do the balance of the work itself, and commenced the work of constructing the open canal at the diverting dam at the head of the first division of the projected work, near which Weisberger naturally, if not necessarily, commenced the manufacture of the shapes, which were made of sand and gravel, reinforced with steel rods running around and lengthwise of the shapes. There was evidence given tending to show that the road which the government agreed to construct was never completed to the diverting dam, nor within a mile and a half of it, and was not completed so that Weisberger could use it for the transportation of his machinery and appliances up to the point where the first shapes were manufactured until about July 1, 1907, and that after that the road was more or less blocked by government employes with debris thrown from the canal as it was being dug, and that subsequently a flood in the cañon destroyed the sites that had been designated for the manufacture of the shapes, all of which impeded and delayed the contractor in carrying on the work agreed to be performed by him.

The record also shows that the shapes for the open canal were to be a little more than a half circle 8 feet $3\frac{3}{8}$ inches in diameter, with walls 4 inches thick, and with a cross-bar across the top to strengthen them, and for the tunnel lining the shapes were to be circular rings 6 feet $1\frac{1}{4}$ inches in diameter. They were to be laid in the canal so as to practically fit together, and to be joined with a joint one-eighth of an inch in width, the joints to be finished to a smooth flush surface. They were to be constructed and laid according to the specifications and requirements of the contract and in a manner satisfactory to the engineer in charge of the work. That engineer first required the shapes to be made with a variation of only one-sixteenth of an inch in the radius, but afterwards increased it to one-eighth of an inch. It appears that the method of lining provided for was entirely new, and that the place where the work was done, and necessarily had to be done, was remote from any railroad, and that it was therefore an expensive undertaking.

By the time the government had any portion of the canal ready for lining, the contractor had manufactured more than 3,000 of the shapes; and when he began to place them in the canal it was found practically impossible to construct and lay and join them as required by the specifications of the contract, resulting in an application by him, in the fall of 1907, for a change in the manner of constructing and joining the shapes, which application remained under consideration by the officers of the government for a considerable period, and during which period the contractor expended large sums in preparing for the future work. Meanwhile the engineers in charge of the work recommended that the government suspend the work in pursuance of the provisions of the contract and itself take over the work, together with the machinery, supplies, tools, and appliances which the contractor had provided, which recommendation was approved by the Secretary of the Interior on the 1st of February, 1908. Accordingly, the government took possession of the entire work so contracted for, together with the contractor's equipment, and completed it October 15, 1909.

The record shows that when the government undertook the work it found, as had the contractor, that it was impossible to make the shapes with a variation of only one-sixteenth or one-eighth of an inch in the radius, and a much larger variation was thereafter made, as well as a material change in the cross-bars and various other substantial changes. When the government finished the work it thus undertook to do, its engineer found that it had cost it \$51,095.05 in excess of the price agreed to be paid Weisberger for the work he undertook to do, whereupon the present action was commenced to recover such excess from the contractor and his surety.

The contractor, in addition to his denials of the allegations of the complaint, set up three counterclaims and six affirmative defenses. The counterclaims were dismissed by the court below, and the affirmative defenses were put in issue by the government's reply. The surety company set up in defense that the contract as originally entered into was not possible of performance, and that the action of the Secretary of the Interior in suspending the contract was in effect fraudulent. The second affirmative defense pleaded by the contractor included the failure on the part of the government to perform the contract on its part, its wrongful stopping of the work, the taking

of the contractor's equipment, and the action of the Secretary of the Interior in suspending the contract, which was alleged to have been taken under such a gross misapprehension regarding the facts as amounted to a failure to exercise an honest and unbiased judgment in the premises. The third affirmative defense alleged that there was a mutual mistake of the parties in the making of the contract, and that it was impossible and impracticable for the contractor to perform it in accordance with its terms and conditions.

The case was tried with a jury, and resulted in a verdict in favor of the defendants. Subsequently the government moved the court for judgment notwithstanding the verdict, which motion was denied, and, judgment having been entered for the defendants, the case was brought here by writ of error.

Oscar Cain, U. S. Atty., and E. C. Macdonald, Asst. U. S. Atty., both of Spokane, Wash., and Ralph B. Williamson, Sp. Asst. U. S. Atty., of North Yakima, Wash., for the United States.

Parker & Richards, McAulay & Meigs, and Fred Fontaine, all of North Yakima, Wash., and John P. Hartman, of Seattle, Wash., for defendants in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). Only three of the five assignments of error can be considered by us, to wit:

"(2) That the court erred in denying plaintiff's motion for judgment at the close of all the testimony in the case.

"(3) That the verdict herein is contrary to the evidence and against the law.

"(4) That the court erred in entering judgment herein in favor of the defendants, and erred in entering judgment upon the verdict."

At the time the motion was made for judgment in favor of the plaintiff, the evidence before the court and jury tended to show that the government had suspended the contract, taken possession of the contractor's material and equipment, and, departing from the provisions of the contract in a number of material particulars, had finished that portion of the work covered by the contract at a claimed excess of \$51,095.05 in cost, for which it sued the contractor and his surety. It is true that the Secretary of the Interior was by the express terms of the contract authorized, upon the happening of the conditions therein specified, to suspend the operation of the contract, take possession of the contractor's material and equipment, and use the same for the completion of the work contracted for, either directly by the government or by other parties for it, and recover any excess of cost arising therefrom over and above the contract price from the contractor and his surety. The work so authorized to be taken over and completed, either by the government itself or by other parties employed by it, was manifestly the work specified in the contract, and not any substantially different work. This is shown, not only by general principles applicable to such matters, but also in this instance by specific provisions of the contract itself, notably by the provision of the contract just referred to, and also by subdivisions 25 and 27 thereof, by the first of which the Secretary of the Interior is given the right to make certain changes and modifications at any time while the contract is being performed by the contractor, and by the second of which the contractor is given the right to make application to the govern-

ment for a modification of the structural requirements or methods of work, should he, by reason of conditions developing during the progress of the work, find it impracticable to comply strictly with the specifications of the contract.

The law is, we think, well settled that where the government undertakes to take over work contracted to be done for it, for some breach of the provisions of the contract, and itself perform the work, or employ a third party to do so at the expense of the former contractor and his surety, the work so to be completed, in order to hold the contractor or his surety for the excess of cost, must be in substance the work that was contracted for, and must be performed without substantial departure from the contract. *United States v. Freel*, 186 U. S. 309, 22 Sup. Ct. 875, 46 L. Ed. 1177; *American Bonding Co. v. United States*, 167 Fed. 910, 93 C. C. A. 310; *American Bonding Co. v. Gibson*, 127 Fed. 671, 62 C. C. A. 397; *United States Fidelity & G. Co. v. United States*, 194 Fed. 611, 116 C. C. A. 187; *Mundy v. United States*, 35 Ct. Cl. 265.

If the power conferred upon the Secretary of the Interior to suspend the contract, take over the work contracted for, and complete it at the cost of the contractor, could be properly held to authorize a substantial departure from the provisions of the contract in completing it, and the recovery from the contractor of the excess of the costs of such completion, it might very well work the ruin of the contractor. To hold him or his surety liable for the excess of cost of substantially different work would clearly be to hold them liable for something for which they did not bind themselves and the cost of which they might have no means of determining. Besides, the third affirmative defense set up by the contractor alleged, as has been seen, that there was a mutual mistake of the parties in the making of the contract, and that it was impossible and impracticable for the contractor to perform it in accordance with its terms and conditions. Much of the testimony of several of the government's own officers, having charge and supervision of the work, strongly tends to sustain that conclusion; and one of the defendant's witnesses—Herbert J. King—expressly testified that it was practically impossible to perform the work in accordance with the contract. The whole case shows that it was a novel undertaking, neither the government nor the contractor knowing much of its feasibility; for otherwise, as said by the court below in one of its opinions, the contract was "such that no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other"—citing *Hume v. United States*, 132 U. S. 406, 10 Sup. Ct. 134, 33 L. Ed. 393.

We are of the opinion that the disposition of the case made in the court below was right, and its judgment is accordingly affirmed.

**RUSSO-CHINESE BANK v. NATIONAL BANK OF COMMERCE OF
SEATTLE, WASH.†**

(Circuit Court of Appeals, Ninth Circuit. July 7, 1913.)

No. 2,182.

1. BANKS AND BANKING (§ 162*)—SPECIAL VERDICT—SUFFICIENCY OF EVIDENCE.

Plaintiff bank sued defendant bank to recover back money paid defendant during the Russo-Japanese War as the proceeds of a draft sent by defendant to plaintiff's Port Arthur branch for collection, on defendant's assertion that it had been collected, during or just prior to the investment of Port Arthur, and not remitted, which plaintiff alleged was not the fact, as was ascertained after the close of the war. Defendant alleged in the answer as an affirmative defense that the draft had been collected by plaintiff's Port Arthur branch, and such issue was submitted to the jury for a special verdict, which was returned in favor of defendant. *Held*, that there was sufficient evidence in the record to support such verdict.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 562, 563, 565, 566; Dec. Dig. § 162.*]

2. BANKS AND BANKING (§ 162*)—COMPETENCY—COURSE OF DEALING.

On such issue, evidence of the course of dealing between plaintiff's Port Arthur branch and the drawees of the draft, with respect to the manner of payment of similar previous drafts, *held* competent.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 562, 563, 565, 566; Dec. Dig. § 162.*]

In Error to the District Court of the United States for the Western Division of the Western District of Washington; C. H. Hanford, Judge.

Action at law by the Russo-Chinese Bank against the National Bank of Commerce of Seattle, Wash. Judgment for defendant, and plaintiff brings error. Affirmed.

For former opinion, see 187 Fed. 80, 109 C. C. A. 398.

For a correct understanding of the present case it is necessary to make a full statement of the facts, as was done when the case was first here. 187 Fed. 80, 109 C. C. A. 398. On the 10th day of December, 1903, the Centennial Mill Company, of Seattle, delivered to the Boston Steamship Company and Boston Towboat Company, at Seattle, 35,312 quarter sacks of flour, for shipment by the steamship Hyades to Clarkson & Co. at Port Arthur and/or Dalny in Manchuria. The Centennial Mill Company received from the steamship company its bill of lading in duplicate. The bill of lading contained the following: "Received from Centennial Mill Co. * * * for shipment at Seattle, by steamship Hyades * * * 35,312 Qr. Sax flour * * * to be carried by said steamer or any other steamer of the above company to the port of Port Arthur and/or Dalny * * * and to be there delivered unto shipper's order or to his or their assigns. (Notify Clarkson & Co.)"

The flour had been sold to Clarkson & Co. at Port Arthur on terms of 90 days' draft, through the Russo-Chinese Bank, at \$4.10 per barrel, amounting to \$36,194.80. It appears that Clarkson & Co. were merchants at Port Arthur engaged in buying and selling different kinds of goods. They were also agents at that place for different steamship companies, including the Boston Steamship Company and the Boston Towboat Company, and were therefore the agents of the steamship Hyades, which carried the 35,312 quarter sacks of flour sold by the Centennial Mill Company to Clarkson & Co., to be delivered to the latter at Port Arthur. The Centennial Mill Company had

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
† Rehearing denied October 20, 1913.

made other sales of flour to Clarkson & Co., which need not be referred to in this opinion. The Russo-Chinese Bank is a banking corporation existing under the laws of the Russian Empire, with its head office at St. Petersburg, and with numerous branches throughout the empire. At the dates referred to in this case it had a branch bank at Port Arthur, Manchuria, and another at Shanghai, China. In referring to either of these banks hereafter we shall designate it by its locality.

In accordance with the terms of the sale of the flour a draft was drawn by the Centennial Mill Company on Clarkson & Co. at Port Arthur for \$36,194.80, with exchange and collection charges payable in 90 days after sight to the National Bank of Commerce, at Seattle. The Centennial Mill Company procured insurance on the flour with the Fireman's Fund Insurance Company of San Francisco in the sum of \$40,000. The Centennial Mill Company thereupon took this draft on Clarkson & Co., the bill of lading issued to it by the steamship company for the flour, the insurance policy issued by the Fireman's Fund Insurance Company attached thereto, and delivered the same to the National Bank of Commerce at Seattle, with whom the Centennial Mill Company regularly transacted business, and, in accordance with the customary business usage, the bank discounted the draft, and paid the mill company the value thereof. Thereupon the bank sent the draft, with the other documents, by letter dated December 11, 1903, to the Port Arthur branch of the Russo-Chinese Bank for collection. The letter was received by the latter in due course of mail on January 22, 1904, according to the Gregorian, or "new style," calendar, or on January 9, 1904, according to the Julian, or "old style," calendar. The new style calendar prevails in this country; the old style in Russia. Under the latter the corresponding date is 13 days earlier than in this country. The dates referred to in this opinion will be according to the "new style" calendar in use in this country, and will involve a change of dates to that extent in documents issued and transactions had in Port Arthur. The letter with its inclosures, received by the Port Arthur branch of the Russo-Chinese Bank on January 22, 1904, from the National Bank of Commerce of Seattle, was acknowledged on the same date. In this letter of acknowledgment the Port Arthur bank called the attention of the Seattle bank to the fact that instructions were required as to the return of documents accompanying the draft, if the draft should be protested for nonacceptance or nonpayment. The letter states: "Please note: (1) That, unless otherwise instructed, bills of any description sent us for procuring acceptance and/or for collection will be protested both for nonacceptance or nonpayment and immediately returned to the sender. (2) When sending us for collection documents and bills or only documents clearly state in your letter accompanying same whether in case of dishonor: (a) Both bills and documents are to be promptly returned with the relative deed of protest, or (b) if the bill is to be returned and the relative documents are to be kept here at your disposal, or (c) if the goods are to be stored by us and fire insurance is to be recovered pending receipt of your instructions."

It does not appear that the Seattle bank ever furnished the Port Arthur bank any instructions with respect to the matters referred to in this letter. The Port Arthur bank presented the draft to Clarkson & Co. for acceptance on January 23, 1904. It was accepted by Clarkson & Co. on January 30, 1904, and on the same date the Port Arthur bank notified the Seattle bank by letter of the acceptance of the draft. The acceptance of the draft on January 30, 1904, fixed its maturity on April 30, 1904. On April 28, 1904, or two days before the maturity of this draft, the Port Arthur bank received a telegram from the Shanghai branch of the Russo-Chinese Bank, making inquiry concerning a reported sale of the flour by Clarkson & Co. without paying for it. The Port Arthur bank replied that the draft was due on the following day; that the fact that Clarkson & Co. had got possession of the flour through the bill of lading in the hands of the bank was due to Clarkson & Co. being the agents of the steamer carrying the flour, and could be in no way prevented by the bank. On April 30, 1904, the draft became due, but was not paid. Under the Russian law two days' grace are allowed in the matter of the payment of bills of exchange. At the expiration of this period of grace, on May 2, 1904, the Port Arthur Bank delivered the draft

to the notary public at Port Arthur for protest. On the following day, May 3, 1904, the draft was protested.

The Russo-Japanese War, formally declared February 10, 1904, was then in progress. The Japanese had been directing naval operations against the Russian naval base at Port Arthur from February 9, 1904, at which date a complete blockade of Port Arthur on the water side had been effected by the Japanese fleet. About May 3, 1904, it was completed by the Japanese military forces on land, and, when the deed and protest was received by the bank from the notary, communication between Port Arthur and the outside world had been completely cut off by the besieging forces of the Japanese army. The draft with the deed of protest was thereupon placed by the Port Arthur bank in its safe, to be kept until such time as communication should be restored. On January 2, 1905, the Japanese forces took possession of all the papers and documents belonging to the Russo-Chinese Bank at Port Arthur, and retained possession of them until March, 1906, when they were all returned to the Russo-Chinese Bank. While the books, papers, and effects of the Port Arthur bank were in the possession of the Japanese the bank had no access to them. When they were returned to the bank, they were taken to the home office of the principal bank at St. Petersburg.

Pending this situation of affairs at Port Arthur, the Seattle bank, on July 7, 1904, wrote to the St. Petersburg bank that Clarkson had advised the Centennial Mill Company that certain drafts on Clarkson & Co., including the one due on April 30, 1904, had been paid before maturity. To this letter the St. Petersburg bank replied, to the effect that it was unable at that time to correspond with the Port Arthur bank, and was unable to trace the matter referred to, but, as soon as it was possible to investigate the subject, it would not fail to revert to it. These letters were followed by others passing between the two banks, in which the Seattle bank insisted that it had information that Clarkson & Co. had paid the amount of the draft to the Port Arthur bank, and demanding payment. The St. Petersburg bank repeated its former statement that communication with Port Arthur had been suspended, and it was unable to trace the matter. Finally, on October 12, 1904, the Seattle bank concluded a letter, upon the subject addressed to the St. Petersburg bank, with the following: "We would respectfully request that you notify us immediately on receipt of this letter what you propose doing in the premises, and trust you will not by further delay compel us to take steps in this country to enforce our rights, which we most certainly shall do."

The St. Petersburg bank replied, under date of November 9, 1904, in which, after referring to matters connected with the controversy, it said: "Of course, as the matter now stands, we are unable to discuss the question any further and therefore hand you inclosed, in cover of the bill for: U. S. \$36,194.80, claimed by you, check on Messrs. Ladenburg, Thalmann & Co., New York, for U. S. \$36,013.70, as per note at foot, receipt of which kindly acknowledge. It remains of course however understood that in case your above remittance proves not to have been paid for by Clarkson & Co. you are held responsible to refund the amount of our to-day's check."

The Seattle bank replied under date of December 5, 1904, acknowledging receipt of the draft for \$36,013.70, but declining to accept that amount as full payment for the draft. In this letter the Seattle bank said: "The draft to this date would amount to G\$38,312.19, leaving a balance due us of G\$2,298.49, which we would respectfully request that you remit us by return mail. We on our part agree upon return to us of both sets of bills, showing that the draft has not been paid, to reimburse you in the sum paid us, provided, that we were in no wise injured by the fact that your Port Arthur branch has indefinitely held the bills after their maturity, at which time they could have been returned to us and we could have collected from the steamship company."

To this letter the St. Petersburg bank replied under date of December 29, 1904, inclosing check for the additional amount of \$2,298.49, with this statement: "It remains understood that in case your above remittance proves not to have been paid, you declare yourselves ready to refund us these \$2,298.49 with the \$36,013.70 sent on 27/9 November, plus accrued interest." The Seattle bank under date of January 18, 1905, acknowledged the receipt of the check

for \$2,298.49, with this guaranty: "We agree that guaranty contained in our letter of December 5 shall also cover this amount."

When the St. Petersburg bank received from the Japanese government the books and documents belonging to the Port Arthur bank, it was discovered after investigation, that Clarkson had not paid the draft of the Centennial Mill Company; that the draft upon Clarkson & Co. had been protested, and with deed of protest had been mailed to the Seattle bank on May 23, 1904. On June 27, 1906, the St. Petersburg bank wrote to the Seattle bank the result of this investigation, and asked that the two sums of \$36,013.70 and \$2,298.49, which it had paid to the Seattle bank with interest from the dates of remittances, be refunded to the St. Petersburg bank. After further correspondence between the banks, the Seattle bank refused to refund the money received from the St. Petersburg bank, and thereupon the latter brought this action at law to recover judgment against the Seattle bank for the two sums named.

In the complaint the facts relating to the controversy were alleged substantially as has been stated, with this further allegation relating to the repayment of the two sums of money paid by the St. Petersburg bank to the Seattle bank, namely, that the payments were made upon condition "that if it should thereafter be ascertained that said drafts had not been paid, the said sums should be repaid to it by the defendants, to which condition defendant assented and agreed in writing."

In an amended answer the Seattle bank admitted the sending of the draft drawn by the Centennial Mill Company upon Clarkson & Co. to the Port Arthur bank for collection, the receipt of the draft by the Port Arthur bank, but denied information as to the date of its receipt, or whether the draft was accepted by Clarkson & Co. or not. It admitted that during a portion of 1904 the empires of Russia and Japan were at war; alleged that the draft and protest were never returned to the defendant; admitted that it had represented to the plaintiff that the draft had been paid in full to the Port Arthur bank, that it had demanded payment of the amount of the draft in full, and that it had threatened to sue the plaintiff in the courts of the United States if the draft was not paid; that it had demanded the payment by the plaintiff to the defendant of the amounts stated in the complaint; but denied that the payments had been made upon condition that, if it should thereafter be ascertained that said draft had not been paid, the said sums should be repaid to the plaintiff; denied that the defendant agreed or assented in writing, or at all, to any such condition, but alleged that the defendant agreed upon its part, upon the return to the defendant of both sets of bills and a showing that the draft had not been paid, to reimburse the plaintiff with the sums paid to the defendant, provided that the defendant was in no way injured by the negligence of the plaintiff in connection with the collection of said draft, or in the performance of its duties, or in the handling of said draft or the documents connected therewith; alleged that no showing of nonpayment of said draft had ever been made, and that neither of said sets of bills, or any bill, had ever been returned to the defendant by the plaintiff covering the transaction referred to in the complaint, and that the plaintiff had never fulfilled or performed the conditions agreed upon by the plaintiff and defendant at the time the payments were made as alleged in the complaint.

Defendant alleged as an affirmative defense that the draft drawn by the Centennial Mill Company on Clarkson & Co. was paid in full, and plaintiff received such payment in full. Defendant further alleged as an affirmative defense that the flour represented by the bill of lading was appropriated by Clarkson & Co. to their own use, and the proceeds were not applied to the payment of such draft, and that the proceeds of the sale of the flour were not used and applied toward the payment of the draft; that the failure to have the same so applied toward the payment was due to the carelessness and negligence of the plaintiff, and was due to a breach of duty that the plaintiff owed to the defendant to cause said flour, or proceeds thereof, to be utilized for the payment of said draft; that the plaintiff did not protest the draft at the date of its maturity, and did not return the draft and the docu-

ments accompanying the same to the defendant, and all without cause or reason, to the great injury and damage to the defendant.

In plaintiff's reply it denied the agreement as to the condition of the payment made by the plaintiff, as alleged in defendant's answer, and denied any connection with or responsibility for the delivery of the flour to Clarkson & Co.

Upon the first trial of the cause in the court below, which was with a jury, the defendant thereto, upon the conclusion of the evidence on the part of the plaintiff, moved the court for a nonsuit on the ground that there had been a total failure of proof to sustain the complaint, which motion the trial court granted, on the ground that the action was based upon a contract in writing, and that the plaintiff had failed to prove the promise alleged in the complaint, and had failed to prove that the protested draft and accompanying documents had been returned to the defendant, as alleged in the defendant's answer. This court held that the complaint stated "a cause of action, upon an implied agreement to restore money paid to the defendant in error by the plaintiff in error under a mistake of fact, and that the evidence introduced on behalf of the plaintiff tended to sustain such a cause of action," and accordingly reversed the judgment and remanded the cause for a new trial. Upon the retrial the plaintiff introduced substantially the same evidence as on the former trial, and testimony was introduced on the part of the defendant; the last trial resulting in a general verdict for the defendant and a special verdict in response to a special issue submitted to the jury at the request of the plaintiff, as follows: "We, the jury in the above-entitled cause, find that the Port Arthur branch of the Russo-Chinese Bank did receive payment of the draft dated December 11, 1903, on account of which the plaintiff made the remittance to the defendant alleged in the complaint." Judgment followed in favor of the defendant, to which judgment the plaintiff sued out the present writ of error.

Warren Gregory and Chickering & Gregory, all of San Francisco, Cal., T. L. Stiles, of Tacoma, Wash., and Dorr & Hadley, of Seattle, Wash., for plaintiff in error.

Kerr & McCord, of Seattle, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1] It is manifest that if the special issue in response to which the special verdict was returned was supported by sufficient evidence, and there was no substantial error in the admission or rejection of evidence bearing on it, and the jury was not wrongly instructed in respect to that question, the judgment must be affirmed.

The record shows that the plaintiff in error requested the court to instruct the jury, among other things, as follows:

"In relation to the affirmative questions set up by the defendant, I advise you that they are as follows: (1) That the draft in question was placed by Clarkson & Co. with the plaintiff. In this connection I charge you that there is no evidence on the part of the defendant that this draft was so paid, either in whole or in part, and therefore this affirmative defense of the defendant must be disregarded by you. * * *

The court refused to give the instruction, and submitted the issue to the jury, to which action the plaintiff reserved an exception, and its counsel here insist that "there is no evidence whatever that the draft was paid."

The record shows that the plaintiff in error's Port Arthur branch caused the draft to be protested, and the plaintiff introduced other evidence tending to show that it was not paid, but it is a mistake to say,

as does counsel for the plaintiff in error, that there is no evidence to the contrary. We find in the evidence of the defendant's witnesses Davidson and Short, and in that of Clarkson, as well as in the circumstances of the case, much evidence upon which the special verdict might well have been based. The record shows that there had been many other similar drafts, accompanied by similar documents, sent by the Seattle bank to the Port Arthur bank for flour sold by the Centennial Mill Company, and that the plaintiff bank was familiar with the business of Clarkson & Co., and indeed was mainly instrumental in the establishment of that firm at Port Arthur. Clarkson & Co. also had a place of business at Vladivostok, where its main office was; Davidson during most of the times in question being its manager at Port Arthur, and Short its assistant manager there, a Mr. Ofsiankin being during all of the times in question the manager of the plaintiff bank at Port Arthur, and subsequently, and at the time of the taking of the testimony in this case, being the manager of the Vladivostok branch of the plaintiff in error. The record shows that Clarkson & Co. were the agents of the steamship company that carried the flour in question from Seattle to Port Arthur, and were also importers, merchants, and insurance agents, and had one of the three warehouses at Port Arthur, all of which facts were well known to the Port Arthur bank. The flour in question was carried to Port Arthur by the ship Hyades, which reached there about the middle of January, 1904. The evidence also shows that Clarkson & Co. were large customers of the bank. The succeeding ship of the steamship company, also carrying flour among other things, reached Port Arthur about the 7th of February, 1904. Short testified, among other things, that when the Hyades arrived with the 35,312 quarter sacks of flour in question, there were but from 6,000 to 8,000 sacks in Clarkson & Co.'s warehouse, and that when that shipment arrived he went to the Port Arthur bank on behalf of Clarkson & Co. to accept the draft drawn for the purchase price of it, and did so; that when he accepted the draft Mr. Ofsiankin, on behalf of the bank, authorized Clarkson & Co. to take immediate possession of the flour and sell it, and that he (Short) on behalf of that firm gave the bank what he designates as a "letter of guaranty," and what Davidson in his deposition designates as one of "hypothecation," recognizing the flour as the property of the bank until paid for, and agreeing to pay over to the bank the proceeds thereof until full payment was made; that the letter was "the regular form of bank guaranty; it was a printed form," said the witness. And both Short and Davidson testified that what was done in the matter of the shipment here in question was in accordance with a long-established custom between the Port Arthur bank and Clarkson & Co.; Short testifying that:

"From the year 1900 the same rule existed. We always gave the bank a letter of guaranty against—a letter of guaranty to take delivery of the cargo, and the cargo belonged to them until it was paid for, and we sold it out and deposited the money in the bank from time to time as Clarkson & Co. got it in."

Davidson in his deposition corroborates the testimony of Short in that regard, and it is a most significant circumstance that, although it

appears from the evidence that, during the times it was being taken Mr. Ofsiankin was the manager of the plaintiff in error's bank at Vladivostok, he was not called to contradict the testimony of Short and Davidson; nor did the plaintiff in error produce the written agreement between the parties, delivered to the bank, according to the testimony of those witnesses, nor in any way account for it. Short testified that upon the acceptance by Clarkson & Co. of the draft in question, and the delivery by that firm to the Port Arthur bank of the documents mentioned, Clarkson & Co. took possession of the 35,312 quarter sacks of flour, and that they thereupon commenced selling it, and paying into the bank the proceeds thereof, is a fair inference from his testimony, as well as that of Davidson.

It appears from the latter's testimony that by reason of orders of the Russian military authorities he was compelled to leave Port Arthur, and did so on the 17th of February, 1904. Being asked on his direct examination when the last shipment of flour from the Centennial Mill Company to Clarkson & Co. arrived at Port Arthur, he answered that it arrived there about the 8th of February, 1904, but that he could not state positively, as he was not there at the time, and, being asked on what steamer that flour arrived at Port Arthur, answered, "On one of the steamers operated by the Boston Steamship Company or the Boston Towboat Company, either the Hyades or the Pleiades;" and, being asked as to the quantity of flour that arrived by the steamer so referred to by him, answered, "Between 35,000 and 40,000 sacks." In his subsequent testimony on both direct and cross examination the witness was evidently quite confident that the steamer that brought that flour was the Pleiades, but the flour itself, the witness distinctly testified, was sold by him before leaving Port Arthur to the firm of Ginsburg & Co., which he testified was a large Russian firm doing an extensive business with the Port Arthur bank, and with its principal place of business at that place, and which sale he testified he had to make in order to protect Clarkson & Co. against the war conditions then prevailing. His testimony is, in part, that he arranged with Ginsburg & Co. to pay a part of the money for which he sold the flour into the Port Arthur bank, and to take a draft from that company on Shanghai in his favor, which he intended to pay into Clarkson & Co.'s branch at that place, and that he took the head of the firm, Ginsburg, to the Port Arthur bank, and explained to the manager of that bank the terms of the sale, to which he agreed.

Short testified that the Pleiades arrived at Port Arthur about the 7th of February, and that he himself left there on board of that vessel, and that not more than 1,500 or 2,000 sacks of flour were landed at Port Arthur from that ship, so that the jury might well have concluded that the 35,000 or 40,000 sacks of flour which Davidson thought were brought by the Pleiades was the consignment of flour that the Hyades carried to that port a few weeks before. As a matter of course that, and all other inconsistencies in the testimony of the various witnesses, as well as their veracity, were matters for the determination of the jury, in the light of all of the facts and circumstances of the case. Moreover, there was testimony tending to show that

from the 1st of January, 1904, to November 23d of the same year, Clarkson & Co. paid into the Port Arthur bank 126,928 rubles and 97 kopeks.

We are of opinion that we would not be justified in holding that there was no evidence to sustain the special finding of the jury to the effect that the amount of the draft in question was paid to the Port Arthur bank.

[2] We are also of opinion that upon the issue of payment proof as to the course of dealing between the Port Arthur bank and Clarkson & Co., with respect to similar previous drafts between the same parties, was competent, and therefore that there was no error in the ruling of the trial court in respect to the admission of such testimony; and, finding no error in the instructions of the court upon the question of payment, the judgment must be affirmed, regardless of other questions elaborately and ably argued by counsel for the plaintiff in error, since they are immaterial in view of the special verdict.

The judgment is affirmed.

HECKERT v. CENTRAL DISTRICT & PRINTING TELEGRAPH CO.

(Circuit Court of Appeals, Fourth District. July 11, 1913.)

No. 1,146.

1. APPEAL AND ERROR (§ 917*)—DEMURRER TO DECLARATION—REVIEW.

On a writ of error to review an order sustaining a demurrer to the declaration, the allegations contained in the declaration, with all reasonable inferences to be drawn therefrom, are to be treated as true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3706-3709; Dec. Dig. § 917.*]

2. MASTER AND SERVANT (§ 106*)—INJURIES TO SERVANT—DANGEROUS PLACE—ELECTRICAL APPLIANCES.

Where defendant telephone company permitted a city and an electric company to place high tension electric wires on the company's telephone poles, and defendant failed to install a circuit breaker resulting in injury to plaintiff, an employé, while at work on the pole, defendant could not be exonerated from liability because the agency which was the cause of the injury was placed by the city or the electric company in close proximity to where plaintiff was required to work, under the rule that, where a servant is injured by two contributing causes, for one of which the master is liable, and not for the other, the master cannot escape liability, though defendant was not chargeable with the negligence of the city or the electric company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 193-198; Dec. Dig. § 106.*]

3. MASTER AND SERVANT (§ 106*)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

Where defendant telephone company permitted a city to construct high tension electric wires on defendant's telephone poles, it thereby became defendant's duty to see that such steps were taken as were reasonably necessary, by requiring insulation or otherwise, to protect its employés from injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 193-198; Dec. Dig. § 106.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. MASTER AND SERVANT (§§ 285, 286*)—INJURIES TO SERVANT—ELECTRICITY—PROXIMATE CAUSE—QUESTION FOR JURY.

Where defendant telephone company permitted a city and an electric company to string high tension electric wires on its telephone poles and did not install circuit breakers or other safety appliances, and plaintiff was injured while at work on one of such poles by coming in contact with a high tension wire, whether defendant was negligent and whether its negligence was the proximate cause of the injury was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001-1003, 1006-1008, 1010-1016, 1017-1033, 1035-1044, 1046-1050, 1053; Dec. Dig. §§ 285, 286.*]

In Error to the District Court of the United States for the Northern District of West Virginia, at Philippi; Alston G. Dayton, Judge.

Action by Ernest C. Heckert against the Central District & Printing Telegraph Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

This is an action at law brought by the plaintiff in error against the Central District & Printing Telegraph Company, defendant in error, in the District Court of the United States for the Northern District of West Virginia.

The plaintiff in error will be referred to as "plaintiff" and defendant in error will be referred to as "defendant."

The cause of action is alleged in detail in the declaration, which will be epitomized as follows:

The defendant was engaged in the telephone business in the city of Grafton, W. Va., maintaining its telephone lines on the streets and alleys of the city. Among its lines were those over St. Marys street and Latrobe street, and at the junction of those streets. One of the telephone poles, about 40 feet high, stood at that junction. Near the top of this pole was a crosspiece to which the wires of the telephone line were attached. It was the duty of the employes of the telephone company to climb this pole and work at and near the top.

The city of Grafton owns its own electric light plant and lighting system, and the telephone company permitted the city to use said pole for the purpose of attaching to it a span wire leading from an electric light pole or electric light lamp of the city to said telephone pole. The electric light lamp was suspended over the street at the said junction, and on the north or northwest of Latrobe street and St. Marys street, at that point, the city had an electric light pole, opposite to which was the telephone pole of the defendant, and near the top of the telephone pole was attached the span wire leading from the electric light pole to the telephone pole. This span wire supported the electric light lamp over the streets, and at the time of the injury complained of the span wire was against or within a few inches of a wire or wires belonging to the Grafton Gas & Electric Light Company, which last-named wire or wires were not insulated at the point where they rested against the span wire and which were used in conveying large currents of electricity. No current breaker was installed on the span wire between the defendant's telephone pole to which it was attached and the point where the electric light company's wires rested upon or came in close proximity to it. This greatly endangered the safety of the employes of the telephone company who might and did have to work on or at or near the top of said telephone pole.

The plaintiff was in the employ of the defendant as a lineman for hire, wages, and reward. His duties consisted, among other things, in stringing wires on the poles of the telephone lines of the defendant and in repairing its wires and climbing poles to cut wires in order to splice them. On May 6, 1911, it was necessary for him to go up the aforesaid pole to work thereon and cut one of the wires on the pole in order to splice it.

It is charged in the declaration that it was the duty of the defendant to furnish the plaintiff a reasonably safe and secure place in which to work and to use due care that the telephone pole and the span wire and attachments

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

should be in safe and proper condition so that the plaintiff could work thereon with safety. It is also charged that the telephone pole was an insecure and unsafe place in which to work because the span wire was resting upon or in close proximity with the wires of the electric light company conveying high currents of electricity. It is alleged that all of this was unknown to the plaintiff, but that the defendant knew or had reason to know thereof, and that it was the duty of the defendant to render the telephone pole a safe place upon which to work by removing the span wire or by having a proper circuit breaker installed thereon between the telephone pole and the point where the span wire crossed the electric light company's wires. It is also alleged that the defendant wholly disregarded its duty and suffered and permitted the span wire to remain attached to the telephone pole in the aforesaid condition for about nine months.

It is further alleged that on the date above mentioned, May 6, 1911, the electric light company's wires were charged with a strong and powerful current of electricity dangerous to human life; and the plaintiff, while in the exercise of ordinary care, and wholly ignorant of the close proximity of the said electric light wires to said span wire or telephone pole, and of the fact that the electric light company's wires were not insulated and that the said telephone pole was an unsafe and insecure place to work, while in the performance of his duty as lineman, went on the pole to work thereon; and while ascending, without any fault or negligence on his part, and in consequence of the negligence and carelessness of the defendant in permitting the span wire to be attached to the pole, or to be attached thereto without proper circuit breaker thereon, he came in contact with the span wire and received a current of electricity passing from the electric light company's wire through the span wire into his body by which he was greatly shocked, and his hands, feet, and other members of his body burned and injured, to his damage \$20,000.

The defendant demurred to the declaration; and the District Court sustained the demurrer, dismissed the action, and rendered judgment for costs against the plaintiff. The plaintiff excepted to the ruling of the lower court, and the case comes here on writ of error.

Warder & Robinson, of Grafton, W. Va., for plaintiff in error.

W. S. Meredith, of Fairmont, W. Va., for defendant in error.

Before PRITCHARD, Circuit Judge, and BOYD and SMITH, District Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). While the record is silent as to the grounds upon which the demurrer to the declaration was sustained, we gather from the contention of counsel that the learned judge who heard the case in the court below was of the opinion that the facts upon which plaintiff relied to sustain the charges of negligence against the defendant were innocent in themselves, and that had it not been for the negligent act of the city as well as that of the electric company plaintiff would not have sustained any injury. In other words, that the negligent acts of the defendant complained of by the plaintiff were not the proximate cause of the injury; and further that the plaintiff assumed the risk incident to his employment.

The first question that arises is whether the defendant, in permitting the city of Grafton the use of its poles, was charged with the duty of taking reasonable precaution to make its poles where its employes were required to work reasonably safe in view of their use by the city.

The plaintiff insists that the defendant was negligent in that it permitted a condition to exist which endangered the safety of its em-

ployés; that it was the unsafe condition of the span wire on account of the failure to install a circuit breaker that resulted in the injury.

[1] In considering this question the allegations contained in the declaration, with all reasonable inferences to be drawn therefrom, are upon the demurrer to be treated as true. It was undoubtedly the duty of the defendant to provide a reasonably safe place for the employés in which to work, and the test in this instance is whether the defendant failed to exercise due care as to the span wire at a time when it had knowledge as to existing conditions, or by the exercise of reasonable diligence could have known thereof.

[2] It is true that the defendant is not chargeable with the negligence of the city of Grafton or the electric company, but, if the defendant negligently permitted the city to use its poles without installing a circuit breaker and an injury resulted therefrom, the defendant cannot be exonerated because of the fact that the agency which was the cause of the injury was placed by another in close proximity to where the plaintiff was required to work.

[3] It should be borne in mind that, among other things, it is alleged in the complaint that the city of Grafton obtained permission from the defendant company to attach its wires to the telephone poles, and, such being the case, it thereby became the duty of the defendant company to see that such steps were taken as were reasonably necessary, by requiring insulation or otherwise, to protect its employés.

The allegation is that the defendant was negligent in that it took no precaution to provide against the danger to which a highly charged exposed wire subjected its employés, and that the defendant knew or by due care would have known of the danger. We do not think it can be said that if the facts alleged are established by proof the court would be warranted in holding as a legal inference that they furnish no evidence of actionable negligence by the defendant. On the contrary, it seems clear that proof of the knowledge of the conditions alleged or of such facts as imposed the duty to know them, and of the failure of the master to guard against them, would raise an issue of negligence to be decided by the jury.

In the case of *Barto v. Iowa Telephone Co.*, 126 Iowa, 241, 101 N. W. 876, 106 Am. St. Rep. 347, this question was passed upon by that state; the first syllabus being in the following language:

"A telephone company which acquiesces in the use of its poles by an electric company is charged with the duty of seeing to it that the light wires do not expose its employés to unusual danger."

Also the second syllabus is to the effect that:

"A telephone company permitting the use of its poles for carrying electric light wires must use a degree of care for the protection of its employés commensurate with the danger involved."

Also in section 666a, p. 1073, 2 Joyce on Electricity, is to be found the following statement as to the rule in such cases:

"* * * Where a telegraph or telephone company permits another electrical company, whose wires are used to convey a dangerous current of electricity, to use its poles, it is decided that it is the duty of the former company to see that they were not so used as to expose its employés to perils the risks of which were not assumed in entering such hazardous employment. So,

where a lineman in the employ of a telephone company which permitted an electric light company to attach wires to its poles was injured by a shock of electricity from a defectively insulated light wire while on a telephone pole in the prosecution of his work, it was held that the questions of negligence were properly submitted to the jury and a verdict against the telephone company was affirmed. * * *

While the use of electricity for economic purposes is rapidly increasing, yet it must be admitted that it is one of the most dangerous agencies when not properly safeguarded by insulation or otherwise. This is a fact that is within the common knowledge of all, and as to which the defendant had full knowledge at the time it permitted the use of its poles by the electric company.

[4] Whether or not the defendant's negligence was the proximate cause of the injury is for the jury. The defense that the injury resulted wholly or proximately from the negligence of another, and that it was not the defendant's duty to anticipate and provide against the unlawful negligence of another, can be set up in the answer so as defendant can have the benefit of any such defense as the testimony on the trial may entitle him to.

The facts in this case are easily distinguished from the facts in the cases relied upon by counsel for defendant in error. Therefore we are of the opinion that they do not apply to the case at bar.

After a careful consideration of the allegations contained in the declaration, we are of the opinion that the plaintiff has stated a good cause of action, and that the court below erred in sustaining the demurrer thereto.

For the reasons hereinbefore stated, it follows that the judgment of the lower court must be reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

Reversed.

DES MOINES WATER CO. v. CITY OF DES MOINES et al.

(Circuit Court of Appeals, Eighth Circuit. July 10, 1913.)

No. 3,912.

1. WATERS AND WATER COURSES (§ 188*)—WATER COMPANIES—FRANCHISES—DURATION.

A grant to a water company by a city ordinance of a franchise to operate waterworks for a definitely fixed term, accepted and acted on by the company, terminates at the end of that term by force of the terms of the instrument of grant, and cannot be enlarged by implication.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 287, 288; Dec. Dig. § 188.*]

2. COURTS (§ 366*)—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS.

The action of the Supreme Court of Iowa in appointing three district judges to act as a court of condemnation on application of a city council after the passage of a resolution to acquire waterworks, as authorized and required by Acts 33d Gen. Assem. c. 45, as amended by Acts 34th Gen. Assem. c. 35, was at least presumptively, if not necessarily, a de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 206 F.—42

cision that the act is constitutional, and such decision is binding on a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. § 366.*

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank of Memphis v. City of Memphis*, 49 C. C. A. 468; *Converse v. Stewart*, 118 C. C. A. 215.]

3. CONSTITUTIONAL LAW (§ 61*)—OFFICERS (§ 30*)—DELEGATING LEGISLATIVE POWER TO JUDGES—"OFFICE."

The powers and functions of the three judges constituting the court of condemnation under said act in determining the value of the waterworks property after a hearing on evidence as provided by the act are judicial, and not legislative, and the act is not in violation of Const. Iowa, art. 3, § 1, which provides that no person charged with the exercise of judicial powers shall exercise legislative powers, nor of article 5, § 5, which declares that a district judge shall not be eligible to any other office during his term, except that of judge of the Supreme Court; the temporary position of the judges under such appointment not being an "office" within the meaning of the provision.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 106-107; Dec. Dig. § 61.* Officers, Cent. Dig. §§ 37-43; Dec. Dig. § 30.*

For other definitions, see Words and Phrases, vol. 6, pp. 4921-4931; vol. 8, p. 7736.]

4. REMOVAL OF CAUSES (§ 4*)—CAUSES REMOVABLE—"SUIT"—CONDEMNATION PROCEEDINGS.

A proceeding under such act, which has progressed only so far as the appointment of the judges and their organization as a court, is not a "suit," within the meaning of the removal act (Judicial Code [Act March 3, 1911, c. 231] § 28, 36 Stat. 1094 [U. S. Comp. St. Supp. 1911, p. 140]), and is not removable thereunder.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 11-20; Dec. Dig. § 4.*

For other definitions, see Words and Phrases, vol. 7, pp. 6769-6778; vol. 8, p. 7809.]

Appeal from the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Suit in equity by the Des Moines Water Company against the City of Des Moines and others. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 194 Fed. 557.

J. L. Parrish, of Des Moines, Iowa (A. C. Parker and W. E. Miller both of Des Moines, Iowa, on the brief), for appellant.

R. O. Brennan and H. W. Byers, both of Des Moines, Iowa, for appellees.

Before SANBORN and CARLAND, Circuit Judges, and WILLARD, District Judge.

WILLARD, District Judge. The appellant, which was the plaintiff below, commenced this suit to secure a declaration that chapter 45 of the Acts of the 33d General Assembly of the state of Iowa, as amended by chapter 35 of the Acts of the 34th General Assembly of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Iowa, is unconstitutional. The court below sustained a demurrer to the bill and dismissed it.

The law referred to authorizes a city to acquire by condemnation the waterworks located therein when "the contract of franchise of such utility has expired." By the terms of the law the city is required to present to the Supreme Court a resolution of its governing body providing for the acquisition of the waterworks, and thereupon it is made the duty of the court to appoint three district court judges to act as a court of condemnation. These judges are required to perform all the duties imposed upon commissioners in the condemnation of property.

Under the provisions of this law, the city of Des Moines proceeded to acquire the property of the plaintiff, the Des Moines Water Company. It presented to the Supreme Court a resolution of its common council providing for such acquisition. That court thereupon appointed three district judges to act as a court of condemnation. These judges organized as such court, and immediately upon their organization the Water Company filed a petition in the court of condemnation for a removal of the proceeding to the United States District Court for the Southern District of Iowa. This petition was denied. Later on, the company, a corporation of Maine, presented this bill, asking that the city be enjoined from further prosecution of the proceeding of condemnation, on the grounds, that (a) its franchise had not expired, and it did not therefore come within the law; (b) the law was unconstitutional; and (c) the proceeding had been removed into the United States Circuit Court.

[1] (a) The rights of the Water Company were created by an ordinance passed May 1, 1871. Section 12 of that ordinance is in part as follows:

"Provided, however, that to entitle the Des Moines Water Company to the rights and privileges of this ordinance the company shall, within, ten days from this date, accept in writing all its privileges, duties and obligations, signed by its president and attested by its secretary, which privileges, powers and franchises shall extend to said Des Moines Water Company for the period of forty years from this date."

The city took no proceedings to condemn the property of the plaintiff until after the expiration of 40 years from May 1, 1871. By the plain terms of section 12, "the contract of franchise of the owner of the utility" had expired when such proceedings were commenced. This section clearly brings the city within the terms of chapter 45. There is nothing in any other part of the ordinance to limit the language of section 12. Section 1 provides, among other things, that:

"Said company shall have the exclusive right to construct and operate their waterworks as herein specified for the term of forty years from this date."

The effect of this provision was not to extend the term fixed by section 12, but merely to make the franchise exclusive. In view of the limitation of time contained in section 12, cases, many of which are cited by the plaintiff, holding a grant to be perpetual when no limitation of time is expressed therein, are not relevant to this case.

Section 8 of the ordinance authorized the city at any time after six months from the date of the ordinance to purchase the waterworks, but this right cannot possibly be construed as extending the term fixed by section 12. *City & County of Denver v. New York Trust Co.*, 229 U. S. 123, 33 Sup. Ct. 657, 57 L. Ed. —, United States Supreme Court, May 26, 1913. In appellant's brief it is said:

"No provision is made in the ordinance for the disposition of the property at the expiration of the forty years, which indicates that it was not contemplated by the parties that the franchise would expire at that time."

That claim is fully answered by the following quotation from *Detroit United Railway v. Detroit*, 229 U. S. 39, 33 Sup. Ct. 697, 57 L. Ed. —, United States Supreme Court, May 26, 1913:

"Nor do we find more force in the claim of an implied contract to permit the railway to remain in the streets under such reasonable arrangements for public service as the situation might require. The right to grant the use of the streets was in the city. It had exercised it, had fixed by agreement with the railway the definite period at which such rights should end. At their expiration the rights thus definitely granted terminated by force of the terms of the instrument of grant. The railway took the several grants with knowledge of their duration, and has accepted and acted upon them with that fact clearly and distinctly evidenced by written contract. The rights of the parties were thus fixed, and cannot be enlarged by implication. *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296 [22 C. C. A. 334]; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234 [91 N. W. 1081]; *Scott County Road Company v. Hines*, 215 U. S. 336 [30 Sup. Ct. 110, 54 L. Ed. 221]; *Turnpike Company v. Illinois*, 96 U. S. 63 [24 L. Ed. 651]."

The claim of the plaintiff that its franchise has not expired therefore cannot be sustained.

(b) Chapter 45 is claimed to be unconstitutional, because it confers upon the Supreme Court powers not judicial, and because it confers upon that court powers not supervisory or appellate, both in violation of certain provisions of the Constitution of Iowa.

The Supreme Court of Iowa has not passed upon the constitutionality of this act, unless it did so when it appointed the court of condemnation in this case, and perhaps when it so acted in other cases.

[2] Whether or not such appointment in this case was a holding that the law was constitutional was not decided by the three judges who denied the application made herein for a preliminary injunction. (*D. C.*) 194 Fed. 557. It is to be noticed that in this proceeding the order was made by the court, and not by the Chief Justice. Did the making of that order necessarily decide that the law was constitutional? We think that it did. The bill does not show whether or not argument was heard by the court before the order was made, nor whether or not any opinion was filed with the order. If an opinion had been filed discussing the law and the objections made to its constitutionality, and holding it valid, it is not questioned but that this court would be bound to follow that ruling. If it appeared that the case was fully argued on both sides upon the claims now presented, and that the court after such argument had made an order, as it did, without filing an opinion, can it be doubted that this court would consider itself bound to hold in conformity with the ruling indicated by the filing of the order? Whether any argument was heard or not, it cannot be be-

lieved that the Supreme Court took upon itself the performance of a duty sought to be imposed upon it by a new law, without carefully considering its power so to do. But whether it did or not we are bound to presume that it did. In *Cross v. Allen*, 141 U. S. 528, on page 538, 12 Sup. Ct. 67, on page 71 (35 L. Ed. 843), the court said:

"It is said, however, that the cases just cited were decided without having been fully argued and without mature consideration of this question, upon the mistaken assumption that it has been previously decided in the affirmative by the Supreme Court of the state, and therefore they have not become a rule of property in the state and are not binding upon this court. We are not impressed with this contention. Such argument might with propriety be addressed to the Supreme Court of the state, but it is without favor here. We are bound to presume that when the question arose in the state court it was thoroughly considered by that tribunal, and that the decision rendered embodied its deliberate judgment thereon."

[3] It is also claimed that the law is unconstitutional, because it is in violation of article 3, section 1, of the Constitution of Iowa, which provides that no person charged with the exercise of judicial powers shall exercise legislative powers. The powers of the district court judges are thus defined in the act:

"Such court of condemnation shall have the power to summon and swear witnesses, take evidence, order the taking of depositions, and require the production of any books and papers, as is provided in chapter I, title XXIII of the Code, and a reporter may be appointed, as is provided for the district court; and such court shall perform all the duties of commissioners in the condemnation of property and such duties and the method of condemnation and procedure, including provisions for appeal, shall, except as is herein otherwise specially provided, be the same, as nearly as may be, as is provided in chapter 4, title X of the Code, but the clerk of the district court of the county where such city or town is located shall perform all the duties required of the sheriff in said chapter and, in case of a vacancy in said court of condemnation, such vacancy shall be filled in the same manner in which the original appointment was made and the court may review any evidence of its record made necessary by reason of such vacancy."

The duties of commissioners under chapter 4, title 10, of the Code are set out in sections 1999 and 2000 of the Code of 1897. Section 1999 provides in part that:

"If the owner of any real estate necessary to be taken for either of the purposes mentioned in this chapter refuses to grant the right of way or other necessary interest in said real estate required for such purposes, or if the owner and the corporation cannot agree upon the compensation to be paid for the same, the sheriff of the county in which such real estate may be situated shall, upon written application of either party, appoint six freeholders of said county, not interested in the same or a like question, who shall inspect said real estate, and assess the damages which said owner will sustain by the appropriation of his land for the use of said corporation, and make report in writing to the sheriff of said county; and, if the corporation shall, at any time before it enters upon said real estate for the purpose of constructing said railway pay to the sheriff, for the use of the owner, the sum so assessed and returned to him as aforesaid, it may construct and maintain its railway over and across such premises."

Section 2000 provides in part as follows:

"The freeholders appointed shall be the commissioners to assess all damages to the owners of real estate in said county."

Section 2009 of the same Code gives either party the right to appeal from the assessment to the district court, and that court is required to try the same as if an action by ordinary proceedings.

That the determination of an issue of fact after hearing and considering the evidence is a judicial function cannot be doubted. In *City of Burlington v. Leebrick*, 43 Iowa, 252, on page 259, the court said:

"But the question, by whomsoever determined, involves the examination and weighing of testimony, and partakes of the nature of a judicial act. It is not the sole province of courts to determine 'what the existing law is in relation to some existing thing already done or happened.' It is as much a judicial act to determine what are the facts of a particular case, and whether they bring the case within the operation of a recognized principle of the existing law."

In *State v. Barker*, 116 Iowa, 96, on page 110, 89 N. W. 204, on page 209 (57 L. R. A. 244, 93 Am. St. Rep. 222), so much relied upon by the plaintiff, the court, speaking of the powers which the Legislature might confer upon constitutional courts, said:

They "may appoint commissioners to apportion and assess damages for the opening of a highway. * * * But in each and all of these cases the powers are either judicial in character, or are to be exercised in the discharge of functions pertaining to the judicial department. If the matter is one requiring some judicial determination, it may be left to the court or to judges, although it is not involved in the determination of an actual case litigated in the ordinary manner. Thus the propriety and necessity of the construction of a bridge over railway tracks may be left to a judge for decision."

In *Ford v. Town of North Des Moines*, 80 Iowa, 626, 45 N. W. 1031, a law authorizing the district court to appoint commissioners to call an election for the purpose of organizing a town, was held constitutional.

There is nothing in the case of *Kaw Valley Drainage District v. Metropolitan Water Co.*, 186 Fed. 315, 108 C. C. A. 393, cited by plaintiff, which holds that the determination of the amount of damages in a condemnation proceeding is not a judicial function.

It is said that chapter 45 is unconstitutional, because it violates that provision of the Constitution of Iowa (article 5, § 5) which declares that a district judge shall not "be eligible to any other office except that of judge of the Supreme Court, during the term for which he is elected"; it being argued that these judges, when they are appointed to sit in a court of condemnation, are appointed to another office. There is nothing in this point. Although this body is called a court, the members thereof can be no more considered a judicial tribunal than can the six freeholders selected by the sheriff to perform similar duties. The temporary position which they occupy can in no sense be called an "office," within the meaning of that term as used in said article 5, § 5.

[4] (c) At the time the petition for removal was filed the proceeding was not then a "suit," within the meaning of the removal acts (see Act March 3, 1911, c. 231, § 28, 36 Stat. 1094 [U. S. Comp. St. Supp. 1911, p. 140]). *Kaw Valley Drainage Co. v. Metropolitan Water Co.*, 186 Fed. 315, 108 C. C. A. 393.

The decree of the court below is affirmed.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(Circuit Court of Appeals, Second Circuit. June 26, 1913.)

No. 276.

RAILROADS (§ 209*)—MONEY PAID TO RECEIVER—REIMBURSEMENT FOR OBLIGATIONS INCURRED—RIGHTS OF CREDITOR.

The receiver of a railroad company, which had operated the tracks of the M. Co. under a lease, in an apportionment proceeding was held entitled to reimbursement out of certain funds for an expenditure made on certain of the leased lines of the M. system, and for all other expenditures made and obligations incurred by the operating railroad company prior to the appointment of receivers for the purposes described in a provision of the lease. *Held*, that petitioner, having furnished paying gravel to the operating company to be used in the reconstruction of one of the lines of the M. system, and such gravel having been used for the improvement of the M. property, was within the requirements of the lease, and the receivers, having received money under the apportionment decree for the settlement of such debts, held the same as trustees for the petitioner to the extent of his claim.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 692-695; Dec. Dig. § 209.*]

Appeals from the District Court of the United States for the Southern District of New York.

Suit in equity by the Pennsylvania Steel Company and another against the New York City Railway Company, the Metropolitan Street Railway Company, and others. An order was entered (196 Fed. 661), apportioning a fund in the hands of the receiver of the New York City Railway Company, which was modified and affirmed on appeal, after which the Hugh Thomas Company applied for payment to it of certain funds received by the receiver under the decree to reimburse the receiver's estate for obligations incurred under a lease by the Metropolitan Street Railway Company to the City Company. An order was entered in favor of petitioner (202 Fed. 607), and the receiver and others appeal. Affirmed.

Appeal from an order of the District Court, Southern District of New York, in the New York City Railway Company and Metropolitan Street Railway Company receivership proceedings.

This matter is an outcome of the "Apportionment Proceeding" (198 Fed. 778, 117 C. C. A. 560) to which reference should be had for the facts. In that proceeding it was held that the proceeds of the action at law constituted a fund to be used for improvements upon property of the Metropolitan Company and should be paid over to the receivers of that company by the City receiver less certain deductions. Among such deductions was the following:

"The receiver of the City Company is also entitled to reimbursement from said share for the expenditures made upon the Twenty-Third Street loop and the First Avenue line of said Metropolitan system, described in the foregoing findings of fact, and for all such other expenditures made and obligations incurred by the City Company prior to the appointment of receivers on September 24, 1907, for the purposes described in article XV of the lease made by the Metropolitan Company to the City Company, dated February 14, 1902, as shall hereafter be found due upon the accounting to be held upon further order of the court. * * *

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The petitioner, the Hugh Thomas Company, furnished paying gravel to the amount of \$869.09 to the City Company to be used in the reconstruction of the First Avenue line of the Metropolitan system and such gravel was in fact used for the improvement of the Metropolitan property and came within the purposes stated in article XV of the Metropolitan-City lease above referred to. Consequently, it is conceded by all parties that under the "apportionment decision" the City receiver had the right to retain the amount stated from the fund apportioned to the action at law, and the question presented in this case is whether the petitioner is entitled to it or whether it should be distributed among all the creditors of the City Company.

The District Court decided in favor of the petitioner.

Other material facts are stated in the opinion.

Dexter, Osborn & Fleming, of New York City (Matthew C. Fleming, of New York City, of counsel), for Ladd, as Receiver.

Masten & Nichols, of New York City (Arthur H. Masten, William M. Chadbourne, and Ellis W. Leavenworth, all of New York City, of counsel)), for Robinson, as Receiver.

Geller, Rolston & Horan, of New York City (Bronson Winthrop and Charles T. Payne, both of New York City, of counsel), for Farmers' Loan & Trust Co.

R. R. Rogers, of New York City (J. Tufton Mason and Alfred Ely, Jr., both of New York City, of counsel), for New York Rys. Co.

Davies, Auerbach & Cornell, of New York City (Julien T. Davies and Brainard Tolles, both of New York City, of counsel), for Guaranty Trust Co.

Byrne & Cutcheon, of New York City (James Byrne, F. W. M. Cutcheon, and C. M. Travis, all of New York City, of counsel), for Pennsylvania Steel Co.

B. S. Catchings, of New York City, for committee of tort creditors.

O'Brien, Boardman & Platt, of New York City (Morgan J. O'Brien, Chas. E. Rushmore, George W. Hamlin, and Clarence G. Galston, all of New York City, of counsel), for Hugh Thomas Co.

Before COXE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The City receiver holds and has the right to hold the amount of the petitioner's demand. The question is whether he holds it in trust for the petitioner.

No express trust is shown. No lien is claimed. No agreement between the City Company and the Metropolitan Company running in terms to the petitioner or to the class to which it belongs appears. No express duty is imposed in its favor by the apportionment decree. The petitioner's demand must stand or fall as based upon an implied trust. And if a trust can be implied it must be upon the theory that although not stated so expressly the fund in question was really set aside by the action of the parties and the court for the payment of the petitioner's demand.

Now it must be regarded as established that where in a transaction between two persons an amount is permitted to be retained by one for payment to a third person, a trust will be created in his favor which

he may enforce.¹ *Western Tie, etc., Co., v. Brown*, 196 U. S. 502, 25 Sup. Ct. 339, 49 L. Ed. 571; *Carley v. Graves*, 85 Mich. 483, 48 N. W. 710, 24 Am. St. Rep. 99; *Matter of Le Blanc*, 14 Hun (N. Y.) 8; *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. (N. Y.) 657. The underlying principle is the same as if money were placed in the hands of one person to be delivered to another and in such a case the Supreme Court has said (*McKee v. Lamon*, 159 U. S. 317, 322, 16 Sup. Ct. 11, 13 [40 L. Ed. 165]):

"There can be no doubt of the general proposition that when money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which he may enforce by bill in equity, if not by action at law."

In the present case, as already shown, there was no distinct agreement between the parties, nor did the apportionment decree order, that the moneys which the City receiver had the right to hold to *reimburse* his estate for obligations incurred should be used to meet such obligations. But we think that such was the substance of the agreements and the decree. The history of the transactions culminating in the order demonstrates, in our opinion, that the receiver of the City Company was entitled only to reimbursement for expenditures; that he had no right to retain any moneys except for such purpose, and that when he did retain them he assumed an obligation, enforceable in equity, to meet the obligation for which he retained them.

More in detail: The lease and contracts show that the fund in question was provided for the purpose of reimbursement for expenditures—to enable the City Company to pay debts incurred by it in construction work—and not for the purpose of paying it the value of improvements made. The instruments repeatedly refer to "expenditures." Moreover in practice it appears that the City Company received reimbursement only for money actually expended. Manifestly it was not intended that the City Company should do the work on credit, leave its obligations unpaid, acquire a floating debt and subject the Metropolitan property to mechanics liens. Besides, the relations of the parties were such that the City Company had no right to collect more than it expended. Both the agreements and the decree contemplated *indemnification*—reimbursement of out-of-pocket expense. The City receiver holds an amount representing the petitioner's demand. He holds it to reimburse himself on account of such demand. Every equitable consideration requires that he should pay it over. And it is quite immaterial that the petitioner may have known nothing about the City-Metropolitan arrangements when it delivered the gravel.

For these reasons we hold that upon the agreements and the decree the City receiver by deducting from the fund and holding moneys on account of construction obligations became charged with a duty to the Metropolitan interests to discharge such obligations upon which a trust arose enforceable in equity in favor of the construction creditors like the petitioner, and, consequently, that the District Court was right in holding the petitioner entitled to payment.

¹ *Dillon v. Barnard*, 21 Wall, 430, 22 L. Ed. 673, is not regarded as inconsistent with this statement.

In the circumstances the receiver as a trustee was not chargeable with any more interest than he actually received.

The order of the District Court is affirmed with costs.

FERRO CONCRETE CONST. CO. v. CONCRETE STEEL CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1913.)

No. 2,298.

1. PATENTS (§ 310*)—"INVENTION"—DETERMINATION ON DEMURRER.

"Invention" is a question of fact, and, when it is raised on demurrer, must be determined from what is shown on the face of the patent, aided by matters of common and general knowledge at the time of the alleged invention of which the court may take judicial notice, as to which it may reinforce its recollection by antecedent and reliable publications.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. § 310.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3749-3754.]

2. PATENTS (§ 41*)—INVENTION—EVIDENCE.

In seeking to ascertain on which side of the dividing line between invention and mechanical skill the device of a patent belongs, if it shall appear that through a new combination a novel and useful result is achieved, the court is not to be misled by the apparent simplicity of the device nor by the fact that the elements of the combination are old.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 48; Dec. Dig. § 41.*]

3. PATENTS (§ 328*)—VALIDITY—CONCRETE FLOOR.

The Nolte patent, No. 859,511, for a process of constructing a concrete floor by which the nailing sleepers are first placed in position and attached to the temporary floor by brackets and the concrete laid in a single layer, *held* not void on its face for lack of invention.

Appeal from the District Court of the United States for the Southern District of Ohio, Western District; Howard C. Hollister, Judge.

Suit in equity by the Ferro Concrete Construction Company against the Concrete Steel Company and the Isaac Faller's Sons Company. Decree for defendants, and complainant appeals. Reversed.

Murray & McCallister, of Cincinnati, Ohio (W. F. Murray, of Cincinnati, Ohio, of counsel), for appellant.

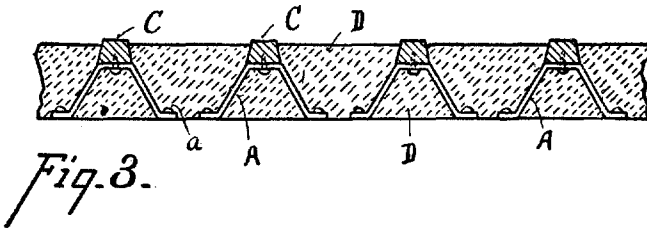
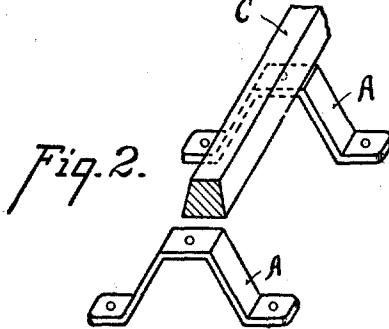
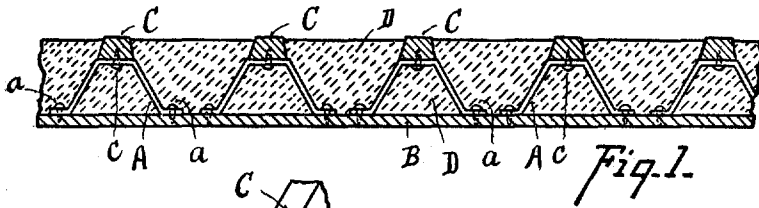
J. N. Ramsey and Charles A. J. Walker, both of Cincinnati, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. The only question of importance in this case is whether a certain patent is void upon its face for lack of invention. The suit was for infringement of letters patent No. 859,511, for "concrete floor construction," granted to appellant as assignee of the inventor, Louis H. Nolte. Apart from some minor features, the bill of complaint as amended is in the usual form. It was dismissed upon demurrer, and the plaintiff below appeals. The de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

clared object of the invention is "a construction which will simplify and render less expensive the process of laying wooden sleepers in the



surfaces of concrete floors." The accompanying drawings, as in substance described in the specification, show: (1) A horizontal view of a floor in course of construction, with brackets sustaining the sleepers, and all resting on the temporary floor; (2) a perspective view of part of a sleeper and its supporting brackets; and (3) a horizontal sectional view of a concrete floor construction. It is stated in the specification that the customary method of making concrete floors had been—

"* * * to spread a layer of concrete upon the temporary flooring, to allow this concrete to harden, then to lay the wooden sleepers, which afford a nailing surface, upon this first layer of concrete, and then to fill in around the sleepers with another layer of concrete."

The patented method described is: First, to nail rows of brackets to the sleepers; next, to nail the brackets to the temporary floor; and then to place the concrete about the brackets and sleepers so as to leave the upper faces of the sleepers exposed. This follows:

"It is seen that the process of constructing the floor with my supporting brackets for the sleepers, is a continuous one, that is, that the concrete is laid at one operation. Besides simplifying the method of forming the flooring, the brackets distribute the strain due to the nailing of the permanent

floor to the sleepers, over a greater area of concrete and thus prevent any tendency to crack in the same in securing the permanent floor in place."

There is but one claim:

"In a concrete floor in the course of construction, the combination of the temporary floor or centering, sleepers, brackets secured in rows upon the floor beneath and supporting the sleepers, and concrete surrounding the brackets and the sleepers, leaving the upper faces of the sleepers exposed."

Profert is made in the bill of the letters patent, and the record contains a copy. Many decisions are cited by counsel, especially for the appellees, in support of their respective claims of validity and invalidity of the patent. The decisions are, of course, helpful so far as they announce settled and apposite principles of law; but the ultimate assistance they afford must depend upon how the subjects they treat are related to the subject of the instant case. It could serve no useful purpose to discuss these cases, for the applicable principles of law are not in dispute; and we do not find that a patented subject closely kindred to the present one was involved in any of the cases cited.

[1] Necessarily a question of invention is one of fact. *Herman v. Youngstown Car Mfg. Co.*, 191 Fed. 579, 582, 112 C. C. A. 185 (C. C. A. 6th Cir.). Where this question is disposed of upon demurrer, as here, the sources of knowledge are confined to the letters patent and those related matters of which the court may take judicial notice, not to speak of relevant facts well pleaded. When facts of common and general knowledge tend to show that the patented device is old and so has been anticipated, or, when compared with familiar objects of a kindred character, it appears to be a product of mere mechanical skill, the quality of invention may safely be determined and should be on demurrer; and the court may reinforce its recollection of facts that were of common knowledge at the time the patent was applied for, by antecedent and reliable published matter—always distinguishing, however, between its own special knowledge and what is considered to be the knowledge of others, where the device in question has been in use. *American Fiber-Chamois Co. v. Buckskin-Fiber Co.*, 72 Fed. 511, 512, 18 C. C. A. 662 (C. C. A. 6th Cir.); *Charles Boldt Co. v. Nivison-Weiskopf Co.*, 194 Fed. 871, 874, 114 C. C. A. 617 (C. C. A. 6th Cir.). The present case affords a limited field for the exercise of judicial knowledge. No prior patents or history of the earlier art, if there be any, have been so brought to our attention as to be available on this hearing. For the most part, learned counsel themselves are not in harmony as to what is and what is not applicable common knowledge here, and they are altogether at odds as to analogies. The importance, then, of the specification in this instance cannot be ignored.

The specification shows, as stated, that the old method of construction involved two layers of concrete, the second one being laid after the first had hardened; and that the sleepers rested on the first layer and were held in place by the second layer. The patented method requires the sleepers to be fastened to the brackets and the brackets to the temporary flooring, before the laying of concrete is commenced; and only one layer of concrete—involving "one operation," as stated by the inventor—is required or laid to complete the concrete floor, so as to

leave the upper faces of the sleepers exposed. The quality of strength—the sustaining capacity of the floor—would seem to be decidedly greater in the new than in the old method; while, according to the inventor's declared object, the expense of the new method would appear to be less than that of the old. Further (and this, if true, clearly avoids impairment in construction), the inventor states that the "brackets distribute the strain due to the nailing of the permanent floor to the sleepers, over a greater area of concrete," and so prevent any tendency to crack the concrete. True, no dimensions for sleepers and brackets are stated in the specification; nor is the material mentioned of which the brackets are composed, although it may fairly be inferred from the drawings that they are of metal; and the bracket legs spread from a horizontal top, corresponding in length with the width of the beam, to flanges at the base and through which the brackets are nailed to the temporary floor. The sizes of sleepers and brackets would naturally be suggested by the purpose of the particular floor structure. If the statements of the specification are not true, they should be met by answer and evidence, not by admission.

[2] However, it is urged that these qualities do not involve invention, but simply mechanical skill. Insistence upon this distinction is by no means novel; yet the difficulty and obscurity of the distinction persist, because the dividing line baffles either definition or rule of safe general application. In seeking to ascertain on which side of the dividing line between invention and skill the device in issue belongs, if it shall appear that through a new combination a novel and useful result is achieved, the court is not to be misled by the apparent simplicity of the device, nor by the fact that the elements involved are old. As Justice Bradley said in *Loom Co. v. Higgins*, 105 U. S. 580, 591, 26 L. Ed. 1177:

"This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention. It was certainly a new and useful result to make a loom produce 50 yards a day when it never before had produced more than 40; and we think that the combination of elements by which this was effected, even if those elements were separately known before, was invention sufficient to form the basis of a patent."

See, also, *Kellogg Switchboard & Supply Co. v. Dean Electric Co.*, 182 Fed. 991, 105 C. C. A. 545 (C. C. A. 6th Cir.), and cases cited.

[3] Admittedly the combination described in the claim of the patent is new. That it produces a new and beneficial result has been sufficiently pointed out; indeed, defendants admit by their demurrer that they construct and sell concrete floors made according to this invention. They give to this floor construction "the tribute of its imitation." *Diamond Rubber Co. v. Consol. Tire Co.*, 220 U. S. 428, 441, 31 Sup. Ct. 444, 450 (55 L. Ed. 527). We conclude that the patent must on demurrer be treated as entitled to the rank of invention. *N. Y. Belting Co. v. N. J. Rubber Co.*, 137 U. S. 445, 450, 11 Sup. Ct. 193, 34 L. Ed. 741; *American Sulphite Pulp Co. v. De Grasse Paper Co.*, 157 Fed. 660, 662, 87 C. C. A. 260 (C. C. A. 2d Cir.). The ques-

tions not passed on are of a character that may be disposed of by amendment below.

The decree below will be reversed, with costs, and the cause remanded, with instructions to overrule the demurrer and require the defendants to answer.

WEIR FROG CO. v. PORTER.

(Circuit Court of Appeals, Sixth Circuit. May 16, 1913.)

No. 2,433.

1. PATENTS (§ 27*)—INVENTION—APPLICATION TO NEW USE—"DOUBLE USE"—"NEW RESULT."

A patent for a semiautomatic railway switch, which by means of a weight attached to the operating lever returns to its former position after the lever has been manually raised and held to permit the passing of a train or car, and which in its mechanical operation is the same as the device of a prior patent, from which it differs only in that one in its normal position leaves the main track open while the other leaves the switch track open, is an instance of "double use," producing no new result in a patentable sense and which does not constitute invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. § 27.*]

For other definitions, see Words and Phrases, vol. 3, p. 2187.]

2. PATENTS (§ 328*)—INVENTION—RAILWAY SWITCH.

The Porter patent, No. 556,317, for a derailing switch, is void for lack of invention in view of the prior art, and especially of the Martel patent, No. 243,933.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Suit in equity by Joseph Y. Porter against the Weir Frog Company. Decree for complainant, and defendant appeals. Reversed.

Porter brought, against the Weir Frog Company, a suit for injunction and accounting based upon infringement of Porter's patent, No. 556,317, issued March 10, 1896, for a derailing switch.

His device belongs to the common type of switches employing a movable switch point, which, when held against one rail of the track, will operate to lead the passing wheel away therefrom, and which, when held away from the track rail, permits the wheel to pass along without interruption. He shifted this switch point by a horizontal rod running out underneath the track and connected to a long rod running parallel to the track. At the further end of this latter rod was an operating lever to which was attached a weight, which would normally hold the lever in one position but would permit its manual, temporary shifting to the other position, and would then, when the hand was removed, automatically return the lever, and, through it, the switch point, to the former position. The special utility of Porter's device was found in connection with the crossing of steam railroads by electric railways where statute or custom requires that the electric car be stopped before reaching the crossing, and that the conductor go forward to ascertain whether the steam railway track is clear before permitting his car to cross. By using this device, the crew of the electric car cannot carelessly omit this precaution; the car must stop and the conductor must go forward

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the switch-operating point, which is placed where it gives a view of the steam railway track. Claim 2 sufficiently indicates the issues. It is:

"2. The combination, with the main track, of a switch normally set to divert the car from said main track, a switch-operating mechanism situated at a point in advance of said switch, whereby the conductor or other operative is compelled to precede the car and set the switch, so as to permit the car to continue its passage on the main track, and means for automatically restoring said switch to its normal position when the operating mechanism is released, substantially as specified."

The question of infringement has not been very seriously made. The case turned below, and must turn here, upon the validity of the patent. The District Court sustained the patent, and the defendant below appeals.

Wood & Wood, of Cincinnati, Ohio, for appellant.

G. B. Parkinson, of Cincinnati, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). It is not necessary to go very far into the state of the art. It is clear and is conceded that, with one exception, everything about Porter's invention was entirely common. Switches and switch points were old. Operating them by rods or cables running to a distant point was old. The use of a spring or weight to hold the switch point normally in one of its two alternative positions, so that it would always be in that position, excepting while temporary force held it in another position, was old. It was old to operate a switch of this particular kind from a distant point. This kind of switch, properly called semiautomatic or automatic return, had been used in connection with a main track and a side track for the purpose of making certain that a switch, opened to let a train from the main track onto the side track, should not accidentally remain open, but should automatically return, so as to keep the main track normally always with a continuous rail with the switch closed and the track open for traffic. On this record, Porter is entitled to say that he was the first who reversed this use and employed this mechanism in order to keep the switch normally open, so as not to permit traffic on the main line to get by except while the switch was manually held in abnormal position. Porter's idea had merit, as applied to electric car traffic; it was a distinct contribution to the safety of travel; and his patent is entitled to consideration as favorable as the law permits.

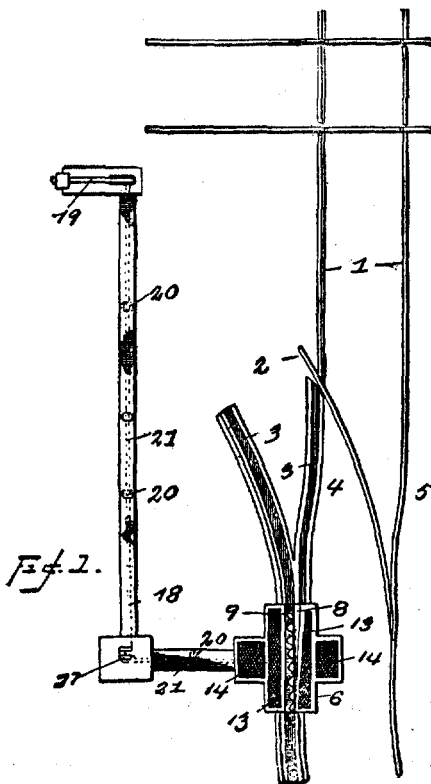
[1] In approaching a comparison with other devices, we must first observe that this is a "derailing switch." If there might be any distinction between a switch and a mere derailer, placed in one rail only, which would do nothing except to force the wheels onto the ground, Porter can take nothing by such distinction. He illustrated and described a connection between a main track and a side track and a device which would turn the wheels from the former to the latter. Neither his specification nor his claims are concerned with what becomes of the car or where it goes after it is diverted; and a switch which sends the car onto a side track or a switch track is just as much an

infringement or just as much an anticipation as if the car was sent into the ditch. Indeed, Porter expressly says that the track onto which the car is diverted may be a siding.

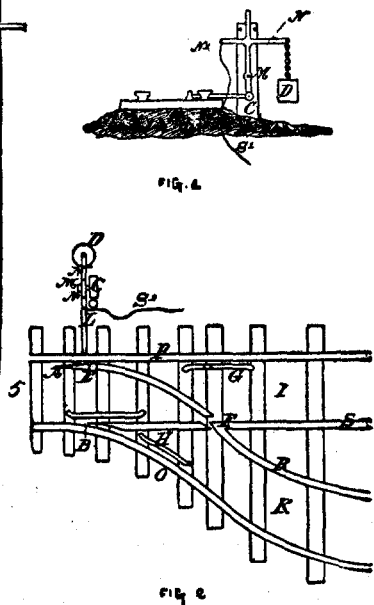
It is complainant's theory that changing the adjustment and relation of the parts so as to hold the switch point normally against the main rail and away from the switch rail, instead of normally away from the main rail and against the switch rail, was a sufficient change upon which to predicate invention, when taken in connection with the new operating result which followed. This theory is not easy of acceptance, particularly in view of one of the earlier patents (Woodville, No. 140,230, June 24, 1873), which shows a switch point operated by a vertical lever, having a horizontal cross-arm extending in both directions, and a weight which could be hung upon one or the other arm as it was desired to set the switch point normally in one or the other position. Whatever might be the ultimate conclusion on this theory, we think the case is clearer and disposed of more satisfactorily by approaching it from another standpoint.

For a better understanding of the comparison to be made, we reproduce a drawing of Porter's device alongside the drawing of Martel, No. 243,933, July 5, 1881.

J. Y. PORTER.
DERAILING SWITCH.



A. F. MARTEL.
RAILWAY SWITCH.



Martel's general description and second claim are as follows:

"My invention relates to railway switches; and it consists in a point or tongue pivoted at the end of the inner siding rail and adapted to be swung against the inner main rail, and a lever connected with said point or tongue, and having two arms, to one of which a weight is applied to hold the point or tongue normally away from the main rail, and to automatically open the switch after the passage of a train to or from the siding, while the other arm is furnished with a wire rope, or its equivalent, by which the switch may be closed by the attendant in the switchhouse or at a distance."

"2. In combination with the main and siding rails, arranged substantially as shown and described, the pivoted tongue *A*, and the weighted lever *M*, provided with an actuating rope, or its equivalent, and connected with the tongue *A*, as set forth."

Martel shows a cable running to a distant point, for the manual operation, while Porter shows a rod; but defendant here uses a cable, and for the purposes of this case the two are equivalents. While Martel uses, for his normalizing agent, a weight applied to a shifting lever at the switch, Porter uses a weight on a shifting lever at the distant point; but defendant employs a normalizing agent (a spring) operating directly at the switch point; and again, for the purposes of this case, Martel's weight (normalizing agent) and Porter's weight are equivalents. It follows that there is no material, mechanical difference between Martel and Porter, save in the selected, normal position of the movable switch point. If we might, at first thought, regard the two structures as mechanically different because of this different setting of the parts, we would then observe that the two cannot be distinguished from each other, excepting by the names of the tracks. A main track and a side track are structurally identical; they can be distinguished only by the use to which each is put. The fact that one track curves away while another continues the tangent does not differentiate. If these two devices, Martel and Porter, were put upon the ground side by side, with their above-mentioned, immaterial differences reconciled, and without extensions and continuations not covered by the patents, the skilled observer could not tell which was which—and for the very sufficient reason that there would be no difference whatever. The tracks must be labeled "main track" and "side track," before the observer could distinguish.

"Main track" and "switch track" are arbitrary names of things; they are mechanically identical, and are intended for, and capable of, the same primary use, viz., to run cars over; they are substantially interchangeable; what is switch to-day may become main line to-morrow because of a blockade on the main line or because the superintendent changes his mind. If the superintendent operating the road including Martel's device should, for some temporary reason, send his regular trains on the track *O R*, opening the switch for them each time, and should use the track *P S* for his siding, running cars thereon without touching the switch, he would have Porter's use and structure and would infringe the Porter patent. If, then, the next day, he went back to the old plan of running his trains, he would not infringe. Whether the apparatus infringed or did not infringe would not depend upon any rearrangement, construction, adaptation, or hair's breadth of physical change, but only upon the shifting manner of its use.

In this view of the facts in the present case, we can see only a typical instance of that double use which will not support a patent. A review of a considerable number of decisions (cited in the margin)¹ where this double use has been found to exist, confirms our conclusion. Remembering that Porter's idea was that a new rule of conduct in using an existing structure would be highly desirable, we find special pertinence in Judge Grosscup's decision in the Voightmann Case (margin). A fusible link, which had been used in other places, was applied to an external shutter. Judge Grosscup said (138 Fed. 57, 70 C. C. A. 483):

"It is possible that Voightmann was the first to conceive that windows thus constructed would be a valuable adjunct to fireproof buildings. If so, it is the previousness of his conception that constitutes the merit of his co-called invention; for the mechanical embodiment of that conception is old. But it does not follow that a conception is patentable merely because it is first in time. Concept, alone, is not patentable. Concept must be accompanied by mechanical embodiment; and, as the law now stands, the mechanical embodiment, to make the invention patentable, must itself be unanticipated. * * * Voightmann possibly has pointed out to the world a wider use of the pre-existing art than was before known. But the discovery of an enlarged use is not, of itself, patentable invention."

So, also, in the Bullock Case (margin), Judge Gray said (162 Fed. 28, 36, 89 C. C. A. 68, 76):

"But this function was dormant in the [device of the prior art]. Surely invention cannot be claimed in the appropriation of an old device, by reason of the unthought of and undisclosed function in question."

The cases relied upon by appellee (margin),² to the effect that a mere

¹ *In the Supreme Court*: Phillips v. Page, 65 U. S. (24 How.) 164, 16 L. Ed. 639; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; Roberts v. Ryer, 91 U. S. 150, 23 L. Ed. 267; Planing Machine Co. v. Keith, 101 U. S. 479, 25 L. Ed. 939; Heald v. Rice, 104 U. S. 737, 754, 26 L. Ed. 910; Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438; Pennsylvania Co. v. Locomotive Co., 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222; Miller v. Foree, 116 U. S. 22, 6 Sup. Ct. 204, 29 L. Ed. 552; Fond du Lac County v. May, 137 U. S. 395, 11 Sup. Ct. 98, 34 L. Ed. 714; Lovell Co. v. Cary, 147 U. S. 623, 13 Sup. Ct. 472, 37 L. Ed. 307; National Co. v. Boston Co., 156 U. S. 502, 515, 516, 15 Sup. Ct. 434, 39 L. Ed. 511, reviewing the platform gate case (Aron v. Manhattan Ry. Co., 132 U. S. 84, 10 Sup. Ct. 24, 33 L. Ed. 272), the transom case (Wollensak v. Sargent, 151 U. S. 221, 14 Sup. Ct. 291, 38 L. Ed. 137), the engine valve case (Blake v. San Francisco, 113 U. S. 679, 5 Sup. Ct. 692, 28 L. Ed. 1070), and the billiard cue rack case (St. Germain v. Brunswick, 135 U. S. 227, 10 Sup. Ct. 822, 34 L. Ed. 122); Mast F. & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856.

In this court: Steiner Co. v. Adrian, 59 Fed. 132, 8 C. C. A. 44; Griswold v. Wagner, 68 Fed. 494, 15 C. C. A. 525; Stearns v. Russel, 85 Fed. 218, 29 C. C. A. 121; Fry v. Rockwood Pottery, 101 Fed. 723, 41 C. C. A. 634; Johnson v. Toledo Co., 119 Fed. 885, 56 C. C. A. 415.

In other Circuit Courts of Appeals: Bettendorf v. Little, 123 Fed. 433, 59 C. C. A. 473; Jones v. Cyphers, 126 Fed. 753, 62 C. C. A. 21; Voightmann v. Parkinson, 138 Fed. 56, 70 C. C. A. 482; Baker v. Duncombe Co., 146 Fed. 744, 77 C. C. A. 234; Bullock Co. v. Gen. Elec. Co., 162 Fed. 28, 89 C. C. A. 68.

² *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658; Keystone Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103; Potts v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275; Hobbs v. Beach, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586; Kellogg Co. v. Dean Co. (C. C. A. 6) 182 Fed. 991, 105 C. C. A. 545.

change of location of elements may involve invention, all refer to a rearrangement causing a new mutual interrelationship of the old elements. They do not involve the use of the old elements, in the old position and in the old relationship to each other, to get a "new result." For example, in the Keystone-Adams Case, it seems true that the revolving shaft with wings was like an older one, save that it revolved in an opposite direction; but to permit this reverse revolution required mechanical adaption in other parts of the device, and results could have been made certain only by experiments. In the Kellogg-Dean Case, the condenser was for the first time associated with the combination which was patented. In the Hobbs-Beach Case as well as in the Potts-Creager Case, we have the typical transfer from one art to another, and a decision that, while there was analogy between the arts, it could not be said that there was identity of function, and hence that the comparatively slight mechanical changes and adaptations which were made were sufficient to support invention. We have observed no more extreme instance, where a slight physical change accompanied by new use and result, has been held sufficient to sustain a patent than is furnished by our own decision in *Dunn Co. v. Standard Co.*, 163 Fed. 521, 90 C. C. A. 331, and on second appeal, 204 Fed. 617, decided March 13, 1913; but here, also, there was physical change which, though slight, signified transformation of one thing into another.

It often is not easy to determine whether a case discloses that "new result" which is one of the criteria of invention. The phrase is not of absolute meaning nor always applied with discrimination. In one sense every new use gives a new result—freezing fish with a particular form of device (*Brown v. Piper*), dredging with a propeller screw (*Atlantic v. Brady*), operating jail doors from a distance (*Fond du Lac v. May*), a safety gate for street car platforms (*Aron v. Railway*), a soft metal switch-plate holder (*Johnson v. Toledo*)—each was a thing accomplished which had not been done before. But when it was seen that the means employed were old, even in substantially the same form and substantially the same association, each was held to be not a new result, but only a new use of an old device—a newly observed or discovered function of a well-known thing. To the same point are all the double-use cases.

On the contrary, in cases where a new result has been adjudged to support patentability, the inquiry whether there was a "new result" has been for the purpose of testing out whether the observed novelty in the means employed could be considered patentable novelty. If there is a new structure or combination of means, then the fact that a "new result" follows tends to indicate the presence of the inventive faculty in the rearrangement of mechanical, electrical, or chemical elements or method steps which constitute the new combination; and to be possibly effective for this purpose it is immaterial whether the result be ultimate or intermediate—in the final product or in the manner of its making. Examples are: A more rapid production (*Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177); a different product (*Potts v. Creager*); special qualities in the product (*Diamond v. Consolidated*,

220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527, and *Ferro Concrete Const. Co. v. Concrete Steel Co.*, 206 Fed. 666, opinion of this court filed May 6, 1913); more perfect operation of the device (*Kellogg v. Dean*); etc. But when the means employed are wholly old, inherently and as well in their combination, apparently similar "new results" are, of necessity, only new or double uses, and no amount of them will persuade that invention exists.

What then is Porter's "new result," considered either mechanically or functionally? Is it anything more than maintaining one track normally closed, capable of being held open by force and while the force is applied, and then automatically closing again? Is not his safety plan for handling electric cars approaching a railroad crossing merely a new utility of an old result? We think it should be so classified, and that, as said in the *Voightmann Case*, *supra*, "the mechanical embodiment to make the function patentable must itself be unanticipated"; or, as said in the *Platform Gate Case* (*Aron v. Manhattan Ry. Co.*), 132 U. S. 84, 10 Sup. Ct. 24, 33 L. Ed. 272, "his right to a patent" must depend upon the novelty of the means employed "and not the end accomplished."

There is another consideration (common, indeed, to all double-use cases) which further confirms our conclusion. An inventor and patentee is entitled to all the uses of his structure, even if he did not know or foresee all those uses. *Goshen Co. v. Bissell Co.* (C. C. A. 6) 72 Fed. 67, 74, 19 C. C. A. 13. So, Martel would be entitled to use his device for the safety purpose of Porter, since to do so required no mechanical change or adaption; and, in this connection, it should be noted that Martel's second claim above quoted reads on and covers Porter's device, and Porter's device, within the life of the Martel patent, would have been an infringement thereof. Such a comparison with the claim of an old patent is not always important; but, when the old patent and the new stand side by side as alternatives rather than as merely original and improvement, the comparison is at least significant.

There is still another consideration. The steam railroad that Porter is about to cross and which is the foundation of the operating merit in his plan is not named as an element in his combination; but if it were named, or if it were to be read in, the language of Mr. Justice Blatchford in *Fond du Lac County v. May*, 137 U. S. 407, 11 Sup. Ct. 102, 34 L. Ed. 714, would seem applicable:

"As the mechanical operation and effect of the patented devices are the same, whether there be a grating or other barrier [steam railroad] or not, there is no patentable combination between the devices and the grating [steam railroad]. The grating performs no mechanical function and has no mechanical effect."

[2] Quite obviously, we think, it cannot be important whether the cause of stopping before deciding which track to take is another railroad crossing with its inherent danger, or is another train ahead which it may be best to wait for and may be best to go around, or is any other common, operating situation—or whether the man sent ahead to

turn the switch is a freight brakeman who sets it as he has been directed or a conductor who sets it as he may decide.

The decree must be reversed, with costs, and the record remanded, with instructions to dismiss the bill.

McKENNA v. BROPHY.

(District Court, E. D. New York. July 26, 1913.)

PATENTS (§ 328*)—INFRINGEMENT—TALLY CARD.

The McKenna patents, Nos. 927,581 and 865,795, and the Goulding patent, No. 655,862, each for a tally card for use in progressive euchre contests, etc., must be narrowly construed, and, as so construed, *held not infringed*.

In Equity. Suit by Edward D. McKenna against J. Bernard Brophy. On final hearing. Decree for defendant.

Roderick Begg, of New York City, for complainant.

Lewis J. Doolittle, of New York City, for defendant.

CHATFIELD, District Judge. The defendant has been charged with infringement of a patent taken out by the complainant on the 13th day of July, 1909, No. 927,581, and one taken out September 10, 1907, No. 865,795, for a tally card, to be used in such contests as progressive euchres on a large scale, and another patent, issued to A. M. Goulding, upon the 14th day of August, 1900, No. 655,862, with rights assigned to the complainant, for a similar card.

The defendant has denied that he is a proper party defendant, and has also denied infringement. The question as to his being the responsible party for the acts alleged as infringement was disposed of upon the trial, and there seems to be no reason for changing that determination nor for a detailed statement as to this matter. A patent for a tally card system was granted to the defendant, under No. 985,108, February 21, 1911. The defendant has retained ownership of the patent, and has allowed his sons to use it in connection with the printing business, in which he now has no beneficial interest, and which is conducted by his sons. But both he and his sons assist in managing the euchre parties and in using the tally cards, and he is an active participant in all of the matters which are charged to be infringements.

Some question is also raised as to the assignment of the Goulding patent; but this is immaterial, for the complainant shows *prima facie* title, and, in view of the necessary determination of the case, this is sufficient. The tally cards patented under these three patents are an outcome of the natural desire to prevent fraud, to make scoring easy, and to save time and confusion in the service and management at large contests like progressive euchres at which several hundred persons play simultaneously.

The general idea of such tally cards is to have a pair of counters or coupons, which in some way may be taken by the winning couple at

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

each table and kept track of in consecutive order. Thus a set of coupons must be used at each table, and yet no use can be made thereof except by the winners, and a distinction is kept as to the person playing the hand of a man from that of a person playing the hand of a woman. The devices in use are similar to other patents, such as patent No. 690,123, issued December 31, 1901, to Charles Sparks, for golf score; No. 582,771, of May 18, 1897, to A. H. Wilson, No. 592,054, of October 19, 1897, to W. C. James No. 758,808, May 3, 1904, to E. Bach, and No. 411,952, October 1, 1889, to W. W. Clay, for euchre and whist counters; No. 326,879, September 22, 1885, to H. E. Lomas, for a theater ticket selling chart; No. 510,011, December 5, 1893, to Eastman and Babcock, and No. 570,249, October 27, 1896, to C. Elkin, for installment payments upon accounts. They all indicate the idea of detaching stubs or coupons from one sheet, for transfer to some other place of attachment or safe-keeping, and there used to keep track of successive payments or scores.

The idea of inserting the coupons in a pocket or attaching them by adhesive to a second card is old. The idea of numbering them consecutively, or of distinguishing a series by a separate color, or, where there are two competitors, by calling one "lady" and the other "gentleman," and by giving one an odd and the other an even number, are only variations in the idea and in the form of design, which might be the subject of copyright, and which is patentable only to the extent that it forms a new scheme of working out an entire system. Such a patent must be narrowly construed, and no one would be an infringer for making a new combination of the old ideas, with a general resemblance to the result.

The complainant's own patents show a tally card for each player and a set of coupons, with the expected arrangement of two coupons for each game, numbered consecutively and with a distinguishing color. Ordinary directions for the use of the game are printed upon the card, but the substance of these is not set forth in the claim of the patents, and the coupons are to be placed (under the first McKenna patent) by the person entitled in a series of consecutive slits in the tally card. The player thus has a coupon in the slit for each game which he wins, and a blank space for games which he loses.

The other patent of the complainant provides for a card of a similar general scheme, but with adhesive upon the face of the tally card (instead of upon the coupon, as the inventor says is "now commonly the case"), and directions to paste the coupon upon the card, instead of inserting it in the slit, of the earlier patent. The Goulding patent adds the distinguishing feature of the words "lady" and "gentleman," and has the adhesive upon the back of the coupons.

The defendant's card uses a similar arrangement, with adhesive upon the coupons, and also distinguishes by number between the persons playing as "gentleman" and "lady." The defendant's card also has a stub at the bottom to use for identification when the balance of the card is turned in, and contains much printed matter as to the management of the euchres and the methods of playing in the contest.

The defendant's own card is patented, and shows only patentable

novelty in the sense that it is a variation from other forms and has the stub for identification. In this sense it is not an infringement of either of the cards patented and controlled by the complainant, and the entire difficulties between the parties would seem to be those of business competition and successful management of such large gatherings. Any of the counters, if used properly and carefully, are sufficient to prevent fraud, and any person is entitled to use any particular form which he desires, unless he copies a patented form so closely as to indicate that he is following that card, and not the old ideas embodied therein.

The bill will be dismissed.

CROWN CORK & SEAL CO. OF BALTIMORE CITY v. NEW YORK
SPECIALTY CO. et al.

(District Court, E. D. New York. July 25, 1913.)

PATENTS (§ 308*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Motion to vacate a preliminary injunction against infringement, and permit defendant to give a bond in lieu thereof, denied.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 504-506; Dec. Dig. § 308.*]

In Equity. Suit by the Crown Cork & Seal Company of Baltimore City against the New York Specialty Company and others. On motion of defendants. Denied.

Philipp, Sawyer, Rice & Kennedy, of New York City, for complainant.

Robert B. Killgore, of New York City (Harry E. Lewis, of Brooklyn, of counsel), for defendants.

CHATFIELD, District Judge. The defendants have been enjoined from infringing certain patents held valid in the suits of Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co. (D. C.) 201 Fed. 344, in this court. The present suit is at issue, but the defendants are under order to furnish a bill of particulars, which has not been given.

The machine used by the defendants is identical in function and substantially identical in structure with those held to infringe in the suits previously adjudicated. In those cases motion to suspend the injunction was denied, and an appeal has been taken, but not hastened to hearing, although the solicitor for the defendants therein is also solicitor for the defendants here.

This application is made under the ruling allowing the giving of a bond in *Karfiol v. Rothner* (C. C.) 151 Fed. 777; but experience has shown that such a bond, except in unusual cases, is not conducive to shortening or lessening litigation, and does not prevent loss to defendants in case they may be ultimately successful on appeal. The defendants in the cases now on appeal have changed the form of their

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

machines, and a motion is now pending in that action to punish them for contempt, but it is as yet undecided.

The court feels that the granting of this motion would only delay final hearing, which can be had at any term of the court. Inasmuch as the injunction is in terms against "infringing machines," and not in terms against the defendants' form of device, it would seem that a proper case for preliminary injunction was made out. The defendants cannot expect to prevail in this district on the ground of non-infringement, as their device is admittedly like those already enjoined, and there seems to be no sound reason for charging laches in bringing the suit. Any hardship involved is only that necessarily involved by the court's decree, which can be tested only by appeal.

The motion must be denied.

In re DUNPHY.

(District Court, D. Maine. August 9, 1913.)

No. 9,163.

BANKRUPTCY (§ 407*)—DISCHARGE—PRIOR DISCHARGE.

Under Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), providing that the judge shall hear the application for discharge and any proofs and pleas in opposition thereto, and discharge the bankrupt unless he has been granted a discharge in voluntary proceedings within six years, the six years is measured backward from the date of the filing of the application for discharge, not from the hearing of the application by the court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.*]

In Bankruptcy. In the matter of Lewis E. Dunphy. On report of referee denying a discharge. Finding of referee affirmed, and petition for discharge denied.

N. V. MacLean, of Bangor, Me., for bankrupt.

U. G. Mudgett, of Bangor, Me., for creditor.

HALE, District Judge. This case now comes before me upon the report of Mr. Mason, referee, denying the discharge of the bankrupt.

It appears that on January 27, 1912, Dunphy filed a voluntary petition in bankruptcy, and on the same day was adjudged a bankrupt; that he filed his petition for discharge January 24, 1913; that upon this petition hearing was ordered for March 7, 1913; that on the 1st day of March, 1913, one of the creditors appeared, and filed specifications of objection to the granting of such discharge, upon the ground that the bankrupt in a previous voluntary proceeding in bankruptcy had been granted a discharge within six years before January 24, 1913, to wit, on March 11, 1907. The referee heard the parties on the question of the discharge of the bankrupt, and on July 8, 1913, filed his report recommending the denial of the discharge on the ground

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the specifications and objections had been sustained, namely, that it had been shown that Dunphy, in a previous voluntary proceeding in bankruptcy, had been granted a discharge on March 11, 1907, namely, within six years before January 24, 1913, the date of his application for discharge in this proceeding. It appears, then, that the bankrupt was discharged upon his former voluntary petition more than six years before the present time, but less than six years before his petition for discharge. Does section 14b have reference to the judge at the moment when he enters a decree granting or refusing a discharge? And does it direct him to grant the discharge unless within six years before that time the bankrupt has been discharged in former voluntary proceedings? In the *Little Case*, 137 Fed. 521, 70 C. C. A. 105, the Court of Appeals for the Seventh Circuit held that the limitation of six years referred to the time between the first and second discharge, and not between the first discharge and the filing of the second petition in bankruptcy. In the *Jordan Case* (D. C.) 142 Fed. 292, the District Court for the Eastern District of Pennsylvania granted a discharge where the bankrupt had been discharged in voluntary proceedings on June 20, 1899, and where he applied for another discharge on September 21, 1905, namely, more than six years after his former discharge. The court overruled the objections to the discharge, and thus decided that in order that the former discharge in voluntary proceedings should be "within six years," so as to defeat the right of a second discharge in subsequent proceedings under the statute, it must have been granted within six years prior to the application for a second discharge. The court, however, clearly expressed its opinion as follows:

"The section evidently has reference to the judge at the moment when he is about to enter a decree granting or refusing a discharge, and directs him to grant it, unless within six years the bankrupt has been discharged in voluntary proceedings."

In the *Haase Case* (D. C.) 155 Fed. 553, in the Southern District of New York, the bankrupt was granted a discharge within six years before the filing of the petition in bankruptcy in the case. Judge Hough quoted the provision of the statute, and said:

"I cannot perceive how this language bears any construction other than that the six years is measured backward from the time of hearing."

Judge Hough cited the *Little Case* and the *Jordan Case*. His decision was affirmed by the Court of Appeals. 164 Fed. 1022. This section was considered in this circuit by Judge Lowell, in the *Carleton Case* (D. C.) 131 Fed. 146, and by the Court of Appeals in the *Seaholm Case*, 136 Fed. 144, 69 C. C. A. 142; but this question did not arise in either of those cases. Loveland, in his fourth edition, section 732, says:

"The six years limit runs from the date of the discharge in voluntary proceedings to the date of judicial action upon the application for the next discharge, either in voluntary or involuntary proceedings."

Most of the other text-writers upon bankruptcy who have considered the subject take the same view. Remington, however (volume 3, p. 757), in speaking of the six years provision, says:

"Yet it would seem, on principle, that the rule should be that it measures the time between the granting of the first discharge and the filing of the application for the second discharge; otherwise a bankrupt, by merely delaying the final hearing upon his second application, might overcome that which was a valid bar at the time creditors were required to file specifications of their grounds for barring the discharge. Moreover, the finding of courts ordinarily should revert to the conditions as existing at the time of the instituting of the particular application in controversy."

I think the language of Remington presents a sound view of the subject, although it is not based upon any judicial decision; nor can I find that any court has distinctly held to this view. It must be said, however, that the cases which I have cited which seem to take the opposite view present merely dicta. They contain merely cogent and forcible language of the court, and not direct judicial decision. The statute (section 14b) provides:

"The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto * * * and discharge the applicant unless he has (5) in voluntary proceedings been granted a discharge in bankruptcy within six years."

The statute thus points vividly to the hearing as the vital time to be considered. It seems to me, however, that this reference to the time of hearing must be held to mean the time when the petition for discharge is filed; otherwise the bankrupt might file his application for his second discharge long before the expiration of the six years, and by procuring delays upon the final hearing of his second application he might then render the six years rule invalid. I think Remington is right in saying that the findings of courts should revert to the conditions as existing at the time of the instituting of the particular application. The day when the court happens to take up the case for decision ought not to be conclusive on the bankrupt's rights. A bankrupt ought not to be able to apply for his discharge within the six years, and then by delay avoid a law intended for the protection of creditors. The pleadings fix the status of a controversy. The bankrupt states his case in his petition for discharge. He ought not to have more than his petition entitles him to. He ought not to be allowed to state a groundless case, and then wait for time to give him a good case. I cannot hold that the moment of the finding of the court is conclusive, and that all a judge has to do, when he hears the petition for discharge, is to see if a discharge has not been rendered within six years before that moment. I think the application for discharge must be held to be the conclusive time as affecting the vital question.

The finding of the referee is affirmed.

The petition for discharge is denied.

HAVEN & CLEMENTS v. JAMES.

(District Court, N. D. Georgia. June 21, 1913.)

GAMING (§ 50*)—WAGERING CONTRACTS—ACTION BY BROKERS—INSTRUCTIONS.

Instructions considered in an action by brokers to recover from a customer for money advanced on a contract made on the exchange for the purchase of cotton for future delivery in which the defense was that the contract was unlawful as a wagering contract, and held to fairly submit the questions in issue.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 103-107; Dec. Dig. § 50.*]

At Law. Action by Haven & Clements against D. W. James. On motion by defendant for new trial. Motion denied.

For former opinion, see 185 Fed. 692, 107 C. C. A. 640.

Brown & Randolph, Parker & Scott, and Spencer Atkinson, all of Atlanta, Ga., for plaintiff.

Smith, Hammond & Smith, of Atlanta, Ga., and Charlton Battle, of Columbus, Ga., for defendant.

NEWMAN, District Judge. The main argument of counsel for the defendant on this motion for a new trial was based on the fact that the court here called the attention of the jury to certain language in a decision by the Supreme Court of the United States in *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031. The quotation was really taken from the language embodied by the Appellate Division of the Supreme Court of New York in the opinion in the case of *Springs et al. v. James*, 137 App. Div. 110, the quotation being on page 121, 121 N. Y. Supp. 1054. The court stated in the charge here, after making this quotation:

"That is to say, I understand this method of doing business to be treated by the courts, both the Supreme Court of the United States and the Supreme Court of New York, as an entirely legitimate method of transacting this part of the business."

The Supreme Court of New York, in the same opinion, quoted also to precisely the same effect from the case of *Clews v. Jamieson*, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183.

The decision by the Appellate Division of the Supreme Court of New York just referred to was affirmed by the Court of Appeals of New York, 202 N. Y. 603, 96 N. E. 1131.

Examining the language to which counsel calls attention in *Board of Trade v. Christie Grain and Stock Co.*, supra, on page 250 of 198 U. S., on page 639 of 25 Sup. Ct. (49 L. Ed. 1031), as follows:

"We speak only of the contracts made in the pits, because in them the members are principals. The subsidiary rights of their employers where the members buy as brokers we think it unnecessary to discuss."

—I am unable to see that this has any effect whatever on the matter involved here. If the contracts between the principals were legal—that is, if Haven & Clements had contracts that were valid and binding

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as against them with other members of the Exchange, and paid out money, as they did, because of their liability on such contracts—it would be singular indeed if they could not recover the same from their principal, Mr. James.

In this case the court endeavored to instruct the jury in accordance with the suggestion of the Circuit Court of Appeals in the opinion rendered in this case (*James v. Haven & Clements*, 185 Fed. 692, 107 C. C. A. 640) as follows:

"Of necessity we have been compelled to read much of the evidence which includes many telegrams and letters passing between the parties, and we cannot resist the conclusion that from James' alleged notice to the agent Tate, and his telegrams and letters to the plaintiffs, and the course of dealing pursued by the parties and other matters shown, the jury might well have found that James did not contemplate actual delivery of any cotton on the future contracts bought or sold for him by the plaintiffs, and only intended wagering or gambling on the fluctuations of prices of cotton futures, expecting to settle by the receipt or payment of differences, and that the plaintiffs were well advised thereof and well understood that in buying and selling for James' account no delivery was to be made or expected to be made, even if third parties should become interested in the future contracts entered into by them on James' account."

The court, on the trial now being reviewed, said this:

"Now another defense in this case on the part of the defendant is that this was a wagering contract pure and simple. That is a gambling transaction, without any intention whatever, on the part of the defendant, to deliver cotton when sold or to receive cotton when bought, and that the plaintiff understood this to be his intention. If the jury find that James did not contemplate the delivery of any cotton on the future contracts bought and sold for him by the plaintiffs, and only intended to wager or gamble on the fluctuations in the price of cotton futures, expecting to settle by the receipt or payment of differences, and that the plaintiffs were advised thereof and well understood that in buying and selling for James' account no delivery was to be made or expected by him even if third parties should become interested in the future contracts entered into by them on James' account, then this arrangement would be one in which recovery could not be had for money advanced in this connection and to carry out these purchases and sales."

The Circuit Court of Appeals also suggested, in their opinion, that the jury should have been instructed in accordance with the statutes of Georgia, in the following language:

"Certain it is that the charge does not refer to section 3668 of the Code of 1895 of Georgia, which controls in suits in that state on wagering contracts, and declares such contracts to be against the policy of the law and not to be enforced, nor does it otherwise advise the jury as to what are wagering contracts and the public policy relating thereto."

In line with this suggestion the court, on the trial here, read to the jury section 4253 of the Code of Georgia of 1910 (being section 3668 of the Code of 1895 of Georgia) concerning wagering contracts, as follows:

"A contract which is against the policy of the law cannot be enforced; such are contracts tending to corrupt legislation or the judiciary, contracts in general in restraint of trade, contracts to evade or oppose the revenue laws of another country, wagering contracts, contracts of maintenance or champerty."

The court then further instructed the jury on this subject as follows :

" 'Wagering contracts' you understand, betting contracts, and if this in the present case was one where there was no actual purchase or sale intended, it is simply a bet on the rise or fall of cotton."

And further along in the charge as follows :

"A wagering contract in this case would be one, of course, such as I have just described, where it was simply betting on the rise or fall of the market and not a legitimate transaction under the law and under the rules of the New York Cotton Exchange."

The other portions of the charge, while they may be excepted to, have not been stressed in the argument here.

I am satisfied that the instructions given to the jury were fair in every way and that they embodied the law of the case. This made a question for the jury to decide, and the evidence was sufficient, in the opinion of the court, to justify the verdict reached.

The motion for a new trial is overruled.

In re MANNING.

Ex parte SMITH.

(District Court, E. D. South Carolina. July 22, 1913.)

1. CHATTEL MORTGAGES (§ 41*)—VALIDITY—DESCRIPTION OF PROPERTY.

Under Civ. Code S. C. 1912, § 4103, which provides that no chattel mortgage shall be good unless the property mortgaged shall be described in writing or typewriting, but not printing, on the face of the mortgage, as construed by the Supreme Court of the state, a mortgage of crops contained only in the printed portion of a mortgage is void.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 84; Dec. Dig. § 41.*]

2. COURTS (§ 366*)—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS.

On a question of the validity of a chattel mortgage arising between citizens of the same state in which the mortgage was executed and the property is situated, the construction and application of a state statute as determined by the highest court of the state is controlling in a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. § 366.*]

In the Matter of Marshall Manning, bankrupt; P. J. Smith, trustee. On review of order of Referee. Reversed.

Townsend & Rogers, of Bennettsville, S. C., for bankrupt.

SMITH, District Judge. This matter comes up on a petition to review an order of the referee in bankruptcy allowing a claim on behalf of one A. L. Calhoun as a preferred claim secured by a mortgage of the crops of the bankrupt.

[1] It appears that on April 4, 1912, the bankrupt, a resident of Marlboro county in South Carolina, gave to A. L. Calhoun, also a resident of that county, a paper purporting to be a chattel mortgage to se-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cure \$300 and interest. The paper is in the form of a printed blank chattel mortgage. It contains a blank space of several lines left for the insertion of the description of the goods or chattels to be mortgaged. Then follows in print the words:

"And also all the crop or crops (which are acknowledged and agreed to be personal property) whether matured or unmatured, gathered or ungathered, raised or to be raised by me (the word 'me' written) during the year 1912 (the figures 12 written)."

This mortgage the trustee in bankruptcy claims to be invalid and void under the terms of section 4103 of the Code of Laws of S. C. 1912, which declares that:

"No chattel mortgage, except mortgages or deeds of trust covering the whole or any part of the real or personal property of a railroad company or manufacturing company, shall be valid or good to convey any interest or right whatever to the mortgagee unless the property mortgaged shall be described in writing, or typewriting, but not printing, on the face of the mortgage."

This section has been held by the Supreme Court of South Carolina to be valid and constitutional and that a mortgage of crops when contained in a printed clause as an attempted chattel mortgage was void. *Rose v. Harllee*, 69 S. C. 523, 48 S. E. 541.

[2] On a question of this kind arising between citizens of South Carolina under a chattel mortgage made in South Carolina, of chattels situated in South Carolina, the statute law of South Carolina as construed and held valid by the Supreme Court of South Carolina must control, and, accordingly:

It is ordered that the order of the referee in bankruptcy allowing this mortgage as a good and valid mortgage of the crops of the bankrupt be and the same is hereby reversed, and it is hereby adjudged that the mortgage or paper purporting to be a chattel mortgage dated April 4, 1912, made by the bankrupt, Marshall Manning, to A. L. Calhoun, is null, void, and of no effect as a mortgage of the crops of the bankrupt.

THE SAMUEL LITTLE.

(District Court, E. D. New York. July 16, 1913.)

1. SEAMEN (§ 27*)—WAGES—LIEN.

One who has permitted himself to be made the record owner of a vessel, although merely for the accommodation of the real owner, and being in fact without interest, cannot establish a lien on the vessel for wages, to the displacement of other lienholders.

[Ed. Note.—For other cases, see *Seamen*, Cent. Dig. §§ 4, 141, 157-169; Dec. Dig. § 27.*]

2. MARITIME LIENS (§ 61*)—PROCEEDINGS FOR ENFORCEMENT—CONTEST BETWEEN LIEN CLAIMANTS.

Where the proceeds of a vessel sold in proceedings to enforce liens are insufficient to pay all claims, one lien claimant may be permitted to answer and defend against the claim of another, even after an inter-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

locutory decree has been entered, where newly discovered evidence justifies such relief.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 99; Dec. Dig. § 61.*]

In Admiralty. Suit by Arthur F. Smith against the steam tug Samuel Little. On petition of William Horre & Co. to open interlocutory decree. Petition granted.

Foley & Martin, of New York City, for libelant Smith and for colibelants Taft and McCambridge.

Alexander & Ash, of New York City, for colibelants William Horre & Co.

CHATFIELD, District Judge. The libelant Smith filed his claim for wages as engineer against the steamer Samuel Little, on January 30, 1913. On this claim an interlocutory decree was entered on February 21, 1913. One Taft and one John J. McCambridge were allowed by order of the court to file, on February 14, 1913, claims for wages as deckhands, as colibelants in the Smith action. The vessel was sold on February 14, 1913, under a libel for repairs, filed by one Ward, and realized the sum of \$670, which is not sufficient to pay all the filed claims.

[1] On March 11, 1913, William Horre & Co. petitioned the court to be allowed to open the interlocutory decree and to file an answer to the Smith libel. A libel had been filed by Horre on the 8th day of February, 1913, for supplies. The ground for the petition is the discovery since the decree of facts tending to show that the libelant Smith is the record holder of title to the vessel. This would invalidate any claim by him of a lien for wages.

The affidavits show that a second man, by the name of John J. McCambridge, was the real owner, and that this McCambridge arranged with Smith to take title in Smith's name. Smith did this merely as an accommodation, and without consideration; but, having so done, he cannot claim a lien for wages as engineer. If he is the record owner, he could deduct his debt or collect the same before giving back his record title. If the value of the vessel be not sufficient to meet all claims, it must be held that he has trusted the individual, who has used him as a tool, and lost his rights in rem. This makes it impossible to grant to Smith a lien for his wages in advance of a lienholder for repairs.

[2] The only question is whether the libelant William Horre & Co. has been foreclosed from interposing an answer against the libelant in another action, by the advertising for claims and the entry of an interlocutory decree on default. Its libel was filed in time. Its proposed answer is not as to the merits of its own claim, but is rather to prevent priority or sharing in the proceeds by a colibelant, who now appears (before final decree) not to be entitled.

The court cannot see how this right has been cut off by anything which has occurred. The newly discovered evidence is sufficient ground to allow him to attack the Smith claim.

The motion will be granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MISSOURI, K. & T. RY. CO. v. CHAPPELL et al.

CHAPPELL v. MISSOURI, K. & T. RY. CO.

(District Court, W. D. Oklahoma. February 28, 1913.)

Nos. 1,084 and 1,074.

1. REMOVAL OF CAUSES (§ 95*)—PROCEEDINGS—REMOVAL EFFECTED—JURISDICTION.

On filing a petition for removal in due form with a proper bond, the case is in law removed, and the state court loses jurisdiction, and all subsequent proceedings therein are void.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 204, 205; Dec. Dig. § 95.*]

2. COURTS (§ 508*)—INJUNCTION AGAINST PROCEEDING—REMOVAL OF CAUSE—PROCEEDINGS IN STATE COURT.

After presentation of a sufficient petition and bond for the removal of a cause to a federal court, it is competent for the District Court by an ancillary suit, without violating Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), forbidding a federal court from enjoining proceedings in a state court, to restrain the party against whom the cause has been removed from taking further steps in the state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1423, 1425-1430; Dec. Dig. § 508.*]

3. REMOVAL OF CAUSES (§ 94*)—JURISDICTION—DUTY OF STATE COURT TO SURRENDER.

If on the face of the record, including the petition for removal of a cause, the suit does not appear to be a removable one, the state court is not bound to surrender jurisdiction, but may proceed as if no application for removal had been made.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 203; Dec. Dig. § 94.*]

4. REMOVAL OF CAUSES (§ 94*)—ACTION IMPROPERLY REMOVED—EFFECT.

Where a suit entered on the docket of a federal District Court as removed was never in law removed from the state court, no amendment made in the federal court could affect the state court's jurisdiction, or put the case rightfully on the docket of the federal court, and no amendment could be made there to show that the case was removable.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 203; Dec. Dig. § 94.*]

5. REMOVAL OF CAUSES (§ 94*)—RECORD—AMENDMENT IN FEDERAL COURT.

Where sufficient grounds for removal of a cause are shown on the record as presented to the state court, including the petition for removal, the petition may be amended in the federal court, so as to show more fully and distinctly the facts supporting the grounds alleged.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 203; Dec. Dig. § 94.*]

6. REMOVAL OF CAUSES (§ 17*)—RIGHT TO REMOVE—WAIVER—DEFENSES IN STATE COURT.

There is no waiver of a right to remove a cause to the federal court by defendant's making a defense in the state court, after that court, over defendant's objection, has declined to surrender jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 10; Dec. Dig. § 17.*]

7. REMOVAL OF CAUSES (§ 89*)—RIGHT TO REMOVE—DETERMINATION—RECORD.

In determining whether a case is presented for removal to the federal

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

court, it is the duty of the state court to examine, not only the petition for removal, but the rest of the record.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 162, 165, 189, 192-195, 197, 200, 201; Dec. Dig. § 89.*]

8. COURTS (§ 326*)—FEDERAL COURTS—JURISDICTION—ANCILLARY SUIT—AMOUNT IN CONTROVERSY.

In a suit in equity to restrain the further prosecution of an action claimed to have been removed to the federal court, the relief claimed being purely ancillary, to wit, the protection of the jurisdiction of the federal court over the suit alleged to have been removed, the amount in controversy is not a jurisdictional element.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 888; Dec. Dig. § 326.*]

9. COURTS (§ 508*)—REMOVAL OF CAUSE—PROSECUTION OF FURTHER PROCEEDINGS IN STATE COURT—ADEQUATE REMEDY AT LAW.

A suit to restrain further prosecution of an action at law in the state court, alleged to have been lawfully removed to the federal court, is not objectionable on the ground that complainant had an adequate remedy at law in the state court, by moving to set aside the order of the state court denying the petition to remove, and appealing to the Supreme Court of the state from an adverse ruling thereon.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1423, 1425-1430; Dec. Dig. § 508.*]

10. REMOVAL OF CAUSES (§ 86*)—PETITION TO REMOVE—DIVERSE CITIZENSHIP—ALLEGATION.

Where a petition for the removal of a cause alleged that in such cause there was a controversy between the plaintiff, who, "as appears from her petition," at the commencement of the suit was and ever since has been and now is a citizen and resident of the Western district of Oklahoma, and defendant, who is a citizen and resident of another state, to wit, a corporation organized and existing under and by virtue of the laws of Kansas, it was not fatally defective, on the theory that it merely alleged plaintiff's citizenship by reference to the petition, and not as a fact.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. § 86.*]

11. REMOVAL OF CAUSES (§ 94*)—PETITION TO REMOVE—AMENDMENT.

A petition to remove may be amended to supply facts to make clear an averment already present, not amounting to supplying a necessary jurisdictional averment, though the state court, ignoring the petition for removal as originally filed, has proceeded to final judgment.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 203; Dec. Dig. § 94.*]

12. COURTS (§ 327*)—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY—STATUTORY PROVISIONS.

Judicial Code (Act March 3, 1911, c. 231) § 291, 36 Stat. 1167 (U. S. Comp. St. Supp. 1911, p. 243), provides that whenever, in any law not embraced within the act, any reference is made to, or any power or duty is conferred or imposed on, the Circuit Court, such reference on the taking effect of this act shall be deemed and held to refer to and confer such power and impose such duty on the District Court. Section 299 declares that the repeal of existing laws, or amendments thereof, embraced in this act, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding, including those pending on writ of error, etc., but all such suits, etc., for causes arising or acts done prior to such date (January 1, 1912), may be commenced and prosecuted within the same time and with the same effect as if said repeal or amendments had not been made. *Held* that, where an action for wrongful act accrued against a railroad company prior to January 1, 1912, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
206 F.—44

prior law, creating federal jurisdiction of actions involving \$2,000 exclusive of interest and costs, applied, though no action was brought until after the Judicial Code took effect.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 889; Dec. Dig. § 327.*]

13. REMOVAL OF CAUSES (§ 88*)—BOND.

The form of a bond, however, required to accompany a petition to remove, was governed by the Judicial Code, declaring that the bond shall be conditioned for the entering of a certain copy on the record in the federal court within 30 days of the filing of the petition to remove, and a bond conditioned under the old law for the filing of such copy of the record by the first day of the following term was insufficient.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 184-188; Dec. Dig. § 88.*]

In Equity. Suit by the Missouri, Kansas & Texas Railway Company against Laura Chappell and others to restrain defendants from further prosecuting a suit in the state court in which the parties were reversed. On demurrer to complaint. Sustained.

At Law. Action by Laura Chappell against the Missouri, Kansas & Texas Railway Company, removed from the state court. On motions to amend a petition for removal. Case remanded to state court.

Clifford L. Jackson and M. D. Green, both of Muskogee, Okl., C. G. Hornor, of Guthrie, Okl., and John E. Du Mars, of Oklahoma City, Okl., for plaintiff.

A. N. Munden and S. A. Horton, both of Oklahoma City, Okl., and Milton Brown, of Guthrie, Okl., for defendants.

POPE, District Judge. The facts in the case are as follows:

Laura Chappell, the plaintiff in case 1,074, on August 9, 1912, filed her petition against the Missouri, Kansas & Texas Railway Company in the district court of Oklahoma county, state of Oklahoma, alleging, among other things, "that she is a resident of Oklahoma county, state of Oklahoma." The pleadings show that on October 22, 1911, she purchased a first-class ticket over defendant's line from Guthrie, Okl., to Oklahoma City, Okl. She was accompanied by five children, as to two of whom the conductor demanded the payment of fare. Plaintiff offered to pay for one of these as being the only one over five years of age, but the conductor refused to accept passage for the party upon such terms, and ordered her off the train at a station called Fallas. It is claimed that no one offered to help her off the train, and that in alighting she sprained her ankle, misplacing the socket in some way, and that, being a stranger in the place, she found difficulty in securing accommodations, and was obliged to go a distance of more than a mile to secure shelter for the night for herself and her children, and was obliged to make a similar trip the next morning to the depot, from which fact and by reason of the inclemency of the weather she was subjected to exposure and contracted cold, and one of the children pneumonia. Upon returning to the train the following morning she was given passage upon the same terms which, it is alleged, were declined the day before. The allegation is that the conduct of so much

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the train crew as participated in the matter was willful, malicious, and reckless. There is an allegation that she was caused humiliation, pain, and suffering, and permanent injury, by reason of the facts above set forth.

The original petition as filed claimed \$1,900 actual damage and \$1,000 exemplary damages, and thus a total of \$2,900, for which judgment was asked. The summons issued on August 9, 1912, requiring the defendant company to answer on or before September 10, 1912. Service was made on August 12, 1912, and the summons returned served August 14, 1912. On September 9, 1912, and thus within the time provided for answer, the defendant company filed with the clerk of said court its petition for removal, together with a bond. The bond bears an endorsement of approval by the clerk on September 9, 1912, the same day upon which it was filed. On September 7, 1912, a copy of the petition for removal was served on plaintiff's counsel, together with a notice that it would be presented to the state court on September 9, 1912. It is alleged that the petition was presented on the date just named to the state judge, and taken under advisement by him until September 26, 1912. On September 26, 1912, plaintiff presented to the state judge a motion to reduce the claim to \$1,950 by interlineation. This motion was sustained by the court over the defendant's exception, and the petition amended so that the actual damages claimed were in the sum of \$1,500, and the exemplary damages in the sum of \$450, making the total of \$1,950, above stated. Thereupon, and on the same day, September 26, 1912, the petition for removal was taken up by the court and denied over defendant's exception. On September 27, 1912, the case was further called by the state court, and the defendant adjudged in default. On October 1, 1912, the defendant filed in this court a transcript of the proceedings in the state court. On October 12, 1912, the defendant appeared in the state court under protest and asked for an order setting aside the default, which motion was on the same day denied.

Thereupon, on October 19, 1912, defendant brought its bill in equity in this court, being No. 1,084, alleging that plaintiff was threatening to proceed with the case in the state court, to restrain the plaintiff, Chappell, and her counsel, and the sheriff of Oklahoma county, state of Oklahoma, from proceeding further under case No. 1,074, being case No. 12,520 in the state court. Case No. 1,084 is pending at the present time upon demurrer, and case 1,074 upon certain motions to amend the petition for removal, to be presently considered.

It is definitely settled by decisions of the Supreme Court of the United States in a long line of cases—latest of which is *Madison Traction Company v. St. Bernard Mining Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462, and among the clearest of which are *Railroad v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262, 30 L. Ed. 1159, *Cameron v. Hodges*, 127 U. S. 322, 8 Sup. Ct. 1154, 32 L. Ed. 132, *Crehore v. Railway Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144, and *Powers v. Railway Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673—as follows:

[1] (1) That upon the filing of a petition for removal in due time, with a proper bond, the case is in law removed, and the state court in which it is pending loses jurisdiction to proceed further, and all subsequent proceedings in that court will be void.

[2] (2) After presentation of a sufficient petition and bond, it is competent for the District Court, by a procedure ancillary in its nature—without violating Revised Statutes, § 720 (U. S. Comp. St. 1901, p. 581), forbidding a federal court from enjoining proceedings in a state court—to restrain the party against whom a cause has been legally removed from taking further steps in the state court.

[3] (3) If upon the face of the record, including the petition for removal, a suit does not appear to be a removable one, then the state court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made.

[4] (4) If a suit entered upon the docket of a District Court as removed was never in law removed from the state court, no amendment of the record made in the federal court can affect the jurisdiction of the state court, or put the case rightfully on the docket of the federal court, and no amendment can be made in the federal court to show that the case was a proper one to have been removed.

[5] (5) If, however, sufficient grounds for removal are shown on the record as presented to the state court, including the petition for removal, the latter may be amended in the federal court by showing more fully and distinctly the facts which support those grounds.

[6] (6) There is no waiver of the right to removal by defendants making their defense in the state court, after that court has, over defendant's objection, declined to surrender jurisdiction in the case.

[7] (7) In determining whether there is a case for removal, it is the duty of the state court to examine, not only the petition for removal, but the rest of the record.

Bearing these rules in mind, we come to the grounds of demurrer urged against the bill to restrain further proceedings in the state court. It is urged first against this injunction suit that it is in effect a suit to restrain proceedings in a state court, and thus precluded by Revised Statutes, § 720, forbidding a federal court from enjoining proceedings in a state court. Paragraph (2) above, however, is conclusive as against this contention. See, also, *Donovan v. Wells, Fargo & Co.*, 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250.

[8] It is further contended that this suit may not be maintained because the amount involved is less than \$3,000, the sum fixed by the Judicial Code as the minimum for jurisdictional purposes in cases of this character in this court. This contention would, of course, be forceful, were this an original and independent suit. Its functions, however, are purely ancillary, to wit, the protection of the jurisdiction of this court over the suit at law which the railroad company is attempting to remove into this court. Under such circumstances the amount is not controlling of the jurisdiction. If, as we shall presently consider, the suit sought to be removed involved the necessary jurisdictional sum, the present suit in aid of the other is maintainable, notwithstanding the fact that at the date of its filing the jurisdictional

amount had been advanced to \$3,000. The measure of the matter goes back to the original right; and if, under the law to be presently considered, that right is within the jurisdiction of this court upon removal, the present case, as ancillary thereto, is likewise within the jurisdiction of the court. In such auxiliary proceedings it has been held from a very early date that diversity of citizenship was not material. *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Dunlap v. Stetson*, 4 Mason, 349, Fed. Cas. No. 4,164. For similar reasons such a suit may be maintained without reference to the amount involved. *White v. Ewing*, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67; *Brown v. Morgan* (C. C.) 163 Fed. 395.

[9] There is also the contention that a sufficient remedy is afforded the railroad company by proceedings at law in the state court, to wit, by the motion to vacate filed by it, from the adverse ruling on which it has the right of appeal to the Supreme Court of the state. It is clear, however, upon the authorities above cited, that this is no answer to complainant's bill. It is a well-recognized rule, as we have seen, that litigants in the federal court are not relegated to the state tribunals for the assertion of a right to prosecute their suits upon removal to the federal court, but may, by the proper bill, enjoin litigants in such court from proceeding where a cause has been properly removed. The authorities above cited also dispose of the suggestion that the railroad company's motion to vacate the default judgment in the state court was a waiver of this right of removal.

The case therefore turns, after all, upon whether or not there was filed in the state court on September 9, 1912, the proper petition for removal and bond. If these were in due form, the power of the state court ceased, its further proceedings in the case were of no effect, and a bill to restrain the plaintiff in that case from prosecuting it further is well brought. This brings us to the reasons which it is claimed caused the state court to proceed further with the cause, notwithstanding the previous filing of the petition and bond for removal. It was asserted upon the argument, and is now reasserted as a ground for this demurrer, that the state court declined to entertain the removal proceedings for the reasons, first, that the petition for removal was not in due form; second, because the necessary jurisdictional amount was not involved; and, third, because the bond tendered was not conditioned as required by law.

If these positions taken by the state court were proper, then, of course, that court was justified in not surrendering jurisdiction, and the present suit to enjoin those proceedings may not be maintained. This involves the consideration of the several criticisms upon the removal proceedings.

[10] It is urged that the petition for removal does not contain a sufficient averment of diverse citizenship. The petition in this respect is as follows (*italics ours*):

"Your petitioner further states that in said cause there is a controversy between the plaintiff, Laura Chappell, who, *as appears from her petition*, at the time of the commencement of said suit was, and ever since has been, and now is, a citizen and resident of the Western district of the state of Oklahoma, and this defendant, who is a citizen and resident of another state, as fol-

lows, to wit: At the time of the filing or institution of this suit, and ever since, the defendant, Missouri, Kansas & Texas Railway Company, was and is a corporation, organized and existing under and by virtue of the laws of the state of Kansas, and that there are no other parties to this suit."

It is contended that this averment is insufficient, in that it does not allege any facts, but states the mere allegation that the petition showed certain facts. This view of the petition, however, seems too restricted. It is, in my judgment, a clear allegation of the citizenship of the respective parties. True, there is the expression "as appears from her petition," and true, a reference to the petition simply shows an allegation of residence at the date the petition was originally filed in the state court. The reference to the petition, therefore, is to that extent in support of the petition for removal. That it does not fully sustain it does not detract from the direct assertion of the petition for removal as to the citizenship of plaintiff. The reference to plaintiff's petition is purely parenthetical, and does not destroy the legal effect of the rest of the pleading. If, however, it leads to some obscurity in the latter, it is a matter that may be corrected by amendment.

[11] The tendency of recent decisions of the Supreme Court has been towards liberality in this direction, and where the amendment does not supply the necessary jurisdictional averment, but simply goes to make clear such averment already present, the amendment will be entertained in the federal court; and this notwithstanding the fact that the state court, ignoring the petition for removal thus framed, has proceeded even to final judgment. *Powers v. Railway Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. There is no legal obstacle, therefore, to entertaining the motion of the railroad company made in the case sought to be removed, No. 1,074, to amend its petition for removal by striking out the words "as appears from her petition." *Kinney v. Columbia Savings & Loan Ass'n*, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103, and cases cited.

[12] It is further stated that the petition for removal is defective, in that, assuming \$2,000 to be the sufficient jurisdictional amount, in the event that the cause of action arose prior to January 1, 1912—a matter to be hereinafter considered—there is no allegation in the petition for removal alleging that the cause of action did arise prior to the date last named. While it is true that this is not specifically stated in the petition for removal, yet it appears from plaintiff's complaint, which, as above noted, declares that the action arose by reason of certain wrongful acts of the defendant company on October 22, 1911. The matter of removal is to be determined, not by the petition therefor alone, but also by the rest of the record. *Gillespie v. Pocahontas Co. (C. C.)* 162 Fed. 742; *Kyle v. Chicago, etc., Ry. Co. (C. C.)* 173 Fed. 238. This is not denied as having been the law prior to the Judicial Code, which went into effect January 1, 1912; but it is claimed that under section 28 of the Code there is a requirement not previously existing that the petition for removal shall be "duly verified." It is argued that, since the petition must now be under oath, it cannot be aided by the rest of the record, which is not under oath.

I do not concur in this view. Even assuming the Judicial Code to be

applicable to causes arising prior to January 1, 1912, in the matter of the form of the petition for removal, still, so applied, the new requirement of verification does not dispense with the rule settled by continuous decisions of the Supreme Court of the United States, some of which are above cited, to the effect that in aid of the petition for removal the rest of the record may be consulted. This rule proceeds upon the idea that whatever in the record estops the party seeking to remand from claiming the contrary is equally reliable upon the question of removal as the petition for removal itself. Carr v. Fife, 156 U. S. 494, 15 Sup. Ct. 427, 39 L. Ed. 508. Applying this to the present case, certainly the recitals in the complaint filed by the plaintiff Chappell are as strong evidence against her on the question of removal as if such recitals had been embodied under oath in defendant's petition for removal. Since plaintiff's complaint sets forth that the cause of action arose prior to January 1, 1912, and since this complaint is a part of the record upon which the state court proceeded, it follows that that jurisdictional fact was sufficiently established for purposes connected with the removal, notwithstanding the petition for removal did not contain it. The motion of the defendant railroad company to amend its petition for removal by setting up this averment omitted from the petition would, therefore, while unnecessary, seem to be allowable, since the most that could be claimed on the subject of its being necessary is that it would not import a jurisdictional fact into the record, but simply make perfectly clear what, to say the most, is not fully stated already.

It is said, however, that the record as presented to the state court did not justify removal, for the reason that, even assuming \$2,000 to be a sufficient jurisdictional amount by reason of the cause of action having arisen prior to January 1, 1912, the record fails to show \$2,000 involved. There is a direct averment in the petition for removal that more than \$2,000 is involved, but it is claimed that this is overcome by an examination of plaintiff's complaint itself. An examination of plaintiff's complaint in its original form, it is said, does not show a suit for over \$2,000 for the reason that the \$1,000 mentioned as exemplary damages is, it is urged, set forth only in the prayer to the complaint, and, the prayer being no part of the complaint, the latter must be viewed as if no exemplary damages were asked. The complaint, however, as has been above outlined, contains an express allegation that the acts of the conductor and auditor of the train were reckless, willful and malicious, and also alleges that plaintiff "is entitled to receive and recover exemplary damages in this action in the sum of \$1,000." This would seem to be a sufficient averment of exemplary damages as a matter of recovery, so as to place the case beyond the rule that the prayer is no part of the complaint.

It is said, however, that even if exemplary damages be deemed alleged and prayed for, such allegations are insufficient and subject to demurrer, and that, therefore, this item in the complaint, unauthorized by law, does not make up the jurisdictional amount, but leaves the complaint standing upon the sum of \$1,900, originally claimed as actual damages. A comparison of the allegations of the complaint with

the general current of authority, and with the statement of the Oklahoma law on the subject of exemplary damages as contained in *Atchison Co. v. Chamberlain*, 4 Okl. 542, 46 Pac. 499, shows, however, a case for exemplary damages. This latter observation is upon the assumption that it is open for a complainant, claiming exemplary damages in the state court, to state upon the issue of removal that such claim is unauthorized by law. The case upon this point would seem to be within the observation of Judge Lurton in *Hayward v. Nordberg Mfg. Co.*, 85 Fed. 4, 29 C. C. A. 438, where he says:

"The case is not one of colorably enlarging a demand for the purpose of giving jurisdiction to the courts of the United States, for the plaintiff could not have entertained any such purpose."

Plaintiff occupies an anomalous position in asserting exemplary damages in the state court, and yet at the same moment seeking to avoid the effect of such assertion upon the question of removal by the statement that such exemplary damages so sought are not recoverable. The usual course in judicial procedure is for an attack upon one's pleading and claim to come from the opposite party, not from the party himself. *Henderson v. Cabell* (C. C.) 43 Fed. 257; *Johnson v. Computing Scale Co.* (C. C.) 139 Fed. 339.

It is also said that, notwithstanding all the foregoing, the complaint, as passed on by the state court, did not, even including exemplary damages, claim as much as \$2,000, for the reason that upon September 26, 1912, and thus after the petition for removal had been filed, but apparently before it had been taken up by the court, an amendment was allowed reducing the amount claimed to \$1,950. Of course, however, this amendment could not affect the right of removal. This was to be judged by the allegations as they stood upon the filing of the petition and bond. If these latter were sufficient, it was the duty of the court under the express terms of the statute to proceed no further. It could not defeat the statute by an after-allowed amendment.

This brings us to the controlling question affecting the petition for removal, which is whether, even if, as we have held, the record showed a claim for over \$2,000, upon the requisite diversity of citizenship, upon a cause of action arising prior to January 1, 1912, such circumstances justified a removal in September, 1912. The plaintiff Chappell contends that the Judicial Code, which went into effect January 1, 1912, increased the amount necessary to an original suit, and thus necessary to removal, to \$3,000. The railroad company contends that the Code is without effect as to causes of action arising prior to January 1, 1912. By section 291 of the Judicial Code it is provided that:

"Wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the Circuit Courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the District Courts."

The effect of this last section is to transfer to the District Court all powers possessed by the Circuit Courts, and among such was the power to deal with the present cause of action, which, accruing prior to

January 1, 1912, the date on which the Judicial Code went into effect, could have been brought in the Circuit Court of the United States.

Section 299 of the Judicial Code is as follows:

"The repeal of existing laws, or the amendments thereof, embraced in this act, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding, including those pending on writ of error, appeal, certificate, or writ of certiorari, in any appellate court referred to or included within, the provisions of this act, pending at the time of the taking effect of this act, but all such suits and proceedings, and suits and proceedings for causes arising or acts done prior to such date, may be commenced and prosecuted within the same time, and with the same effect, as if said repeal or amendments had not been made."

The section just quoted provides, it will be noted, that the Code shall not "affect * * * any right accruing or accrued," and further provides that "suits and proceedings for causes arising, or acts done, prior to such date"—i. e., of the taking effect of the act—may be commenced and prosecuted "within the same time, and with the same effect," as if the Code had not been passed. Is removal a right protected by this saving section, and one which, by its terms, is not to be affected by the enactment of the Code? Certainly the right to remove is valuable. While not inhering in the original cause of action, it is yet a highly important privilege connected with the procedure. It is not a vested or constitutional right. It may be taken away by legislative act. Equally by legislative act it may be retained. But was not the language of section 299 designed to that very end? That section says that rights and suits to protect such rights shall be prosecuted "with like effect" as if the Code had not passed. Does not this protect removals as an incident to the prosecution of such suits? It would so seem. A more definite indication of the will of Congress at least is necessary to lead to the view that Congress intended to deprive litigants of the privilege of removal given them as to causes of action existing prior to the taking effect of the Judicial Code.

The expressions in *Washington Home for Incurables v. American Security & Trust Co.*, 224 U. S. 486, 32 Sup. Ct. 554, 56 L. Ed. 854, in dealing with the question of appeals in the District of Columbia, cited for plaintiff, are not so clearly in point as to lead to a conclusion other than that here reached. On the other hand, the uniform opinion of other District Courts, upon what impress me as sufficient premises, has been to the effect that the provision contained in section 299 was sufficiently broad to preserve the privilege of removal as to causes of action arising prior to the taking effect of the Code. In *Dalryn v. Brady* (D. C.) 197 Fed. 494, it was held by Judge Witmer that section 299 had the effect to permit a party to institute an action in the District Court after January 1, 1912, where the right of action in the Circuit Court arose and was complete prior to that date, and where the amount was between \$2,000 and \$3,000. Likewise Judge Youmans, in *Taylor v. Midland Valley R. R. Co.* (D. C.) 197 Fed. 323, held that the phrase "with the same effect," as used in section 299 of the Judicial Code, meant "with the same result or with the same consequences," and that thereunder it was the intention of Congress to leave a cause of action arising prior to January 1, 1912, subject to the same

rules and procedure to which it would have been subject if the law had not been changed, and as a result a motion to remand was denied upon a suit involving \$2,900, where the cause of action arose on the 14th of November, 1911, and the suit was brought on the 25th of January, 1912. In the latter case Judge Youmans notes and distinguishes the case of *Washington Home for Incurables v. American Security & Trust Co.*, supra. In *Lincoln v. Robinson* (D. C.) 194 Fed. 571, Judge Hale, sitting in the District Court for the District of Maine, held that a suit properly removed to the Circuit Court before the Code took effect should not, in view of section 299, be remanded on motion made in the District Court after it took effect because it involved less than \$3,000. In *United States v. New Departure Mfg. Co.* (D. C.) 195 Fed. 778, it was held by Judge Hazel, in the District Court for New York, that section 299 protected inquiries pending before a grand jury on January 1, 1912, and in which an indictment was not found until after that date. The concurrence of all this judicial opinion is to the result that as to a cause of action accruing before January 1, 1912, the right of removal exists notwithstanding the amount involved may not be \$3,000. With the reasoning of these cases, so far as they tend to this result, I concur, and the showing, therefore, made to the state court as to the jurisdictional questions, including that of amount, made a removable cause.

[13] It only remains to determine whether the view of the state court as to the form of the removal bond was correct. The old procedure was to the effect that the bond should be for the filing of the record in the federal court by the first day of the following term. The provision of the new Code is that the bond shall be for the entering of a certified copy of the record in the federal court within 30 days from the date of filing of the petition for removal. The bond in this case, pursuing the old statute, provided for a filing by the first day of the following term, and not within 30 days. Was this a compliance with the law? Manifestly it was not a compliance with the terms of the Code, and if these terms control the bond was not in proper form. It is answered by defendant to this suggestion, relying upon the line of authorities last above mentioned, that the provisions of the Code as to the form of the bond had no application to a cause of action such as this arising prior to January 1, 1912. I am of opinion, however, that this carries too far the reservation contained in section 299 in behalf of accrued rights. The form of the bond went to a matter of mere technical procedure. It was a matter of considerable consequence to a litigant whether his right to sue upon a cause of action arising prior to the Code was preserved in the federal courts, and whether the right of removal upon such cause of action was preserved; and it is to be assumed, as above pointed out, that Congress, in using the language of section 299, had this, among other rights, in view for preservation. It cannot be assumed, however, that in preserving rights arising prior to the Code it was the intention of Congress to continue in effect statutes regulating purely the matters of detail connected with either the trial of cases or the accomplishment of a removal.

If it be conceived that Congress intended that the old form of bond should continue simply because a cause of action arose prior to January 1, 1912, then in all other respects in which pre-existing law is modified by the Code the latter to be held inapplicable to such actions, no matter how remote these may be from the substantive rights of the parties. This would impress me as leading to great confusion, and as being entirely beyond what Congress intended. It would seem a strained construction of the Code to hold that it resulted in two lines of court procedure—one for cases arising prior, and the other for cases subsequent, to January 1, 1912. It is true that in *Henry v. Harris* (D. C.) 191 Fed. 868, it was held that section 21 of the Code, disqualifying judges for prejudice, a provision originating with the Code, has no application to causes arising prior to January 1, 1912. That also seems to have been the view in *Ex parte N. K. Fairbank Company* (D. C.) 194 Fed. 978. It is also true that this view of section 21 would lead to a similar view as to section 29, regulating the form of the bond, for each section is remedial. If this be the necessary result of the logic adopted in these cases last mentioned, I find it impossible to follow them. Since the bond as filed in the state court was not proper in form, it did not arrest the jurisdiction of that court and does not now arrest it. *Austin v. Gagan* (C. C.) 39 Fed. 626, 5 L. R. A. 476; *Clark v. Guy* (C. C.) 114 Fed. 783; *Alexandria Bank v. Bates Company*, 160 Fed. 839, 87 C. C. A. 643.

Reliance is placed by the defendant railroad upon *Chase v. Erhardt* (D. C.) 198 Fed. 305, as establishing a different rule. In that case, as in a number of others which might be cited—among them *Deford Co. v. Mehaffy* (C. C.) 13 Fed. 481, and *Harris v. Delaware Co.* (C. C.) 18 Fed. 833—there was a motion to remand for a defective bond, and against this motion was a counter motion to be allowed to file a good bond to supply the defect. The court held in these cases that the form of the bond was not a jurisdictional matter, but one of procedure, and declined to remand, but upon terms that a proper bond be filed within a stated time. Here, however, the question is not one of amendment, nor whether another bond may be filed; that is not asked here, nor was it asked of the state court. The railroad stood there, as it stands here, upon the bond originally tendered. The present question is whether the state court upon the bond tendered was called upon “to proceed no further.” The correct answer in my judgment to this is in the negative.

It follows, therefore, that the suit as brought in the state court continued there, notwithstanding the attempted removal, because of the absence of the statutory bond. It follows that the state court acted within its powers in proceeding to award a default judgment. It results that this court cannot properly arrest by injunction the action of the parties in pursuing their remedies in the state court. The demurrer to the bill must accordingly be sustained, and an order will be entered for its dismissal.

Under this view of the matter case No. 1,074, in which the removal has been attempted, has been improperly docketed. It is unnecessary,

therefore, to pass upon the motions to amend the petition for removal, which motions, as we have above seen, would otherwise be permissible. An order will be entered remanding the cause.

UNITED STATES v. HUFF.

(District Court, S. D. Georgia, W. D. May, 1913.)

1. CONTEMPT (§ 3*)—NATURE AND FORM OF REMEDY—CONVERSION OF CIVIL INTO CRIMINAL PROCEEDING.

A contempt proceeding, although instituted in civil form by an order made in a pending suit directing the issuance of an attachment to bring the defendant into court, may be converted into a criminal proceeding by the intervention of the United States and the filing of a motion asking to be made plaintiff therein.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 4; Dec. Dig. § 3.*]

2. CONTEMPT (§ 38*)—DEFENSES—PLEA OF FORMER JEOPARDY.

The overruling of a demurrer filed by a defendant cited for contempt, and the continuance of the cause for trial on the merits before another judge, will not support a plea of former jeopardy, when by the substitution of the United States as plaintiff the cause is converted into a criminal proceeding.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 117-121; Dec. Dig. § 38.*]

3. CONTEMPT (§ 58*)—DENIAL UNDER OATH IN ANSWER—CONCLUSIVENESS.

The common-law rule that one charged with contempt may purge himself, and be entitled to a discharge, by the filing of a sworn answer denying the contempt, is not recognized by the federal courts, which leave the question to be determined by the proofs on the hearing.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 169-175; Dec. Dig. § 58.*]

4. CONTEMPT (§ 6*)—POWER OF FEDERAL COURTS TO PUNISH—CONSTRUCTION OF STATUTE—"MISBEHAVIOR SO NEAR THE COURT AS TO OBSTRUCT ADMINISTRATION OF JUSTICE."

In the provision of Rev. St. § 725 (U. S. Comp. St. 1901, p. 583), and Judicial Code (Act March 3, 1911, c. 231) § 268, 36 Stat. 1163 (U. S. Comp. St. Supp. 1911, p. 237), limiting the power of federal courts to punish for contempt to "misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice," the second clause is not restricted in meaning to acts committed so near in point of distance to the place of holding court as to be obstructive to orderly procedure, which are covered by the preceding clause as construed by the Supreme Court, but applies to all acts of misbehavior whose natural tendency and effect are to interfere with the administration of justice, wherever the acts may be committed.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 6, 9, 10, 13; Dec. Dig. § 6.*]

5. CONTEMPT (§ 2*)—ACTS CONSTITUTING CONTEMPT—LETTERS TO JUDGE RELATING TO PENDING SUIT.

Defendant wrote and sent letters to a federal judge, which were delivered to him in a room of his residence where he frequently heard matters in chambers, although it was not being so used at the time. The letters related to a pending suit, to which defendant was a party, and in which the judge was still required to take judicial action substantially affecting defendant's interest. Much of the letters was devoted to per-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sonal abuse of the judge, either generally or because of his past actions in the suit, and they also contained references relating to action to be taken in the future, with implied threats in case such action did not conform to defendant's views. *Held*, that they should be construed in accordance with the natural meaning of the language used, rather than defendant's actual intention as testified to subsequently, that they were calculated to influence the action of the judge in the suit and to obstruct the administration of justice, and constituted a "contempt" punishable by the court, under Judicial Code (Act March 3, 1911, c. 231) § 268, 36 Stat. 1163 (U. S. Comp. St. Supp. 1911, p. 237).

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 1-3, 5, 7, 8; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1489-1492; vol. 8, p. 7614.]

Proceeding for contempt by the United States against W. A. Huff. Defendant adjudged in contempt.

O. D. Street, of Guntersville, Ga., and Arthur H. Codington, of Macon, Ga., for plaintiff.

T. S. Felder, of Atlanta, Ga., for defendant.

GRUBB, District Judge. This matter arose out of an attachment issued by the District Court for the Southern District of Georgia against the defendant, W. A. Huff, upon an order of the court charging the defendant with contempt in having written and delivered to the District Judge for the Southern District of Georgia two letters, which were filed by direction of the judge as part of the record of a cause in equity in which the defendant in this proceeding was one of the defendants, and certain of his creditors were plaintiffs, which was entitled on the docket of the District Court, to which it had been transferred from the Circuit Court, *Wm. A. Bidwell et al. v. W. A. Huff et al.* The letters were written and delivered during the pendency of the equity cause. The order of the court in the equity cause, upon which the attachment was issued, recited certain facts attending the delivery of the letters, quoted from their contents, and directed the issuance of the attachment and of a rule to be served upon the defendant directing him to show cause why he should not be punished for contempt because of the writing of the letters. The defendant appeared in response to the rule, and by his counsel demurred to the proceedings. The District Judge for the Southern District of Georgia overruled the demurrer and required the defendant to answer the rule. The defendant thereupon filed his answer to the rule, and the District Judge then stated that he would call in another judge to try the cause on its merits, and continued the cause for that purpose. Another District Judge was designated to sit in the cause, and upon the calling of the case for trial before him the United States intervened, through its law officers, and filed a motion in the proceeding in the name of the United States, asking the punishment of the defendant for the alleged contempt. The proceeding was thereupon tried upon this motion, in the name of the United States as plaintiff, as a criminal proceeding, and conducted thereafter as a separate cause

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from the original creditors' bill, in which the contempt proceeding had its inception.

[1] The defendant moved to dismiss the proceeding because it was entitled in the equity cause, and was a branch of it, and therefore a civil and not a criminal proceeding in form, while the relief asked was entirely punitive in nature. It was conceded upon the hearing that the proceeding was criminal and not civil in fact (*Gompers v. Buck Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. [N. S.] 874), and should be so in form. The contention of the government was that it was made criminal in form by the intervention of the United States as plaintiff, and the filing of the motion, and that this cured the impropriety, if any existed, in the form the proceeding originally took. The order of the District Judge, by which the proceeding was instituted, was no more than an order for the issuance of the process by which the defendant was brought into court to answer for the alleged contempt, and served its purpose when the defendant appeared for that purpose. It might have been more regular to have docketed the proceeding separately from the equity cause, and on the criminal side of the docket. The ultimate character of the proceeding was not determined beyond recall by the form of the order directing the process to issue. When the United States became the plaintiff, and filed a pleading appropriate to make the proceeding a criminal cause, and it was conducted as such thereafter during the entire hearing, the rights of the defendant were fully protected, and he was fully informed by the government's intervention and motion that he was being called upon to answer a criminal contempt; and the motion in itself, and by its reference to the original order, fully informed him of the nature of the accusation, which was the basis of the proceeding. The motion to dismiss is therefore overruled.

[2] The defendant also filed a plea of former jeopardy, based upon the conceded facts that upon the appearance of the defendant in answer to the attachment a hearing was had, upon a demurrer to the proceeding interposed by the defendant, and upon its being overruled the defendant was required to put in his answer to the rule, after which the cause was continued. Jeopardy does not arise until a tribunal has been duly organized competent to try defendant upon the merits, and a trial on the merits is entered upon. A hearing of a demurrer to the indictment of itself is insufficient, as is the arraignment and plea of the defendant. It requires in addition at least the impaneling and swearing of the jury. In this proceeding there was a hearing upon the law only, and what was equivalent to the arraignment and plea of the defendant, and no more. The trial was to be a nonjury one. No witnesses were sworn, and no trial on the facts entered upon, and the minute entry shows that no trial upon the facts was contemplated at that time; the District Judge reciting that he intended to call in another District Judge to try the case on the merits. Jeopardy cannot be predicated on such a record, and the plea is insufficient.

[3] The defendant then filed a sworn answer admitting the authorship and delivery of the letters, the basis of the proceeding, but denying the intent to commit a contempt, and asked to be discharged from the rule, upon the ground that he was purged, by his sworn denial, of the contempt. The federal courts do not recognize the common-law rule of purgation, and leave the question of the commission of the contempt to be determined by the proof adduced upon the hearing. The defendant's application to be discharged on his sworn answer is denied. *In re Savin*, Petitioner, 131 U. S. 267-279, 9 Sup. Ct. 699, 33 L. Ed. 150; *U. S. v. Shipp*, 203 U. S. 563-575, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265; *United States v. Anonymous* (C. C.) 21 Fed. 761-767; *Kirk v. U. S.*, 192 Fed. 273-279, 112 C. C. A. 531.

This brings the case to the merits. It was conceded in argument that the letters, the delivery of which to the District Judge constituted the alleged contempt, would, if delivered to the judge in open court, have been sufficient in their nature to place the defendant in contempt. The letters were not, however, delivered to the District Judge in open court, but at his house, and at a time when it is not shown that court was being held there, though the evidence tends to show that it was customary for the District Judge to hear matters in chambers in the room of his dwelling in which delivery of the letters may be inferred from the evidence to have occurred. The inquiry, then, is whether the delivery of letters, concededly so improper in the nature of their contents as to constitute contempt in other respects, when delivered to the judge at his home and at a time when he was not engaged in holding court, can be said to be contempt of the court over which the judge presided.

Under the Judiciary Act of 1789 the federal courts were vested with power "to punish by fine or imprisonment, at the discretion of said court, all contempts of authority." Congress did not define what acts constituted contempts, but left this, as well as the amount of punishment, to the judicial discretion of the courts. Prior to 1831 the judges in several cases had punished criticisms of themselves or their decisions, published in the press, as contempts of their authority, and to such an extent had this action been considered a usurpation by the public that impeachments had been instituted on account of such acts against several of the judges. The impeachments failed, but resulted in the passage of the act of March 2, 1831, by Congress, which limited the acts for which the courts might thereafter punish for contempts of their authority to defined classes, viz.: (1) Misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice; (2) misbehavior of any of the officers of the courts in their official transactions; and (3) disobedience or resistance of the orders of the court by any officer, juror, witness, party, or other person. Section 1, Act March 2, 1831, 4 Statutes at Large, 487; Revised Statutes, § 725 (U. S. Comp. St. 1901, p. 583); Judicial Code, § 268.

The acts relied upon by the government in this case bring it, if they constitute contempt at all, within the first subdivision, and no

other. They are not disobedience of the court's orders or misbehavior of its officers. If contempt, it must be because they constitute misbehavior, either (1) in the court's presence, or (2) so near to the court's presence as to obstruct the administration of justice. The letters having been delivered to the judge while the court was recessed and not in the courtroom, but in a room of the judge's dwelling, which was at most but occasionally used for the purpose of a courtroom, and was not being so used upon the occasion of the delivery of the letters, and which was at a remote distance from the courtroom, it cannot be said that the acts relied upon as constituting the contempt—i. e., the delivery of the letters—occurred in the presence of the court. The presence of the court is limited, as to place, either to the room in which the sitting is being held or the building of which the room is a part, and the vicinity so near it as to be within the range of vision and hearing, and as to time to occasions when the court is in session, or is about to sit, or has just arisen. Giving to "the presence of the court" its widest latitude, it is clear that the facts of this case do not present a case within its true meaning.

[4] It remains to be determined whether the delivery of the letters by defendant constitutes a contempt of the authority of the court committed so near to its presence as to obstruct the administration of justice. The meaning assigned the last clause of the first subdivision by the defendant's contention, is so near in point of distance to the place of holding court as that the acts of misbehavior can reach and disturb the physical senses of those concerned in holding the court and obstruct thereby the due administration of justice. On the other hand, the government emphasizes the quality of the act as to its being obstructive of the administration of justice, without regarding the place of its commission as important, except as it may reflect upon the existence of this quality. The solution of this case depends largely upon which is the correct construction of the statute.

The nature of the abuse which the restrictive statute was intended to correct throws light upon its proper construction. Prior to its enactment, as stated, federal judges had inflicted punishment for contempt based upon improper criticisms of their conduct and decisions, published after the cases had been finally determined. This had been resented, and the judges had been impeached therefor. The impeachments had failed because under the Judiciary Act the judges were clothed with discretion to decide what constituted contempts of their authority. This was the mischief which Congress intended to remedy by the act restricting contempts to defined classes. Congress was evidently of the opinion that the subjecting of judges to criticism in the press, if it did not obstruct the administration of justice, was of advantage to the judges, and that the citizen should not be punished therefor. The limitation to this was that (1) the criticism should not be administered in the presence of the court, and (2) that its tendency should not be obstructive of the due administration of justice. The judge was deprived by the act of all immunity from outside criticism which affected him only as an individual. The court and the judge, as an arm of it, was still carefully protected by the act

from all criticism that interfered with or obstructed the proper administration of justice by it. On the one hand, Congress determined that criticism of a judge that related to no litigation in his court, or such as related only to such litigation as had been finally disposed of, was not so directly obstructive of the administration of justice as to form properly the subject of a charge of contempt. On the other hand, Congress determined that the expression of criticism of the judge or of his decisions in the presence of the court and during its sessions was misbehavior in itself, though in its nature not otherwise directly obstructive of the due administration of justice, since it was in its tendency destructive of the order necessary to enable the court to accomplish its business.

Congress also recognized that there might be acts of misbehavior directly obstructive to the proper administration of justice, but which were not committed in the presence of the court, and it was to provide for this class that the second clause of the first subdivision was placed in the act. "So near the presence of the court as to obstruct the administration of justice" applies to all acts of misbehavior whose natural tendency and effect is to interfere with the administration of justice, wherever the acts may be committed. The test of the requisite nearness is made by Congress to depend upon the effect of the act upon the administration of justice. If obstructive of it in fact, it will be held to have been committed near enough the presence of the court to come within the meaning of the act. The locality is important only as reflecting upon whether the misbehavior is or is not obstructive. Criticism or abuse of the judge, though administered to him out of the presence of the court, if obstructive of the administration of justice, may, like other acts of misbehavior, be contempt of the court's authority. If relating to litigation pending before him, and intended or calculated to influence his action or decision with reference to it, they are clearly obstructive of the due administration of justice, and so are committed near enough the presence of the court to obstruct justice within the meaning of the statute.

The act has been given this construction by the weight of authority in the federal courts. In the case of Savin, Petitioner, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150, appellant and contemnor approached a witness in the witness room adjoining the courtroom, with the intent to corruptly deter him from testifying on behalf of the government. This was held to be a contempt committed in the court's presence, though it happened out of the courtroom and not within the hearing or vision of it. If the words "so near the presence of the court as to obstruct the administration of justice" be accorded no broader meaning than that given them by defendant in this case, then it is clear their presence in the act is meaningless and futile, since that meaning is held by the Supreme Court in the Savin Case to be already included within the preceding words of the act, "in the presence of the court," and it ought not to be presumed that Congress intended the former words to have no added significance, or that it used them without purpose. If they have an added significance, it must be that they include all acts of misbehavior calculated to obstruct the administration of

justice, even though they may be committed out of the presence of the court and regardless of the place of their commission. In the *Savin* Case the Supreme Court declined to expressly decide whether the words "so near thereto as to obstruct the administration of justice" referred "only to cases of misbehavior outside of the courtroom, or in the vicinity of the court building, causing such open and violent disturbance of the quiet and order of the court while in session as to actually interrupt the transaction of its business," because it construed the acts of the appellant as having been committed in the presence of the court, which rendered a decision of the other question unnecessary. The implication, however, from what they did decide, is persuasive of their opinion with regard to what was left undecided. The same question was also left undecided in the case of *Cuddy*, Petitioner, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154, and has not been decided by that court in any more recent case, unless inferentially in the case of *U. S. v. Shipp*, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265.

In the case of *U. S. v. Anonymous* (C. C.) 21 Fed. 761, it was held to be a contempt, within the meaning of section 725, to use violent and abusive language to an examiner of the court after he had left his office and was upon the street. In that case the court cited many instances of acts held to have been contempts, though committed out of the presence of the court, and said with reference to the effect of the restrictive act of 1831 on the power of federal courts to punish for contempts:

"The next contention of the respondent is that our Act of Congress of March 2, 1831, c. 99 (4 St. at Large, 487; Rev. St. § 725), has deprived the court of the power to punish for such contempts as that alleged against him. It is generally understood that the object of that statute, which has been substantially enacted in Tennessee (Code 1858, § 4106) and other states, was to enlarge the liberty of criticism by the press and others by curtailing the power to punish adverse comments upon the courts, their officers, and proceedings, as contempts which tend to impair respect for the tribunal, and thereby obstruct the administration of justice. * * * I do not find it necessary to go into the distinctions between direct and constructive contempts, which are so unsatisfactory to all who study this subject. There is always a struggle to relegate every contempt to the odious category of constructive contempts, in order to take shelter under these restrictive statutes. But I may say that in my judgment the courts will find that the Legislature has not taken away any valuable power, when these statutes are properly understood. Notwithstanding the seemingly formidable array of authority, it may be that, after all, it is a mistake to say that all contempts not committed in the presence of the court are constructive only. The mere place of the occurrence may not be an absolute test of that question, and it may depend on the character of the particular conduct in other respects, besides the place where it happens. To print hostile comments on the court, its officers, or proceedings, as in cases where the question generally arises, or to ride one's horse into the tavern where the judge sleeps, as in *Com. v. Stuart*, 4 Va. 320, may be only constructively a contempt, as it very indirectly obstructs the course of justice, if at all; but where it takes the form of an assault upon an officer, as when he was beaten and made to eat the process and its seal, as in *Williams v. Johns*, 2 Dick. 477 (s. c., 1 Mer. 302, note d), the impediment to the efficient administration of justice may be quite as direct in its operation to that end, happen where it may, as if the party had ridden his horse to the bar of the court and dragged the judge from the bench to beat him. *Com. v. Dandridge*, 4 Va. 408; *People v. Wilson*, 64 Ill.

195 [16 Am. Rep. 528]. Be this as it may, wherever the conduct complained of ceases to be general in its effect, and invades the domain of the court to become specific in its injury, by intimidating, or attempting to intimidate, with threats or otherwise, the court or its officers, the parties or their counsel, the witnesses, jurors, and the like, while in the discharge of their duties as such, if it be constructive because of the place where it happens, because of the direct injury it does in obstructing the workings of the organization for the administration of justice in that particular case, the power to punish it has not yet been taken away by any statute, however broad its terms may apparently be."

In the case of *In re Brule* (D. C.) 71 Fed. 943, the court said:

"Bribing a person, who is known to be a material witness in a pending cause, to hide himself and remain away from the court, thereby preventing his testifying in such cause, is a contempt of court, whether such person has been subpoenaed or not, and though punishable by indictment, under Rev. St. § 5399 [U. S. Comp. St. 1901, p. 3656], is also punishable under Rev. St. § 725, as a contempt committed by misbehavior 'so near' to the court 'as to obstruct the administration of justice,' though the act is done at the residence of the witness, at some distance from the courthouse, in the town where the court sits."

In the case of *Ex parte McLeod* (D. C.) 120 Fed. 130, the District Court for the Middle District of Alabama decided that one who committed an assault upon an examiner of the court away from the courthouse, because of the discharge of his official duties, was guilty of a contempt. The court said (page 141):

"Is not the judge 'so near' to the court that whatever unlawfully influences him unlawfully influences the court?"

And again (page 142):

"If the people of a distant locality, frenzied by opposition to a particular law, should band together to prevent a United States commissioner being stationed among them, and drive him away by force, the place of the occurrence would be immaterial, in determining the character of the offense, no matter how far distant from the sittings of the court. Such lawless acts would certainly not disturb the sittings of the court or interrupt the orderly dispatch of its proceedings; yet the direct effect, in law and morals, would be as obstructive of justice as if the same lawless assembly had snatched prisoners from the hands of the marshal, or kidnapped witnesses to prevent their going before the grand jury, or, for that matter, arrested the judge himself, when found miles away from the courthouse, and detained him by force, to prevent his holding the next session of the court. No one would doubt the power to punish such acts as misbehavior 'so near to the court as to obstruct the administration of justice,' for they arrest or disturb the powers of the court as effectually as when done in the very presence of the court."

In the case of *Kirk v. U. S.*, 192 Fed. 273, 277, 278, 112 C. C. A. 531, 535, 536, the Circuit Court of Appeals for the Ninth Circuit decided that the corrupt solicitation of one who was to become a juror, at a place three blocks from the courthouse, was an act of contempt within the meaning of section 268 of the Judicial Code. The court said:

"The acts of the plaintiffs in error, which are established by the proofs herein, occurred several blocks distant from the place where the court was held, and not upon property belonging to the United States, or occupied or used by the court. The question is: 'Were they committed so near to the presence of the court as to tend to obstruct the administration of justice therein?' Section 725 of the Revised Statutes was adopted by the act of

March 2, 1831 (U. S. Comp. St. 1901, p. 583), immediately following the conclusion of proceedings against District Judge Peck, who was impeached for imprisoning an attorney for criticism of one of his decisions after the case had ended in his court. It was the purpose of the act to limit the power of federal courts to punish as for contempt criticisms of judicial decisions or judicial officers, and it seems clear that the limitation expressed in the words, 'so near thereto as to obstruct the administration of justice,' was meant to apply more particularly to that class of contempts and to acts of turbulence and disorder committed, not in the presence of the court, nor so near thereto as to present an obstacle to the orderly administration of justice, and not to misbehavior which, at whatever place committed, would tend as completely to obstruct the administration of justice as if committed in the immediate presence or in the vicinage of the court. It is obvious that any willful attempt improperly to influence jurors in the impartial discharge of their duties in a pending case, whether by attempts to bribe or otherwise, no matter where it is committed, is sufficiently near to the presence of the court to tend to obstruct the administration of justice. It is not to be supposed that in enacting the statute Congress intended to deprive the federal courts of the power to deal summarily with persons who are attempting to corrupt jurors who have been called to decide pending cases, for without that power the courts would be practically helpless in the presence of an organized scheme, such as is shown by the evidence in this case, for the purpose of interfering with the administration of justice. There is every reason why the court should have the power to deal with such attempts at their very inception, so as to prevent the evil, and should not be confined to the remedy by indictment to punish such acts after the evil has been accomplished."

In the case of *In re Steiner et al.* (D. C.) 195 Fed. 299, the District Court for the Southern District of New York, said:

"Upon consideration of the arguments presented at the rehearing, I am satisfied that there was error in the decision filed February 2, 1912, holding that the various acts complained of were not committed in the presence of the court, or so near thereto as to obstruct the administration of justice. The opinions cited—*Ex parte Savin*, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150, and *Kirk v. U. S.*, 163 U. S. 49, 16 Sup. Ct. 911, 41 L. Ed. 66—are persuasive to a contrary conclusion. There is no essential difference between 'obstructing the administration of justice,' by tampering with a juror or a witness, or by preparing, verifying, and securing the presentation of a false affidavit, intended to influence the action of a court."

The affidavits were verified before a notary public outside of the court room and building.

In the case of *McCaully v. United States*, 25 App. D. C. 411, the court said:

"There is no possible difference between the corrupt solicitation of a juror at the courthouse door, or in the corridors of the courthouse, or in some obscure nook of the building, and a precisely similar corrupt solicitation at the home of the juror or the place of business of the corrupter. The offense is no greater in the one case than in the other, and its influence upon the administration of justice is precisely the same in both cases. We cannot think that, in the enactment of the statute in question, Congress had any intention to institute a topographical discrimination between acts which have no possible relation to the matter of greater or less distance from the courthouse."

The state of Georgia has a statute (Code 1882, § 4711) substantially like the act of Congress of March 2, 1831. Under this statute the Supreme Court of Georgia in the case of *Baker v. State*, 82 Ga. 776, 9 S. E. 743, 4 L. R. A. 128, 14 Am. St. Rep. 192, held a party to a pending suit to be in contempt because of remarks made to the judge

in presence of certain jurors about a pending case during a recess of the court, and before it convened in the morning, following the recess, but in the courtroom. The court said:

"The conduct imputed to Dr. Baker as a contempt of the city court of Cartersville took place in the courtroom, during the time appropriated to the regular sitting of the court, at September term, 1888, but in the recess of the court for necessary rest and refreshment; business having been suspended the previous afternoon or evening, and the time appointed by the judge for resuming business in the morning not having arrived by six or seven minutes. The matter of the time will, perhaps, be put in the truest light by saying that, the previous day's work having been concluded, the court adjourned over to a stated hour next morning, and the misbehavior occurred from five to seven minutes before the recess expired. The judge had arrived, and was in attendance for the purpose of resuming and proceeding with judicial business, part of which was to conclude an unfinished trial. Some of the jurors who had been impaneled for the week were also present. Dr. Baker, himself a suitor in the court, was there to inquire about or look after his case. The place was the temple of justice, the time was term time, and the business in contemplation by the judge, jurors, and party was court business. Dr. Baker then and there entered upon the subject of his case, and insisted on discussing it, on making remarks about it to the judge, and in the presence and hearing of the jurors. What right did he have to do this if the court was not in session? And what right did he have to do it in an improper manner if it was in session? It was urged in argument before us that he was merely complaining to the judge, and in so doing was in the exercise of a legal right. But what law confers on a suitor the right to converse about his case with the judge out of court? Are the state's judges to be questioned by suitors about their cases, and listen to complaints, elsewhere than in court? We think not. The office of judge would be intolerable to the holder, and degrading to the state, were the incumbent subjected by law to personal and private approach, questioning, and harassment at the will of anxious and discontented suitors. The only place for intercourse with a judge touching business pending in court is the place where the court sits, and the only time for it is during the sitting. And we think that whenever a judge of the city court is in the courtroom during term, and a suitor there calls upon him to deal in any manner with, or answer questions concerning, a pending case, the court is in session respecting that case, to the extent, at least, of keeping the suitor in order in discussing it or making remarks about it, and that any misbehavior of the party then and there occurring takes place in the presence of the court, within the spirit and meaning of the statute above recited. * * * The court is not dissolved by a mere recess; and misbehavior affecting public justice in the courthouse and in the immediate presence of the judge, especially by a suitor, is misbehavior in presence of the court, and may be punished summarily as a contempt of court. * * * We think, however, that necessary adjournments from day to day are but recesses in the sittings, and that when the judge returns to the courtroom to resume business the court at once has 'a presence,' and that disorder, then and there committed, affecting the public justice or business of the court, is misbehavior in presence of the court."

That court held that improper communications made to the judge by a party to a cause pending in his court, though the court was not in formal session when they were made, may constitute a contempt of court, if they tend to obstruct the due administration of justice. The presence of the judge in the courtroom, at a time when the court is adjourned, is not to be distinguished from his presence in a room at his dwelling, where he customarily held court in chambers, though court was not being held at the time the alleged act of contempt occurred. The vital fact is that the judge had in his breast at that time

and place the case to which the improper communications related, just as he had them there the next morning, when in the courtroom and while court was in formal session. The tendency to obstruct justice was the same in either case, since the effect of the communication upon the judge was the same, in whichever place the communication was received by him.

In the case of *United States v. Zavalo* (C. C.) 177 Fed. 536, the court held that the privilege of a witness to be exempt from service of process in a civil cause, while attending court as a witness and until a reasonable time had elapsed for his return home, was for the protection of the court, rather than that of the witness, and should have an extent equal to the necessity for the protection, and the protection to the witness being as necessary to preserve the efficiency of the court, when the witness was out of the courtroom, during a recess of the court, as when within it, the violation of it by the willful service of civil process on the witness, away from the courtroom, but while he was still detained in attendance upon the court, was a contempt of the authority of the court, within section 725, Rev. St. U. S. The second paragraph of the syllabus is as follows:

"Where witnesses were brought by the United States to testify in a criminal proceeding from another state, and duly subpoenaed, and after the termination of the proceeding they were served with civil process by the acquitted defendant in an action for malicious prosecution growing out of their testimony, such act constituted a 'contempt' of court, within Rev. St. § 725, limiting the jurisdiction of the federal courts to punish a misbehavior committed in the presence of the court or so near as to obstruct the administration of justice, though the service was not in the courtroom nor in its immediate vicinity: the court's power being construed to extend as far as necessary to the protection of the witness."

The defendant principally relies upon the cases of *Cuyler v. Atlantic & N. C. M. Co.* (C. C.) 131 Fed. 95, and *In re Griffin* (City Ct. N. Y.) 1 N. Y. Supp. 7. In the first a newspaper criticism of a past act of a judge was held insufficient as the basis of a contempt proceeding under section 725, Rev. St. U. S. Some of the language of the Circuit Judge is inconsistent with the authorities heretofore cited. On page 99 of 131 Fed., however, the court said:

"There may be instances where the publication of editorials or other matter in newspapers would bring the author within the limitations of the statute. For instance, if a newspaper editor should publish an article concerning a trial which was being considered by a jury, and should send a copy of the paper containing such article to the jury, or a member thereof, during the progress of the trial, for the purpose of influencing them in their deliberations, it would present a question whether such conduct would not be misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice."

The second case (*In re Griffin* [City Ct. N. Y.] 1 N. Y. Supp. 7) is like this case in its facts. The statute of New York under which the proceeding was had differs from the act of Congress in that it restricts the misbehavior upon which a contempt proceeding may be based to "insolent behavior towards a court, committed during its sitting," while the language of the act of Congress is "misbehavior in the presence of the court or so near thereto as to obstruct the administration of jus-

tice." The difference is controlling, as was held by the District Court for the Southern District of New York in the opinion of the court in the case of *In re Steiner* (D. C.) 195 Fed. 299-302:

"The New York authorities cited on the brief are not persuasive; the language of the state statute being different from that of section 725, Rev. St. U. S. [now section 268, Judicial Code]. There seems no good reason for confining contempts to boisterous disturbances in the courtroom."

As a result of the authorities, it would seem that under section 725, Rev. St. (section 268, Judicial Code), acts of contempt are not limited to those committed in the immediate presence or vicinity of the court while in session or within the range of its hearing or vision, that locality is not so determinative as is the obstructive quality of the act, and that an act, the natural tendency of which is to obstruct justice, may constitute a contempt wherever committed. This conclusion is essential to the efficiency and independence of the courts. The illustrations gathered from the authorities cited are convincing that without this power the courts could not maintain themselves, since many acts destructive of the independence and the very existence of the courts may be committed out of its presence and during its recess. The courts are not alone *places* where justice is administered, but as well the instrumentalities of government by which it is administered. These instrumentalities are served, as is a corporation, by officers, and can act only in that way. It is necessary to their existence and independence that they have the power of protecting their officers in the performance of their judicial duties wherever they are called upon to perform them, and punishing those who interfere with their officers in the performance of such duties. Otherwise they would soon cease to exist at all. Such officers have no privilege or protection different from their fellow citizens, except when engaged in performing the business of the court, and so far as protection is necessary to its proper performance.

The courts comprise the judges, jurors, witnesses, clerks, examiners, and marshals. Courts are in a sense present wherever any of their officers are engaged in the performance of their functions, and whether the court is in formal session for the trial of cases or not. Any interference with the executive officers of the court, while performing their duties, wherever the place, obstructs the administration of justice. Any attempt, wherever made, to induce a witness to refuse to testify, or to testify falsely, or a juror to depart from his duty, or a judge to decide unlawfully, is likewise an obstruction to the administration of justice. Such officers are all arms of the court, and, where they are performing their duties, there the court is present. Interference with the performance of such duties is an obstruction of justice, and a contempt of court within section 268 of the Judicial Code, wherever committed. This has been expressly held, as applied to jurors, witnesses, and examiners, and is equally applicable to judges. No one of these officers can predicate contempt on acts, however annoying to them, which do not also obstruct justice. Each and all of them are clothed with the court's protection, while engaged in the court's business, to the extent that a willful interference with them while so engaged is a

contempt of the court they are representing. Any other rule would so impair the efficiency of the courts as to destroy them as an independent and co-ordinate branch of the government. It cannot be assumed that Congress had this intention when it enacted the act of March 2, 1831. Its purpose was to take away from the judge the personal privilege of being exempt from public criticism, when such criticism had ceased to be obstructive to the proper administration of justice, and to place him, so far as related to his personal privilege, in the same attitude in this respect as are his fellow citizens.

The language of the act expresses the purpose, and as well the limitation. In the execution of this purpose, Congress showed an equal solicitude to protect the liberty of the critic and to preserve the administration of justice from obstruction or impairment. Criticism of a judge relating to no matter before him for decision obstructs the administration of justice remotely, if at all. Criticism of his decision, after a case has passed finally beyond his control, has no greater effect. The harm done by such criticism is to the judge as an individual and not to the court, or to the administration of justice by it. On the other hand, criticism or abuse of a judge, regarding a case pending before him for decision, brought to the attention of the judge by a party to the case, and which is intended to or calculated to influence or affect him in the decision of the pending case, directly obstructs and embarrasses the administration of justice, in addition to the personal annoyance it causes the judge. The former classes of contempt were removed by the statute from the jurisdiction of the courts. The latter were left undisturbed.

Congress purposely left to the courts the inherent power to inflict their own punishment for improper or corrupt approaches and communications addressed to their officers, including judges, jurors, witnesses, and examiners, with intent to or calculated to influence them in the decision of matters submitted to them, for the reason that no court could maintain its authority, if it was remitted to another tribunal to protect itself, when its integrity was so assailed. The remedy by indictment provided for by the second section of the act of March 2, 1831 (Rev. St. § 5399; Criminal Code, § 135 [U. S. Comp. St. Supp. 1911, p. 1628]), is cumulative, and not exclusive. Its scope is limited to improper approaches that succeed in obstructing justice, and it leaves unprovided for the vastly greater number of such approaches, equally reprehensible, that fail to succeed, unless they be held to come within the first section of the act, as contempts of the authority of the court committed so near the presence of the court as to obstruct the administration of justice. The omission of Congress is a pregnant one, and persuasive of its belief that such unsuccessful attempts could be punished by the court itself under the first section of the act, and in a summary manner.

[5] Coming to apply these principles to the facts of this case: The letters in this case were sent by the defendant to the judge, indicating an intention to reach him directly. The letters contained a statement that they were also to be published in the press, but this itself was in the nature of a threat to the judge. At the time of their delivery to the judge, there was pending in the District Court the case of Bidwell

v. Huff, about which the letters related. The case was yet undisposed of. It was a creditors' bill, under which a part of the property of the defendant and of his children had been subjected to the payment of his debts by judicial sale. Part of the property had been sold, and some remained unsold. No decree of distribution of the proceeds of that which had been sold had been passed by the court, at the time of the receipt of the letters by the judge. There was then pending before him, for confirmation, the master's report, providing for the distribution, and exceptions to the report generally, filed by defendant individually and as trustee for his children, and by his children, and also exceptions filed by the same parties to a report of the master allowing one of defendant's attorneys a fee of \$3,000, to be paid out of the proceeds in the registry of the court, and also exceptions filed by the Scottish-American Mortgage Company, a codefendant, to the same report. The defendant and his children had applied to the court to restore to them the unsold property. This application was pending before the court when the letters were sent, and was afterwards acted on adversely by the judge. The Scottish-American Mortgage Company had applied to the court for an order directing its judgment to be paid immediately out of the proceeds in the registry of the court, and the defendant filed objections to the granting of this relief. This application was also pending before the court at the same time. The decree of distribution was passed by the court on May 1, 1913, almost a year after the receipt of the letters.

The defendant contends that he believed his interest in the case had been eliminated, upon the coming in of the master's report. However, the master's report showed a surplus coming to him, unless absorbed in costs and counsel fees, the incidence and amount of which were still being contested. Nor did the defendant, for himself or for his children, acquiesce in the findings of the master. He complained, among other things, that interest was allowed the creditors, since the filing of the bill and while the proceeds of the sale of his property were deposited under order of the court in a friendly bank without drawing interest. The judge was to be called upon to pass upon the question of its allowance, and in fact did so thereafter by confirming the master's report in that respect, over defendant's exceptions which presented this question. The taxation of costs was still in dispute at the time of the delivery of the letters, and was settled by the court's decree confirming the master's report and distributing the fund. The decree of distribution passed May 1, 1913, did not terminate the litigation. The jurisdiction of the court over the cause and of the unsold property was expressly retained by its terms for future orders or decrees. It is quite clear from this review of the record in the equity cause that it was still pending before the court and in a manner which left in the defendant for himself and for his children a substantial interest. If defendant, in espousal of the rights of his children, made a communication to the judge calculated to influence or embarrass his future rulings in the cause, this would constitute contempt as much as if made in his own interest.

The letters were consequently communicated by defendant to the judge about a cause still pending before him, and in which he was still required to take judicial action substantially affecting the rights and interests of the defendant and his two children. Were they of a nature calculated to influence or embarrass the action of the judge as to the future conduct of the cause? The defendant's contention is that they were merely the indiscreet and improper expressions of a disappointed litigant, and were not intended to influence the future action of the judge, either by persuasion or intimidation. The defendant in his testimony denies that he had any such purpose in writing them, and relies upon the abusive contents of the letters to show that he could have expected to gain nothing from their delivery. The motive of the defendant is but a circumstance in reaching a proper conclusion. The intent of the defendant is to be deduced also from the contents of the letters, and if their language is such that they would be naturally calculated to influence or embarrass the person to whom they were addressed in taking judicial action, the intent of the writer to accomplish what his conduct necessarily leads to may be inferred.

Much of the objectionable parts of the letters is devoted to personal abuse of the judge, either generally or because of his past actions in the pending equity cause. The writing of such a letter by a party to a pending cause to the judge, who is called upon to decide the cause, would seem calculated to embarrass and obstruct the administration of justice. Persuasion is not the only way in which the decision of a judge may be influenced. The willful arraying of a judge in hostility to a party to a case to be decided by him, by writing an abusive letter pending its decision, is well calculated to interfere with that impartial consideration of the cause by the judge which the law contemplates. Whether such a letter would cause the judge to lean unduly to or away from the writer will depend upon the temperament of the judge and seems of little consequence. If it disturbs his equipoise as between the parties, it obstructs and interferes with the administration of justice, without regard to which way it causes him to lean. Letters of the character of those written by the defendant are calculated to accomplish the perversion of justice in this way, and the fact, if it be a fact, that they were not written with that motive, or that, by reason of the temperament of the judge to whom they were written, no such result ensued in the particular case, cannot change the conclusion that they are contempts of the authority of the court over which the judge presides.

The letters, however, are not confined either to general abuse of the judge or to criticism of his past actions in the equity cause. There are many references contained in them relating to action to be taken by him in the future conduct of the cause, which are of a nature calculated to influence such action. When the letters were delivered, there were at least four separate questions still to come before the court for adjudication: (1) The question of the allowance of an attorney's fee to one of defendant's attorneys, and the fixing of its amount; (2) whether interest should be allowed the creditors on their claims, after the sale of property sufficient in amount to satisfy them

fully; (3) the restoration of the unsold property to defendant and his children; and (4) the taxation of costs as between the parties. Each of these questions had been presented for decision to the judge by defendant's exceptions to the master's reports, which were on file. There are references in the letters to three of these questions, and to the possible action of the judge in respect to them, accompanied with what may fairly be construed as implied threats on the part of the defendant if such action did not conform to the right as defendant saw it. It is only necessary to refer to one. In relation to the application to restore the Armory property, which was unsold at the time of the delivery of the letters, the defendant wrote in the letter addressed to the judge personally:

"My son Edison tells me that, when the petition for the return of the Armory property was presented to you in court, you modestly inquired if there was any ammunition in it. My lawyers were, of course, too prudent to answer your question, and I will do it for them. There is ammunition in the Armory lot petition. It is full of dynamite, and when you return to Macon next fall, and order that property sold, the explosion will take place."

This is clearly a reference to future action to be taken by the judge, and a threat in the event such action did not conform to defendant's views as to what was proper. The letter also contains a reference to possible impeachment proceedings, and threatens to publish the two letters broadcast and to express copies of them to the President, Cabinet members, and judges of the Supreme Court. Such references can be fairly construed only as intended as a species of intimidation. It is true that the defendant testified that he neither would have nor could have made use of them for the purpose of intimidation, and it may be conceded that such was not his conscious motive. But, in spite of his testimony, the language of the letters can bear no other reasonable interpretation, and the intent of the defendant is to be ascertained, rather by the natural and inevitable effect of his admitted acts and words, than by his subsequent disavowal of conscious motive. The tendency of the letters to obstruct the administration of justice depends upon the natural impression the reader would get from the perusal of them rather than upon the hidden and undisclosed motive of the writer. If the judge, upon reading the letter, would have been naturally led to believe he was being threatened, then the evil was accomplished. If such was the natural effect of the language used by the writer, he is presumed to have intended what his words imported, and is responsible therefor. The fact that the judge may not have yielded to the threats in the instant case is of no greater importance than would be the fact that a judge had rejected a proffered bribe, if the contempt were based on such a proffer.

The evidence is convincing beyond reasonable doubt that the defendant wrote the letters and caused them to be delivered to the judge while the equity cause was still pending, and while it still required further judicial action at his hands, substantially affecting the rights of the defendant and his children, that the letters were of a nature tending directly to obstruct the administration of justice in the equity cause, and that their writing and delivery, though it occurred at the

home of the judge, was so near the presence of the court as to obstruct the administration of justice, being near enough to reach and influence the judge, who was the arm of the court charged with the administration of justice in the particular case; and the defendant is therefore adjudged to be in contempt of the authority of the court.

BATES v. UNITED SHOE MACHINERY CO.

(District Court, E. D. New York. May 21, 1913.)

1. CORPORATIONS (§ 158*)—RIGHT TO NEW STOCK—DENIAL—NECESSITY OF TENDER.

Where defendant corporation wrongfully refused to transfer stock on its books, the certificate for which, with a power of attorney to transfer, was held by complainant's predecessor in title, and denied his right to subscribe for his share of a new stock issue on the ground that only registered stockholders had such right, an actual tender of the price for the new stock would have been useless and was not necessary to preserve complainant's rights.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 449, 587-592; Dec. Dig. § 158.*]

2. CORPORATIONS (§ 158*)—STOCKHOLDERS—RIGHT TO SUBSCRIBE FOR NEW STOCK.

A transferee of certificates of stock of a corporation, with power of attorney to transfer, presented the same and demanded their transfer on the books. The corporation authorized a new stock issue to which all stockholders of record on a certain date were given a preference right to subscribe. *Held*, that such stockholder had the right to act on the assumption that his stock had been duly transferred, and to preserve his right to make the subscription was not required to offer to subscribe in the name of the prior holder, although through the wrongful act of the company the transfer had not been made.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 449, 587-592; Dec. Dig. § 158.*]

3. CORPORATIONS (§ 158*)—RIGHT OF STOCKHOLDERS TO SUBSCRIBE FOR NEW ISSUE—ENFORCEMENT IN EQUITY.

Where a corporation has authorized a new stock issue with a preferred right in each existing stockholder to subscribe for his proportionate share of the new stock, such right of a stockholder to retain his relative interest in the property and control of the corporation is a substantial right which he may enforce by a suit in equity, and cannot be compelled to resort to an action at law for damages.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 449, 587-592; Dec. Dig. § 158.*]

In Equity. Suit by Jerome E. Bates against the United Shoe Machinery Company. Decree for complainant.

Lexow, Mackellar & Wells, of New York City (George M. Mackellar and Martin A. Schenck, both of New York City, of counsel), for complainant.

Griggs, Baldwin & Baldwin, of New York City (John W. Griggs, of New York City, and Walter Bates Farr, of Boston, of counsel), for defendant.

CHATFIELD, District Judge. This action was presented upon an amended complaint, verified December 27, 1905, and an answer thereto, verified February 15, 1906. Issue having been joined by the filing of a replication, testimony was taken and filed and the case argued in 1912, upon the printed proofs. The statement of facts is complicated, and the conclusions to be drawn from the different items of testimony are more difficult, generally speaking, than the determination of what occurred on the different occasions named. Few of these facts are disputed, and, as these can be referred to subsequently, a general statement of the matter (which may be equivalent to a finding of the incidents therein stated) can be made at the outset.

The United Shoe Manufacturing Company was organized in 1899, under the laws of the state of New Jersey. Another corporation, called the United Shoe Machinery Company of Maine (previously called the Goodyear Shoe Machinery Company), had been organized in 1893. Substantially the same men held corresponding offices in each corporation and the board of directors was the same. But this suit has to do only with the New Jersey corporation.

One William H. Coolidge, who later had a part in the matters referred to herein, was a director in the New Jersey company until the month of February, 1900, but never held an office therein.

Prior to 1899, the Consolidated & McKay Lasting Machine Company had been formed from the union of the Consolidated Hand Method Lasting Machine Company with other interests, and on that date its stock had been exchanged for stock in the United Shoe Machinery Company.

The persons thus becoming stockholders of record in the United Shoe Machinery Company later obtained the right to share in an issue of increased capital stock, of 73,174 shares of common, at par. The right of subscription was given to the "stockholders of record" at the close of business on March 23, 1901, and the subscription and first payment had to be made "on or before April 24, 1901, at 2 p. m." Every 10 shares of preferred or common stock was entitled to subscribe for one share of common stock (\$25), and any portion of this issue not subscribed for was to be disposed of as the board of directors might determine for the best interests of the company. This action was taken upon the 14th of March, 1901, and upon the 16th of March, 1901, the executive committee made the formal offer requiring subscriptions to be paid in full or in stated amounts, and providing that the certificates of stock issued should participate in the dividends to be declared in September, 1901, and thereafter. Receipts were to be given for partial payments, to be returned when the stock was issued, and all subscription payments were to be made to the American Loan & Trust Company, at 53 State street, Boston, or to the Hanover National Bank in New York. Under this subscription, certificates of the new stock were issued to the number of 70,519 shares, in addition to which 492.1 shares, standing in the name of "James Cavanagh, trustee under the instrument of May 16, 1887," were claimed but not issued, 5 shares were claimed by another party, and 2,157.9 were undisposed of.

It appears from the record that the complainant's claim relates to 471 of the 492.1 shares above referred to, and the remaining 22.1 shares appear to have nothing to do with the case.

In 1905, the United Shoe Machinery Corporation of New Jersey was organized, with \$50,000,000 capital stock, having the same officers as the United Shoe Machinery Company of New Jersey, and the stock of the "old" company was purchased by the "new" corporation, at the rate of $1\frac{1}{2}$ shares common and 75 cents cash for each share of the company, while 1 share preferred stock of the corporation and $37\frac{1}{2}$ cents cash was paid for each share of preferred stock of the company. No disposition was made of the 492.1 shares of the company classified as "claimed by Cavanagh." The stock of the corporation was increased in 1906, by giving the right to subscribe for a share of common at par for every 10 shares then held, and in 1907 a stock dividend of 1 share to 4 was issued to the holders of common stock. But in these increases no action was taken making any change in the status of the shares claimed by Cavanagh.

Upon the exchange of the stock of the company for that of the corporation, a sufficient amount was undisposed of to satisfy any rights with relation to the 492 shares affected by the Cavanagh claim, and in the subsequent increases there are also sufficient reserve shares to comply with any demands that might arise from claims with respect to the stock in question.

Dividends were declared by the company and by the corporation from time to time, upon their common and preferred stock; but the dividends belonging to the 492.1 shares of stock labeled as "claimed by Cavanagh" have been withheld. Notice was given upon the 22d of April, 1901, that interest upon the dividends which had accrued before that time would be claimed for the period during which the dividends were unpaid. This notice was given in writing by the attorney for the complainant's predecessor in title to the machinery company.

The complainant makes out his title in the following way: An association of interests, known as the Scott Lasters' Association, transferred its stock, under date of May 13, 1887, to James Cavanagh as special trustee, in order to effect the consolidation then planned. Exchanges of stock, by the Scott Lasting Machine Association and the Hand Method Power Lasting Machine Company, for that of the Consolidated Hand Method Lasting Machine Company, resulted in the formation, as stated above, of the Consolidated & McKay Lasting Machine Company. 3,141 shares of this Consolidated & McKay Lasting Machine Company were set aside or held for the interest of A. H. Jackman, who had been one of the persons associated with James Cavanagh in the Scott Lasters' Association. But during this period, A. H. Jackman had assigned his rights therein to the Jackman Shoe Manufacturing Company, and also during this period—that is, in 1893—proceedings had been brought in the New York Supreme Court for the dissolution of the Jackman Shoe Manufacturing Company. James Cavanagh (Jackman's former associate) was appointed receiver and also claimed individually some of this stock, bringing suit in Massachusetts to substantiate this personal claim.

The principal creditor of the Jackman Shoe Manufacturing Company was Jerome E. Bates, the complainant in the present action, who, because of this (Cavanagh) claim, undertook to have Cavanagh removed as receiver, and who succeeded in obtaining an order, on the 24th day of June, 1899, under which Benjamin B. Odell, Jr., was appointed receiver in the place of Cavanagh. The latter was directed to turn over to Odell as receiver all of the property and assets of the Jackman Shoe Manufacturing Company.

It will thus be seen that, upon the 23d day of March, 1901, Odell as receiver was in possession of the claim of the Jackman Shoe Manufacturing Company to the stock (listed upon the books to James Cavanagh, trustee) of the United Shoe Machinery Company, and had the certificate which in the meantime should have been transferred to his name, and if it had been so transferred would have entitled him as a record stockholder upon that date, viz., March 23, 1901, to the subscription for the additional stock, and hence to any future benefits (including the transfer for the stock of the United Shoe Machinery Corporation).

Upon the 9th day of March, 1903, a decree was made in an action brought in New Jersey by Odell, as receiver, against the United Shoe Machinery Company and others, adjudging the receiver to be the lawful owner and holder of the 4,711 shares of common and preferred stock above referred to. It was held that he was entitled to all dividends and accumulations thereon and to the transfer of the stock to himself as receiver. The defendant was directed to transfer this stock upon its books and to issue certificates therefor to Odell as receiver, and these transfers were made. Subsequently, upon the 16th day of January, 1904, a decree in the same action was entered by which the complainant herein, Jerome E. Bates, who was, as has been said, a creditor of the Jackman Shoe Manufacturing Company, was held entitled to the 3,141 shares of common and 1,570 shares of preferred stock held by Odell, with all rights of subscription and of all actions and causes of action with respect thereto. This decree was carried into effect, thus making the complainant the record holder upon the books of the defendant—that is, the United Shoe Machinery Company—of 4,711 shares of stock (common and preferred) which in turn appear to have participated in the exchange of stock with the United Shoe Machinery Corporation.

With the course of these 4,711 shares subsequent to the 16th of January, 1904, we have nothing to do, and the present action relates only to the rights as to the subscription, which could have been made upon those shares by the record holder on March 23, 1901, under the offers above described, and which the complainant alleges were preserved or made complete by proper demand and tender by Odell as receiver, coupled with knowledge on the part of the defendant and its successors of his claim and of the facts above set forth. That is, the complainant claims 471 shares of the capital stock of the defendant (which we shall hereafter call simply the "company"), together with any dividends actually unpaid thereon, and with any subscription rights

attaching thereto as against the United Shoe Machinery Corporation (which we shall hereafter refer to as the "corporation").

The questions of fact in the case have to do entirely with the notice which was given and the demands which were made with respect to the stock held by Odell as receiver, during the period when the record owner of this stock was entitled according to the defendant's contention, if properly identified and recognized, to the benefits of the subscription rights which would secure the 471 shares comprised within the 491.1 shares unissued and identified by the words "claimed by Cavanagh."

The question of law is simply whether Odell as receiver (having in his possession the certificates of stock of the McKay Company) was entitled to and legally made demand for the rights which he could have exercised if this stock had been exchanged and registered in his name with the defendant company.

The defendant also sets up as bearing upon the question of law, and as a justification for the refusal to accede to the demands of the complainant or of his predecessor, Odell as receiver, a restraining order in a suit brought by one Scott, with respect to the Jackman stock, standing in the name of Cavanagh as trustee, and which the complainant insists was a collusive action, brought at the instigation of the defendant to prevent the stock in question from participating in the possible benefits.

The defendant has also set up the defense of lack of jurisdiction of a court of equity with respect to the delivery of shares of stock dividends and possible interest thereon, which it alleges have at all times been either liquidated in value, or, in the case of the stock, purchasable in the open market, and as to which a remedy at law could be ascertained and measured in dollars and cents, from the standpoint of damage for deprivation. The defendant asks therefore to have the bill now dismissed and to remand the complainant to his remedy in an action at law for damages.

It will be noticed that the Consolidated & McKay Lasting Machine Company stock was forwarded by Cavanagh to the transfer agent of the defendant the American Loan & Trust Company, who raised a question as to the trust suggested by the words "James Cavanagh, trustee." Before the certificates were issued to Cavanagh, as trustee, on the 24th of May, 1900, inquiry was made at the office of Gen. Patrick A. Collins, in Boston, and a paper was found dated May 16, 1887, and headed "Office of the Scott Lasters' Association, James Cavanagh, Trustee." In this the secretary of the Scott Lasters' Association certified that the stockholders had, upon the 13th of May, 1887, for the purpose of forming a new company, agreed to transfer all of the stock to James Cavanagh, as special trustee, for the purpose of effecting the said consolidation.

Among these stockholders was A. H. Jackman, and a part of Jackman's share was the 3,141 shares of common and 1,517 shares of preferred stock which were ordered to be transferred to Benjamin B. Odell, Jr., receiver, as above set forth. This order was not at once carried out, and an application to punish Cavanagh for contempt re-

sulted in the transfer by him, later in the year 1900, of the stock and all claims for dividends or rights accruing from the ownership of the stock to the said Odell, as receiver. This transfer was subject to a claim by Fayerweather & Ladew, which was then in process of litigation but was subsequently determined in favor of the receiver.

Upon the 24th day of May, 1900, a certificate was issued by the United Shoe Machinery Company, countersigned by the American Loan & Trust Company, for 1,570 shares of preferred stock, in the name of "James Cavanagh, trustee, under instrument of May 16, 1887." This particular certificate was indorsed and delivered, on the 16th day of August, 1900, to Odell as receiver of the Jackman Shoe Manufacturing Company, with power of attorney to transfer the said stock on the books of the defendant. A similar certificate with respect to 3,141 shares of *common* stock was also, on May 24, 1900, issued to "James Cavanagh as trustee," and also, under the same circumstances, transferred by Cavanagh, through an indorsement, to Odell as receiver, upon the 16th day of August, 1900, thus giving Odell the necessary power of attorney to transfer this stock on the books of the company.

So far, therefore, as the purposes of this suit are concerned, we have upon the 16th day of August, 1900, certificates of the defendant, outstanding, recognizing the rights in 1,570 shares preferred and 3,141 shares common, which stood in the name of James Cavanagh as trustee (or properly as agent for certain purposes of some of the Jackman stock), and, in so far as these could be transferred by Cavanagh, we find Odell, as receiver, authorized to have this transfer and his claim to this stock registered by the defendant upon the books of the company.

Odell attempted to have this transfer made, according to the complainant's testimony, through correspondence and interviews by his attorney with one William H. Coolidge, who had been attorney for the Consolidated & McKay Lasting Machine Company and for the United Shoe Machinery Company, in the suit by Bates against the McKay Company which had been discontinued. He apparently participated in the negotiations with Odell, as an attorney at law, and discussed the matter with respect to the defendant's property and its rights, with knowledge of the defendant's officers, its general attorney or counsel, and the attorney for its transfer agent. The complainant assumed that Coolidge was acting as attorney for the defendant with respect to this stock, and addressed him in that capacity.

Question was raised by Coolidge that the trust under which Cavanagh held the stock must have been in writing, and that this writing must show whether Cavanagh had the authority to transfer it to Odell. Exhibit 7 (printed on page 121) says:

"So far as Cavanagh is concerned he has authorized, as I understand it, the stock to be transferred to Odell, but for the trust company it will be necessary to see just what his personal authority was in making any transfers from himself as trustee."

Such declarations by Coolidge cannot prove his agency, but do prove that he purported to act for the trust company, and if his action

was authorized, or was in pursuance of conscious acts by the company's officers, holding him out as the trust company's and defendant's representative for this purpose, then his statements are admissible to bind his principal.

The paper found in Gen. Collins' office, which is dated May 16, 1887, and which has been called the trust "instrument," was, during the negotiations with Coolidge, exhibited to him. A copy was sent him in December, 1900, and there seems to be no question that it was known to the officers and counsel of the defendant as well. No transfer of the stock was made to Odell, however, and on March 27, 1901, Mr. Coolidge notified Mr. Choate, who was acting for the complainant herein and for Odell as receiver, that a bill in equity had been brought in the superior court of Suffolk county, by Jacob R. Scott against all the parties interested in this Cavanagh stock, and that the defendant herein had been enjoined on March 25th from transferring any of that stock during the pendency of the Scott suit.

Mr. Coolidge made the further statement, as shown in Exhibit 12 (on page 125 of the record):

"It is the knowledge that Scott makes this claim that has caused the delay on the part of the officers of the Shoe Machinery Company."

In Exhibit 13, Mr. Coolidge said that it was not the fault of the defendant that it was under injunction, and that it should not pay interest, but that the defendant was ready to pay over the money and stock whenever the court should decide to whom it belonged. This was in reply to a letter by Mr. Choate, calling attention to the accumulated dividends and demanding interest thereon.

We need not follow the details of that litigation, but can pass immediately to the result by which the right of Mr. Odell was established in the action in New Jersey.

The Scott suit had been discontinued, and the decree in the New Jersey action determined that Odell as receiver was entitled to the transfer of the stock in question and to all of the various rights to dividends thereon. This gave him the stock upon which he had claimed, in the correspondence with Coolidge, the right to be given a certificate showing his ownership, and he then made another tender and demand for the 471 shares demanded in this suit.

Upon the 23d day of March, 1901 (when the status of the registered stockholders who were entitled to subscribe to the additional stock was determined), upon the 18th day of April, 1901 (when Mr. Odell attempted, through the giving of a power of attorney to one Allen, to insist upon the transfer of the stock and the issuance of a certificate to him), and continuing up to the 24th day of April, 1901 (when payments for the subscription had to be completed), the demands of Odell were known to the defendant and were not recognized by it.

[1] Likewise, upon the 23d day of April, 1901, Mr. Bates, the complainant in the present action, and one Smith, met at Mr. Lexow's office, obtained according to the testimony the sum of \$11,775, and went to the Hanover National Bank, which represented the American Loan & Trust Company of Boston, the transfer agent of the defend-

ant, where an interview was had with a Mr. Carse, for the purpose of subscribing to the increase of stock upon the certificate held then by Mr. Odell.

There is a dispute as to what happened at this interview. Mr. Bates and Mr. Smith claim that they made an actual tender for the stock, Mr. Carse denies the tender or the filling out of any subscription blank, but both parties agree that Mr. Carse investigated the list of stockholders and ascertained that the certificate held by Mr. Odell was not registered. Mr. Carse said or intimated that Mr. Odell could not subscribe in his own name, nor could the transfer to him be recognized without the approval of the American Loan & Trust Company, and no subscription blank was made out. Mr. Smith and Mr. Bates claim that Mr. Carse attempted to buy the right to subscribe from them, and this is denied by Mr. Carse.

But whatever may have happened as to that matter, it is evident that if the list of stockholders had contained the name of Odell as receiver, with respect to the stock in question, the subscription would have been made and apparently received, so far as anything appears from this record.

It is also evident that a subscription by Odell in the name of James Cavanagh as trustee would have availed nothing, and one by Smith and Bates for Odell would not have been received by Carse, as Odell was not a stockholder of record. On the other hand, a subscription by any of these men, as agent for Cavanagh as trustee, might have been one which Carse would have received and forwarded, even though he were desirous or willing to purchase the right to subscribe for himself or his principals. But such a subscription would have been affected by the injunction in the Scott suit, and would have indicated no more than the demands actually made by him, nor was such a subscription necessary, in the face of a refusal to recognize his right to the stock.

The only other question of fact that furnishes ground for argument in the matter is in connection with the Scott suit. The testimony would seem to show that the Scott suit was brought with the knowledge of some of the officers of the defendant, and that it was furthered by them, or at least acquiesced in by them. The expenses of bringing the action and of employing the attorney therefor were paid by the defendant, and this action was but an excuse or attempted justification for the questions raised and the objections presented by the defendant to a recognition of Mr. Odell's claims as receiver to some of the shares of the Jackman stock.

The record indicates that the purpose of the Scott suit was to present Scott's claim in opposition to Odell, and prevent the subscription to the stock in question by him, or by any one receiving title from Cavanagh. It appears that the defendant had knowledge of the situation and preferred to have the rights of the parties determined as a whole, with the risk of being entirely in the wrong, and to withhold the issuance of the additional stock and the payment of dividends until the various questions were determined.

For this reason, a decision that the Scott suit was entirely collusive

is unnecessary. The defendant is responsible for the situation which it allowed to exist during the time which the Scott suit was pending and during which it had knowledge of that litigation and of Odell's claim. The defendant was liable for all rights which Odell might have been entitled to and for all damages which resulted from the withholding of those rights, even though that withholding was not for the sole purpose of preventing him from obtaining the rights at the time when they could have been exercised by him. Under these circumstances, a tender by Odell was known to be useless, and the absence of such a tender would make no difference.

It must be held also that Mr. Coolidge represented the defendant sufficiently to bind it as to the matters which were discussed between him and Mr. Odell or his representatives, for the reason that the defendant has relied upon and acted upon everything which Mr. Coolidge knew and did during the course of these inquiries, and has, through the occurrences in connection with the Scott suit, recognized Coolidge's position in the matter, and hence plainly given him the necessary authority to make the representations from which the extent of the defendant's responsibility should be measured.

An actual tender by Mr. Odell or by Mr. Bates and Mr. Smith was not necessary in view of the position taken by the defendant, or by all of its representatives, including the transfer agent and Mr. Carse, or the Hanover National Bank in New York City.

The testimony of Mr. Lexow and of Mr. Bates shows that an actual and valid tender was possible. No reason is shown nor persuasive testimony presented to indicate that the tender was not in fact made, except that both parties to all the interviews in question recognized that the actual tender was unnecessary, and the manner of making the tender was therefore, to a certain extent, informal.

Under these circumstances, a party cannot be held in default for failure to comply strictly with conditions which are not insisted upon nor taken into account in determining whether or not the party who might have made the tender would be treated as having the right to do so.

[2] The next step to be considered is the failure of Odell to offer to subscribe in the name of Cavanagh as trustee. But inasmuch as Odell had given actual notice that Cavanagh's trust had been ended and that he was entitled to be considered the record holder upon the books of the company, and had made demand for such registry, and inasmuch as the right to subscribe was associated in the notice for the subscription with a notice that the transfer books of the company would be opened on the 1st day of April, 1901, to determine who were stockholders of record on the 23d of March, 1901, and as Odell's stock had been presented for registration prior to that time, we must consider that Odell had the right to assume that what should have been done had been done, and that the defendant company would perform its duty to complete the registration of his stock prior to the date in question, and to thus make his proffered tender good.

In other words, Odell in equity had the right to be treated as a stockholder of record, inasmuch as the defendant knew, or failed to

recognize at its peril, the title which had then vested in him, from which the right to be listed upon the books of the company as a stockholder had been obtained.

The defenses of the Scott suit or of the possible Ladew claim, or of any cloud upon the title through the Cavanagh trust, had been removed, except as the defendant took the risk of relying thereupon. And it having subsequently been proven that the withholding of Odell's rights made the defendant a wrongdoer, he was entitled, and the complainant as his successor is entitled, to have his position and rights restored as they would have been, if properly recognized by the defendant, before March 23, 1901. The defendant cannot justify its conduct by suggesting that questions of title were involved as an excuse for the delay, and then rely upon its own delay when the questions have been decided against it. *O'Neil v. Wolcott Mining Co.*, 174 Fed. 527, 98 C. C. A. 309, 27 L. R. A. (N. S.) 200. To do this would be to allow the defendant in equity to profit from its own wrongdoing. *Real Estate Trust Co. v. Bird*, 90 Md. 229, 44 Atl. 1048.

[3] Whether or not the exact relief claimed by the complainant is substantially beneficial to the complainant—that is, whether the defendant by the withholding of this stock has caused only monetary damage which the complainant could recover at law, or which he could have prevented by purchase of stock in the market—does not answer the question presented. As the issue has been stated, the complainant is entitled to be placed in the position in which he would have been if his rights had been recognized at the outset, and to an accounting for any property or moneys which he should have received.

The right of a stockholder to receive a proportionate share of the control or property of a corporation, when a part of that control or property is being disposed of *to the stockholders* who wish to maintain their relative position and to pay their share therefor, is a substantial and enforceable right. *Stokes v. Continental Trust Co.*, 186 N. Y. 285, 78 N. E. 1090, 12 L. R. A. (N. S.) 969, 9 Ann. Cas. 738; *Snelling v. Richard* (C. C.) 166 Fed. 635; *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156. (This was an action on the case.) If the stock is for sale on the open market, then the price thereof may establish the measure of damage, if judgment be recovered for the loss or deprivation of the stock. *Gray v. Portland Bank*, *supra*; *Stokes v. Continental Trust Co.*, *supra*. If money damage is the relief asked, then no action for the shares of stock themselves should be brought in equity, and the remedy would be without reference to whether the shares could be delivered. An equitable action, however, need not be dismissed entirely, even if merely an accounting is needed, and if the complainant has had equitable rights which can properly be determined in the action, but for which no adequate remedy exists at law.

In the present case the complainant, or his predecessor, could have purchased stock on the market up to 1905. Since that he might have purchased the stock of the New Jersey corporation, but substantially all of the stock of the defendant (the company) has been exchanged for that of the corporation, except the surplus unused.

After the right to subscribe was closed on April 24, 1901, however,

two persons (one of them an officer of the defendant) were allowed to enforce a claim or to subscribe for the stock in question at the rate of the original offer, although the price of such subscription rights had risen or they were no longer obtainable. The directors, therefore, of the company could still use the surplus stock for the complainant's demands, and the stock of the new company is still available for exchange if he so desires. But the ability to obtain the property in some other way, or to find a measure of damage for the stock in question, does not show that an adequate remedy at law existed, nor prove that the complainant was bound to go out and buy other stock merely to save loss or trouble to the defendant, and before it was determined that his remedy should be an action for damages and not for the shares themselves.

The action was properly one in equity, to compel the defendant to perform its contract. To hold that a man has a complete and adequate remedy at law, because the particular property which he wishes has a money value, or because he might have gone into the market and purchased the property, and then claimed to have been damaged, is not a sufficient reason for refusing to exercise equitable jurisdiction, where the rights demanded are equitable rights, which might not have been substantiated in a court of law, and as to which the right to damages (if other stock had been purchased at an increased price) might not have been recoverable from the standpoint of legal (as distinguished from equitable) title. A court of equity should not go so far as to compel litigants, who seek property which they have a right to receive and can receive through the jurisdiction of the equity court, to keep out of the equity court and to proceed at law, where the possession of the property, or the right to the possession of the property, is the basis of the action, and where the legal title depends on conditions which have been met in equity alone.

The complainant therefore may have a decree for the relief prayed.

In re DUNLAP CARPET CO.

(District Court, E. D. Pennsylvania. July 8, 1913.)

No. 2,741.

1. BANKRUPTCY (§ 339*)—RIGHT TO CONTEST CLAIM—DISPUTE OVER OWNERSHIP.

Where the validity of a claim against a bankrupt estate is conceded and the only dispute is between two persons about the ownership, the controversy concerns such two persons alone, and the trustee, as representative of the other creditors, has no interest therein.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 526; Dec. Dig. § 339.*]

2. BANKRUPTCY (§ 331*)—OWNERSHIP OF CLAIM—IMPORTED GOODS SOLD UNDER BANKER'S TRUST RECEIPT.

A bank which furnished the money or credit with which imported goods were purchased in the foreign country, taking the bills of lading in its own name and the usual trust receipt when the goods were sold by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

importer, continued to be the legal owner of the goods until title passed to the purchaser and after that to the account for the purchase price; and, where before payment of such account the purchaser was adjudged a bankrupt, the bank alone was entitled to prove the claim against the estate, of which right it was not deprived by the fact that through an error the purchaser credited the goods to the account of the importers, scheduled them as the creditor, and they made proof of the claim in their name, without repaying the bank its advances.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 520; Dec. Dig. § 331.*]

3. BANKRUPTCY (§ 328*)—PROOF OF CLAIMS—LACHES.

A creditor of a bankrupt is not chargeable with laches in proving his claim, where it is presented within the year allowed by the statute, unless the rights of others have been prejudiced by the delay.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. § 328.*]

4. BANKRUPTCY (§ 331*)—RIGHT TO PROVE CLAIM—OWNER OF LEGAL TITLE.

Where a bank was the owner of the legal title to a debt against a bankrupt for goods bought, by virtue of an importer's trust receipt covering the goods when they were sold and their proceeds, its right to prove the debt cannot be contested on the ground that a general accounting between it and the importers, involving many prior transactions, would show that the importers were not indebted to it; such accounting having no place in the bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 520; Dec. Dig. § 331.*]

5. BANKRUPTCY (§ 331*)—RIGHT TO PROVE CLAIM—ESTOPPEL.

The true owner of a claim against a bankrupt estate is not estopped from proving the same within the time allowed by the statute because another without right previously proved the same debt and sold its claim, where the purchaser had no knowledge at the time of the claim of the real owner and did not act in reliance on its representations or its silence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 520; Dec. Dig. § 331.*]

In the matter of the James Dunlap Carpet Company, bankrupt. On review of order of referee. Reversed.

For prior opinion, see 171 Fed. 532.

Henry C. Huey, of Philadelphia, Pa., for trustees.

William Ewin Bonn, of Baltimore, Mo., for Assets Realization Co.

John P. Walsh and Ralph S. Rounds, both of New York City, and George Wentworth Carr, of Philadelphia, Pa., for Sovereign Bank of Canada.

J. B. McPHERSON, Circuit Judge. It may be useful to preface the following opinion by a short outline of what has taken place in the course of this particular dispute:

The Carpet Company was adjudged bankrupt on March 30, 1907, and within a week—on April 5—Joseph Reichardt of New York, trading under the firm name of Reichardt Bros., filed a proof of claim in which the bankrupt was declared to owe the firm \$11,212.11 for three lots of wool delivered in December, 1906, and January, 1907. The claim encountered no objection and was therefore allowed, and a dividend of 25 per cent. was paid upon it in the following July.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Toward the end of September the claim was bought by the Assets Realization Company for 40 per cent. of its face value, and on October 31 another dividend (of 20 per cent.) was declared and was paid to that company. In February, 1908, the Sovereign Bank of Canada presented a claim identical in all essential details with the Reichardt claim, and thereupon it was manifest that hostile contestants were asserting ownership of the same debt. Recognizing this antagonism, the Assets Company immediately objected to the allowance of the bank's claim on a variety of grounds—some of them technical, but several going to the merits (see [D. C.] 171 Fed. 539)—and the claimants became involved at once in a controversy over the burden of proof. The District Court decided that the existence and formal proof of the Reichardt claim did not debar the bank from claiming to be the owner of the same debt; that the first duty of the bank was to offer *prima facie* evidence of its asserted right; but that the rule laid down in *Whitney v. Dresser*, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584, had made the sworn proof of claim *prima facie* evidence that the averments contained therein were true. The District Court decided also, as a necessary corollary, that, while the bank's claim was open to attack, the Supreme Court had required the objectors to undertake the burden of repelling the *prima facie* case, and of proving that the claim should be rejected. In *re Dunlap Carpet Co.* (D. C.) 171 Fed. 532. Of course, the two claims being identical, it is manifest that only one can survive, and this situation has been accepted by the contestants, although no attack has been made in form upon the Reichardt claim by a motion to expunge. After the decision reported in 171 Fed., the Assets Company offered evidence in support of its objections, and upon the completion of its case the bank moved to dismiss the objections on the ground that they had not been sufficiently proved. The referee refused this motion on February 20, 1911, and directed the bank to offer evidence in rebuttal if it desired to do so. As this order was interlocutory, it could not be reviewed at that time. Accordingly, the bank proceeded in rebuttal, and the contestants were fully heard, both by oral and written evidence and by argument. In November, 1912, the referee made a final order disallowing and expunging the claim of the bank, and thereupon the present certificate was obtained; the two orders (of February and November) being thus brought up for review. As the final order raises all the questions that need be considered, the interlocutory order needs no discussion; but if I dispose of it formally the record will be simplified, and I therefore overrule the objections made thereto, and hold that the decision of the referee, requiring the bank to offer its evidence in rebuttal, was not an erroneous exercise of discretion.

Before taking up the two vital questions in the case, let me say a few words about the findings and opinion of the learned referee. Naturally these are such as are thought to be pertinent from the point of view that he regarded as controlling. But I have found myself unable to agree that this point of view is decisive, and it has seemed best on the whole to make no effort either to reconstruct the findings or to take them up separately; it has rather appeared that confusion would

be avoided if new findings were made upon such matters only as seem to be essential. In this connection it should be noticed in the first instance that the attitude of the bank to the trustees in bankruptcy has apparently been misapprehended. After the bank's claim had been proved *prima facie*, two additional dividends (of 20 and 10 per cent., respectively) were declared in March and November, 1908, and, as the contest over this money had then become well known to all concerned, the referee at first directed the trustees to withhold payment from both claimants; but he afterwards modified this order and permitted the Assets Company to receive the dividends upon giving security for repayment in the event of the bank's final success. A bond was accordingly given, and, so far as the last two dividends are concerned, the trustees are therefore well protected. It is not denied also that the Assets Company is abundantly able to repay the second dividend, but I lay no weight upon the satisfactory position of the trustees, for the bank is making no attempt in this review, and indeed none could be made, to hold the trustees liable to pay any of the dividends a second time—not even the first two, one of which (as already stated) was paid to Reichardt Bros., and the other to the Assets Company without security. Indeed, the brief of the bank expressly disclaims attacking the trustees now or hereafter, or attempting to hold them personally liable for any of the payments referred to. It is certain that no such liability could be the result of the present review, which is purely a controversy between the bank and the Assets Company concerning the title to property—especially the title to a chose in action—and does not put in issue the liability of the trustees at all. Moreover, it is highly important to observe that the trustees have still in hand a sum of money large enough to pay to the bank its share of all the dividends that have heretofore been declared; and of course, if the bank be lawfully entitled to receive, and does receive, payment of this sum, it will have obtained full satisfaction, and can have no further complaint against the trustees or against any other person. If the bank should thus succeed, the trustees would no doubt be under a duty to compel the Assets Company or its surety to repay the amounts of the third and fourth dividends, and would also be under a duty to recover from the Assets Company, if possible, the amount of the second dividend that was paid to that company in mistake. They would also be under obligation to recover from Reichardt Bros., if possible, the amount of the first dividend paid to them in mistake; and out of the moneys realized from these two sources—Reichardt Bros. and the Assets Company—a final dividend would be declared. But this is only to say, what is not likely to be disputed, that if dividends have been paid to the wrong claimant the trustees should endeavor to regain the money; and this is very far from deciding that they have incurred any liability under the circumstances of the erroneous payments. To state these facts is, I think, to show clearly that the present certificate raises, and can raise, no question concerning the liability of the trustees, and that further consideration of this subject may therefore be dismissed. The contemplated danger to the trustees probably had some influence on the referee's decision, and for that rea-

son I have spoken of the matter with more particularity than might otherwise have been necessary.

[1] At this point I may speak briefly of an argument made by the bank, but I think not earnestly relied upon, namely, that the Assets Company has no interest in the present controversy; the trustees alone being concerned. The decisions cited in support of this position do not sustain it. When the validity—that is, the very existence—of a claim is denied, either in whole or in part, this is no doubt a matter that concerns the other creditors generally, and the trustee is their proper representative in such a controversy; but where the validity of the claim is conceded, and the only dispute is between two persons about the ownership, I do not perceive how the other creditors are interested in the result of such a controversy. The bankrupt estate is liable, whichever contestant may succeed, and the dispute therefore concerns these two alone.

[2] It being clear therefore that the present inquiry does not affect the liability of the trustees in any way, and that the Assets Company has the right to object to the bank's claim, it remains to consider the two controlling questions, and of these the first may be thus stated: At the time of the bankruptcy, who owned the true legal title to the debt due by the Carpet Company? I may say at once that in my opinion the bank was the owner, and not Reichardt Bros.; and at the same time I may also express my regret that this prolonged and expensive dispute has been apparently promoted (at least in large measure) by an unfortunate oversight or misunderstanding of the Carpet Company. Instead of crediting the bank with the amount due for the wool, the company's books gave the credit to Reichardt Bros., and the books were therefore apparently in accord with the claim presented by that firm. But I think there is no doubt that this was a mistake—although perhaps an excusable mistake—and that the Carpet Company had sufficient information to put them on guard and to lead to the truth. And the truth was this: The full title to the wool was originally in the bank and was never divested. Without extending this opinion by somewhat tedious detail, it is enough to say that I understand the Assets Company to admit (and if not I find the fact to be) that all the wool—for it is conceded that the three shipments stand on the same footing—was imported under the well-known and the vastly important arrangement known as the "trust receipt" plan. By this arrangement a banker advances money to an intending importer, and thereby lends the aid of capital, of credit, and of business facilities and agencies abroad, to the enterprise of foreign commerce. Much of this trade could hardly be carried on by any other means, and therefore it is of the first importance that the fundamental factor in the transaction, the banker's advance of money and credit, should receive the amplest protection. Accordingly, in order to secure that the banker shall be repaid (or that he may be able to protect his acceptances) at the critical point—that is, when the imported goods finally reach the hands of an intended vendee in this country—the banker takes the full title to the goods at the very beginning; he takes it as soon as the goods are bought and settled for by his payments or acceptances in the for-

eign country, and (speaking generally) he continues to hold that title as his indispensable security until the goods are sold in the United States and the vendee is called upon to pay for them. This security is not an ordinary pledge by the importer to the banker, for the importer has never owned the goods, and moreover he is not able to deliver the possession; but the security is the complete title vested originally in the banker, and this characteristic of the transaction has again and again been recognized and protected by the courts. Of course, the title is at bottom a security title, as it has sometimes been called, and the banker is always under the obligation to reconvey; but only after his advances have been fully repaid and after the importer has fulfilled the other terms of the contract. At present, however, we have nothing to do with such a situation, and need not discuss it. The facts here show uninterrupted title in the bank down to the time when the goods were delivered to the Carpet Company, and show also that the terms of the contracts respecting the repayment of advances had not been fulfilled. As already stated, the trust receipt practice is of great value to importers; without it much of our foreign trade would be impossible, because the individual importer lacks the necessary capital and the foreign credit. An especially pertinent authority is a decision recently made in this circuit (*Century Throwing Co. v. Muller*, 197 Fed. 252, 116 C. C. A. 614), in which the subject has been examined with care by Judge Gray. He refers to some of the other decisions, and I may add *Re Cattus*, 183 Fed. 733, 106 C. C. A. 171; *Re Coe* (D. C.) 169 Fed. 1002; s. c., 183 Fed. 745, 106 C. C. A. 181.

It cannot be denied that under such trust receipt contracts the bank advanced large sums of money to Reichardt Bros. to help that firm in carrying on the business of importing. It follows therefore that when the wool in question reached this country the bank was the owner of the legal title; and it continued to be the owner, for there is no evidence that its title was ever divested up to the time when the wool was shipped to the Carpet Company, and when the bank became the owner of the debt thereupon arising. Indeed, Reichardt Bros. distinctly recognized the bank as the owner both of the wool and of the debt, if such recognition were of decisive importance (as I do not understand it to be).

[3] I do not see how it can be successfully disputed that the title to the wool was in the bank originally; and, if it were, it continued to exist in the bank unless divested in some way that is sanctioned by legal principles. How then is the title supposed to have passed to Reichardt Bros.? I think it cannot be seriously contended that the mere delay of the bank in presenting its claim can furnish the answer to this question. The rights of the bank and of the firm were fixed in March, 1907, when the bankruptcy proceedings were begun, and it is not easy to understand how the title to the wool or to the debt can be affected by the bank's subsequent delay in proving its claim. But if the argument from laches is really relied upon, the following reply would seem to be sufficient: The bank is charged with neglect in presenting its claim because it delayed the presentation for nearly a year. Congress, however, has expressly allowed a full year for this very

purpose, and the bank can hardly be blamed for exercising a right distinctly given by the statute. Of course, delay may sometimes be the source of harm to the rights of others, and when this is true a creditor may lose his right to profit by the belated proof of his claim; but if the delay does no harm he is certainly at liberty to insist upon all the advantages to which he is entitled by the exercise of his statutory right, namely, making proof within the statutory period. For example, if an estate had been fully settled within six months and the assets actually distributed among more diligent creditors, a tardy claimant might find himself in practice without a remedy. In effect he would not be allowed to do harm to others by disturbing an executed settlement, although he might have had a right to share in it if he had not been too leisurely. But there is no such ground for rejecting the claim now in question; creditors have not been injured, and will not be injured, by the bank's delay; they have all been paid their dividends, and no one lawfully entitled to such payment will be asked to refund. The bank took the risk that the trustees might not retain money enough to pay the dividends to which it is now making a tardy, although a lawful, claim; and, since the risk has fallen out in the bank's favor—the fact being that enough money is still available—the mere delay of 11 months furnishes no reason for denying a right to which the bank seems otherwise to be plainly entitled. It must not be forgotten that, when the Carpet Company went into bankruptcy, its creditors became the equitable owners of the assets in due proportion, and in its character as one of such creditors the bank's ownership continues unless it has done something to forfeit its right to claim dividends, or to estop it from setting up a true title against an otherwise unwarranted claim. So far as appears, it has forfeited no right, for it has hurt no one by the delay; certainly there is no evidence that delay has injured the Assets Company, for no legal injury is done by proving that the company never had a lawful claim, even if the bank may have been slow about putting in the proof. In other words, at the end of the inquiry it now appears that the Reichardt claim ought not to have been made at all. If I am right, it had no legal support, for the firm never owned either the wool or the debt due therefor by the Carpet Company, and it seems to follow irresistibly that the firm could not acquire title either to the wool or to the debt by the mere fact that (after the bankruptcy) the bank, who had always been the rightful owner both of the wool and of the debt, did not present its claim at an early stage of the proceedings. I am at a loss to understand how the title to property can be acquired in this way.

[4] But I can understand how title by estoppel in pais may arise, and this brings me to the second vital question that needs attention. Before taking it up, however, there is a preliminary word that should be said upon another subject. Much evidence was offered before the referee (and several of his findings are inferences from such evidence) concerning a subject that in my opinion is, and must be, outside the range of this inquiry altogether, namely, the details and results of the dealings between Reichardt Bros. and the bank. These were proved (not fully but to some extent) for the purpose of answering the ques-

tion whether the firm was or was not debtor to the bank at the time when this particular wool was imported and sold. As I understand the situation, no such subject as the mutual accounts between Reichardt Bros. and the bank is, or can properly be, involved in this collateral proceeding. The dealings between these contestants were numerous and complicated; they covered many transactions and involved many thousands of dollars and many securities. Apparently, the firm was of opinion that (if settlement were made) the balance of account was against the bank in December, 1906, and January, 1907, and probably this is the reason—I think it is the only reason—why the firm asserted ownership of the debt due from the Carpet Company, and of the wool whose sale gave rise to the debt. At least this would furnish an explanation of the promptness with which Reichardt Bros. presented their claim; and they have certainly enjoyed some advantages from being first on the ground, being, so to speak, the party in possession. But if the first and fundamental question be (as I understand it to be) solely and exclusively a question of title, the administration of the bankrupt estate of the Carpet Company is evidently not the proper proceeding in which the mutual accounts between the firm and the bank can be equitably settled. I repeat that the first question is: At the time of the deliveries in December and January, who was the owner of the wool, and who became thereupon the owner of the debt arising from the sales to the Carpet Company? To answer that question is to take a most important step toward deciding to whom the dividends should be paid by the trustees in bankruptcy of the Carpet Company; for the owner is *prima facie* the person entitled, unless he has somehow lost his right—and that will be considered in a moment. If the bank had—and I believe it had—the legal title both to the wool and to the debt, it had a full right to all the advantages arising from that legal position; and, although after an equitable adjustment of accounts the money thus coming into its hands from the Carpet Company's bankrupt estate might ultimately be found to belong to Reichardt Bros., these equities must be adjusted in some direct proceeding between the firm and the bank, to which both are parties and where one can obtain a direct and enforceable decree or order against the other. Such a controversy does not concern either the Carpet Company or its trustees or its general creditors, and is therefore purely collateral to the settlement of the bankrupt estate. Among other reasons why mutual accounts of rival claimants should be adjusted in a different forum, these may be noted: If the right to prove a claim must be decided, not according to the state of the title to the claim, but according to the ultimate balance of equities growing out of mutual accounts between claimants to the title, it is obvious that these accounts must be first settled before the conflict between or among the rival claimants can be determined. Meanwhile, the year allowed for filing claims may easily expire, and thus the claim be barred by the statute. Or if—to avoid this danger—all of the claimants are allowed to prove provisionally, it still cannot be known who should prevail until the accounts are settled. Must the administration of the bankrupt estate await the end of this collateral dispute in which the estate has

no interest whatever? The case before us illustrates what is likely to happen. For several years these claimants have been trying to settle their accounts in an incomplete and desultory fashion, and they have not settled them yet. The effort has necessarily been informal and unsatisfactory, and it has resulted in nothing. Neither party has a decree, and in this proceeding neither party could have a decree that could be enforced against the other. Meanwhile there has been much delay in administering a bankrupt estate that has no concern with the disputed accounts, but was only concerned with the question of disputed *title*—and that could have been decided in 30 days.

[5] Returning now to the question of estoppel, let us inquire whether what would be in effect a transfer of title from the bank to the Assets Company has been made out. The burden of proof is on the company, but I lay little if any weight upon this consideration; in my opinion the evidence establishes, not doubtfully but clearly, that the question must be answered in the negative. I think this may be shown without elaborate discussion. I find the relevant facts to be these: As part of its business the Assets Company buys claims against bankrupt estates, and it bought the claim of Reichardt Bros. on September 23, 1907, for 40 per cent. of its face value. The bargain was made between Rosenheim, an agent of the Assets Company, and Joseph Reichardt, and no element of estoppel can be made out from the surface of the transaction. In order that an estoppel in pais may enable the Assets Company to bar the bank from asserting title to the debt due from the bankrupt, several elements are indispensable: (1) The bank must have known that it was itself the true owner of the debt; I assume that it had such knowledge. (2) It must also have known that the firm of Reichardt Bros. was claiming to be the true owner of the same debt; I assume for the moment (but without deciding) that it had such knowledge also. (3) It must also have known that Reichardt Bros. were attempting to sell the debt to the company as the firm's own property, and the company must have bought the claim in reliance (to some extent at least) upon the representations or the conduct or the silence of the bank in reference to the Reichardt title. See cases cited in 11 Am. & Eng. Ency. of Law (2d Ed.) 427f et seq.; and in 16 Cyc. 759 et seq. Even if it be assumed that the bank was aware that negotiations for the purchase of the claim were pending between Reichardt Bros. and the Assets Company on the basis of the firm's ownership of the claim, it is not the fact that the company made the purchase in reliance upon anything that the bank said or did, or omitted to say or do. The Assets Company must go that far at least in living up to the rules that govern title by estoppel; and the company does not even aver that any representation, either by word or by conduct, was made by any agent of the bank. Indeed, it offered positive evidence (which I accept as true) that the bank was not known in the transaction at all. How could the company be relying in September, 1907, on the bank's silence—and it complains now of nothing except the bank's silence—if it be the fact (as Rosenheim swears) that the bank was not heard of in this connection until the following February? Some conflict may be found in the evidence

that refers to the bank's knowledge of negotiations between Reichardt Bros. and the Assets Company, but no conflict of evidence casts a doubt upon the fact that the company did not even know in September that the bank was being silent. The silence complained of now could not possibly have been relied upon then. The only representative of the bank to whom both contestants refer is Mr. Lanskail, and at the best I think there is much doubt whether Rosenheim saw him at all in connection with the transaction; but, even if he saw Lanskail, he certainly did not know that the latter was the bank's representative, and hence he could not have been trusting the bank. Moreover, Lanskail's agency for the bank ceased on June 30, 1907, and again it is doubtful at the best whether the negotiations between Rosenheim and Reichardt Bros. began at so early a date. But these matters may be left in doubt. This much is clear: The company relied neither on the statement or the conduct or the silence of any agent of the bank, and the facts therefore do not warrant the court in applying the doctrine of estoppel. The discussion need not be pursued, but I may add in a word that what happened was probably this: The Assets Company bought the claim at its own risk from Reichardt Bros., apparently trusting to appearances, some of which could no doubt be interpreted in a sense favorable to the Reichardt title. I say "could" be so interpreted, for these appearances were ambiguous, and could be interpreted with equal plausibility in favor of the bank's title; so that the company would have been more prudent if it had been more thorough in its preliminary examination and had then approached the bank directly for information. But I do not lay the least weight on this suggestion. It is easy for a party to be wise after the event, and much easier for a judge who has heard and considered testimony and argument; but I do lay weight on the decisive fact that the Assets Company during its negotiation for the claim could not have relied on the silence of the bank, since it was not even known that the bank was holding its peace.

If I am right in my decision of this second question, it is not important to add that in any event the Assets Company would only have a right to be made whole; that is, to be protected against losing the 40 per cent. that was paid for the claim. I need not dwell upon this, for the point does not arise if the company has not made out the charge of estoppel.

Before concluding this opinion I wish to acknowledge my debt to the unusually capable arguments of counsel, both oral and written. They left nothing to be desired, and if I have gone wrong it has not been for lack of intelligent guidance. One word about the form of the order that should be entered. In strictness the exact point now involved is the validity or invalidity of the bank's claim, and in similar strictness the validity or invalidity of the Reichardt claim is not yet in issue, as no motion has been made to expunge it. But the contestants agree—as indeed they must agree—that in substance the two claims are inseparably interwoven; both cannot be valid at the same time; so that a decision concerning one necessarily carries with it a decision concerning the other. It would be little less than folly to

compel the bank to make a formal attack upon the Reichardt claim, and solemnly to go again over the identical ground that has already been traversed by both parties at much length and with much pains. I assume that the parties do not wish to do anything so superfluous, but (as the subject was not mooted at the argument) I shall for the present confine myself to the matter in hand. I suggest, however, that the parties agree within 15 days that the following order may be amended by adding a clause expunging the Reichardt claim, so that a record, final in form as well as in substance, may be presented to the Court of Appeals. And in order to leave undisturbed the statutory time for taking an appeal, I shall postpone the entry of a final order until the expiration of the 15 days.

The clerk is therefore directed to enter the following order on July 23, 1913, with any amendment of which he may be advised by the court:

The order of the referee entered on September 30, 1912, disallowing and expunging the claim of the Sovereign Bank of Canada, is reversed, and the claim is hereby allowed.

WILSON v. AMERICAN ICE CO. et al.

(District Court, D. New Jersey. August 11, 1913.)

1. EQUITY (§ 363*)—PLEADING—MOTION TO DISMISS—DEMURRER.

A motion to dismiss a bill in equity for insufficiency of fact appearing on the face thereof presents a question of law, and takes the place of a demurrer, as provided by equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi).

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 762-766, 768; Dec. Dig. § 363.*]

2. EQUITY (§ 129*)—BILL—ALLEGATIONS OF FACT.

A bill in equity must allege with particularity every material ultimate fact necessary for the complainant to prove to establish his right to the relief prayed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 309; Dec. Dig. § 129.*]

3. CORPORATIONS (§ 155*)—DIVIDENDS—DUTY TO DECLARE.

In the absence of statutory provisions, the granting of dividends from the profits of a trading corporation is in the discretion of the directors, subject to the intervention of a court of equity for improper refusal.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 560-563, 568-576, 578, 593-603; Dec. Dig. § 155.*]

4. CORPORATIONS (§ 182*)—DIVIDENDS—RESERVED FUND.

Corporation Act N. J. (2 Comp. St. 1910, p. 1604) § 8, authorizes incorporators to include any provision in their articles for the regulation of the affairs of the corporation, not inconsistent with the act, which they may desire; and section 47 declares that unless otherwise provided in the articles of incorporation, by-laws, etc., the directors in each year, after reserving such sum as a working capital as shall have been fixed by the stockholders, declare a dividend of the whole of its accumulated profits exceeding the amount so reserved, and pay the same to the stockholders on demand. *Held*, that the word "otherwise," as so used, is applicable to the whole subject of dividends, and that the fixing of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

amount to be reserved as a working capital is to be done directly by the stockholders only in the absence of regulatory provisions in the original or amended certificate of incorporation, or in a by-law adopted by a majority of the stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 686-690; Dec. Dig. § 182.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5105-5113.]

5. CORPORATIONS (§ 155*)—DIVIDENDS—STOCKHOLDERS—DECLARATION—RIGHT TO COMPEL—BILL.

Where a bill by a minority stockholder to compel a corporation to declare dividends on preferred stock charged in general terms that the corporation had made large profits, but that the same had been used for improvements to expand the business, etc., and that the directors had refused to declare dividends out of profits amply sufficient to pay the same, and for the purpose of "freezing out" the minority stockholders, including complainant, but did not set out the original or amended certificate of incorporation, or any of the company's by-laws, and did not allege that none of those contained a provision regulating the manner of reserving the working capital from the net profits, so as to show that the directors were not authorized so to do, and further did not allege that the company's assets were in such condition that dividends could be paid without serious injury to the corporation, and set out none of the overt acts tending to show that complainant and the minority stockholders were being oppressed, etc., it was demurrable.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 560-563, 568-576, 578, 593-603; Dec. Dig. § 155.*]

6. CORPORATIONS (§ 155*)—DIVIDENDS—DECLARATION—COERCION—RIGHTS OF MINORITY STOCKHOLDERS.

A minority stockholder may not maintain a bill to compel a declaration of dividends without having first sought relief at the hands of the corporation's directors, and a mere averment in the bill that complainant had demanded of the directors that such dividends be declared, and that the same had been refused, though meetings of stockholders and directors had been held since such demand, was insufficient.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 560-563, 568-576, 593-603; Dec. Dig. § 155.*]

In Equity. Bill by G. Searing Wilson against the American Ice Company and others to compel defendant to declare a dividend on his preferred stock and for ancillary relief. On motion to dismiss the bill for insufficiency of fact appearing on the face thereof. Dismissed.

Everett, Clarke & Benedict and Cornelius W. Wickersham, all of New York City, for complainant.

McCarter & English, of Newark, N. J., and Frank R. Savidge, of New York City, for defendant Ice Co.

RELLSTAB, District Judge. The bill of complaint is filed against the American Ice Company and certain of its officers and directors by a minority stockholder, in behalf of himself and such other stockholders who may join therein, and is designed to force such company to declare a dividend upon its preferred stock. The defendant company moves to dismiss the bill upon the grounds, *inter alia*, that:

"(1) The bill of complaint does not allege that the defendant corporation and the directors thereof are not authorized by the certificate of incorporation and by-laws of said company to do the things of which complaint is

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

made. (2) The bill of complaint does not set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the defendants, and the causes of his failure to obtain such action, or the reason for not making such effort."

[1] This motion, being an alleged defense, in point of law, arising upon the face of the bill for insufficiency of fact, to constitute a valid cause of action, takes the place of a demurrer. Eq. Rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi).

[2] It is elementary that a complainant in equity must allege with particularity every material fact necessary for him to prove to establish his right to the relief prayed. Story's Equity Pleading, § 241; Shipman's Equity Pleading, p. 320; Hageman v. Brown, 76 N. J. Eq. 126, 73 Atl. 862; Schuler v. So. Iron & Steel Co., 77 N. J. Eq. 60, 75 Atl. 552. Only the ultimate facts upon which the complainant asks relief, however, are necessary to be stated, and a short and simple statement of these, omitting mere statements of evidence, is sufficient. See Eq. Rule 25, par. 3 (198 Fed. xxv, 115 C. C. A. xxv).

[3] It is well settled that, in the absence of statutory provisions, the granting of dividends from the profits of a trading corporation is in the discretion of the directors, subject to the intervention of a court of equity for improper refusal. N. Y., etc., R. R. Co. v. Nickals, 119 U. S. 296, 7 Sup. Ct. 209, 30 L. Ed. 363; Gibbons v. Mahon, 136 U. S. 549, 558, 10 Sup. Ct. 1057, 34 L. Ed. 525; Stevens v. U. S. Steel Corporation, 68 N. J. Eq. 373, 59 South. 905; Blanchard v. Prudential Ins. Co., 78 N. J. Eq. 471, 79 Atl. 533; Murray v. Beattie Mfg. Co., 79 N. J. Eq. 604, 82 Atl. 1038; Cook on Corp. (6th Ed.) § 545.

In the U. S. Steel Case, Vice Chancellor Stevenson said:

"The bill presents no case, apart from our statute (Corporation Act, § 47), in which, under the general equity power of this court, the complainant is entitled to have a dividend declared on the common stock of the defendant corporation. The general rule is well settled that the directors of trading corporations are invested with a wide discretionary power in regard to the distribution of profits in the form of dividends among the stockholders. Subject, of course, to provisions in the charter, and also to the by-laws of the company, it is for the directors to say whether profits shall be distributed to the stockholders, or retained for the purpose of the corporate business. It is, however, equally well settled that this discretionary power is not absolute, and when the directors 'improperly refuse to make a division of unused profits,' a court of equity will intervene on behalf of any stockholder who may complain. Laurel Springs Land Co. v. Fougerey, 50 N. J. Eq. 758, 759, 760 [26 Atl. 886]; Fougerey v. Cord, 50 N. J. Eq. 185, 197 [24 Atl. 499]; Griffing v. Griffing Iron Co., 61 N. J. Eq. 269, 271 [48 Atl. 910]; 2 Cook, Corp. (4th Ed.) § 545. These general principles must be kept in mind in dealing with such statutes as those which a little later we are to construe. It does not follow, if the minority stockholders have not the benefit of a hard and fast statutory rule for the distribution of profits, that therefore they are exposed to permanent deprivation of dividends, and that they must wait indefinitely, and accept an increasing book value of their stock in place of the cash dividends which they would prefer to enjoy. The New Jersey cases above cited, as well as many cases in other states, illustrate how ample are the powers of courts of equity to enforce the rights and satisfy the reasonable expectations of stockholders in the matter of the declaration of dividends when profits, which are not required to be retained for the purposes of the corporate business, including protection against emergencies, are unreasonably and unjustly allowed to remain undistributed."

[4] By section 8, par. 7, of the New Jersey act concerning corporations (Rev. of 1896, p. 280), as amended by P. L. 1898, p. 407 (2 Comp. St. N. J. 1910, p. 1604), it is provided that the certificate of incorporation may include—

“any provision which the incorporators may choose to insert, for the regulation of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors and the stockholders, or any class or classes of stockholders; provided, such provision be not inconsistent with this act.”

By section 30 of such act the directors are enjoined from declaring dividends, except from the surplus or from the net profits arising from the company's business. Section 47 of said act, as amended by chapter 110 of the Laws of 1901 (P. L. N. J. 1901, p. 246), provides:

“Unless otherwise provided in the original or amended certificate of incorporation, or in a by-law adopted by a vote of at least a majority of the stockholders, the directors of every corporation created under this act shall, in January in each year, after reserving over and above its capital stock paid in, as a working capital for said corporation, such sum, if any, as shall have been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount so reserved, and pay the same to such stockholders on demand.”

It has been held that the word “otherwise,” as used in section 47, is not limited to the date of declaring the dividends, but is applicable to the whole subject of dividends, and that the fixing of the sum to be reserved as a working capital is to be done directly by the stockholders only in the absence of provisions regulating that matter, contained in the original or amended certificate of incorporation or in a by-law adopted by a vote of a majority of such stockholders. *Stevens v. U. S. Steel Corp.*, supra; *Raynolds v. Diamond Mills P. Co.*, 69 N. J. Eq. 299, 60 Atl. 941; *Bassett v. U. S. Cast Iron, etc. Co.*, 74 N. J. Eq. 668, 70 Atl. 929. And, in *Murray v. Beattie Mfg. Co.*, supra, it was held by the court of last resort in New Jersey (headnote by the court):

“Under the corporation act of 1896, when the by-laws authorize the directors to determine the amount to be reserved for working capital, their power to determine the amount of dividends is absolute as long as they act in the exercise of an honest judgment.”

Turning now to the bill of complaint, it alleges, in substance, mostly on information and belief, as far as is necessary to determine the present motion, that the defendant company is a New Jersey corporation, incorporated on March 11, 1899, with power, inter alia, to carry on the business of manufacturing, gathering, storing, preserving, buying, and selling all kinds of ice; that by an amended certificate of incorporation, authorized about May 13, 1907, its capital stock was reduced to \$40,000,000, divided into \$25,000,000 of common and \$15,000,000 of preferred, 250,000 and 150,000 shares, respectively; that complainant is the owner of 300 shares of the common stock and 100 shares of the preferred stock, the latter bearing a fixed 6 per cent. yearly dividend, payable before any dividend shall be paid on the common stock; that such dividend is cumulative, and that holders of such preferred stock, in case of liquidation or dissolution of the

company, are entitled to be paid in full, both of principal and all earned and unpaid dividends, before any amount shall be paid on the common stock; that complainant has been such a shareholder for upwards of 12 years; that up to July, 1901, dividends on the preferred stock were paid at the agreed rate, but that little has been paid since in such dividends, though the company was amply able to pay from its net profits an annual dividend of at least 2 per cent. on its preferred stock without injuring its business; that on October 31, 1912, the unpaid dividends on such stock amounted to at least 50 per cent., aggregating more than \$7,500,000; that a large majority of the common stock and 96.2 per cent. of the outstanding preferred stock is owned by the American Ice Securities Company; that the Securities Company was organized to give complete control of the defendant company to certain persons active in the management of such company, and to "freeze out" the minority stockholders; that the defendant company has accumulated profits, not reserved for working capital, of upwards of \$2,000,000, and a surplus of upwards of \$3,000,000; that with few exceptions (named) such profits have been put into improvements, maintenance, and equipment, the payment of large salaries, and in surplus, and that at least three-fourths of the accumulated earnings are not required in the prosecution of the business; that during the past three years the defendant company has expended, for maintenance, improvement, and equipment, upwards of \$1,500,000, and that during such period an annual expenditure of \$100,000 would have been more than sufficient for the necessary repairs and improvements, aside from the acquisition of new plants and the payment of moneys for the purpose of acquiring new business; that the defendant company, by substituting a new bond issue, at a higher rate of interest, for an old one, more than a year and a half before the latter became due, occasioned a loss to the company of nearly \$1,000,000; that the defendant company now has a surplus and sufficient accumulated net earnings to pay a dividend on its preferred stock of at least 20 per cent. over and above any duly authorized reserve for working capital; that failure to declare and pay dividends is not due to the exercise of a just discretion by the directors, but to their desire to extend business at the expense of the minority stockholders, and to compel them to dispose of their holdings or become stockholders of the Securities Company; that in several instances in recent years the directors' failure to declare dividends on the preferred stock was due in part to the desire of the majority of the common stockholders to apply the profits, sufficient to pay such dividends, but not on both common and preferred, to repairs and improvements for their general benefit, rather than to the payment of dividends on the preferred stock; that it would be useless to apply to the stockholders or directors of the defendant to take action to declare dividends upon such stock, for the reason that the majority of each of the stockholders and directors are opposed to such declaration, and that the majority of the stockholders and directors who now control the affairs of such company have refrained from declaring any dividends for the last 10 years, except as stated; that the complainant has demanded of such directors that

dividends on such stock be declared, and has frequently demanded declaration and payment of dividends on his preferred stock, and that such demands have never been complied with, except as stated, though meetings of the stockholders and directors have been held since such demands; that complainant has never consented to any by-law permitting the directors to desist from declaring dividends on the common or preferred stock.

The bill thereupon prays for a decree enjoining the defendant company to pay a dividend of 20 per cent. on the outstanding preferred stock, and for discovery, accounting, and a receiver in aid of such payment, etc. It is apparent from this recital that, while the bill covers much ground, its statements, in essentials, are of the most general character. An articulated array of generalities, no matter how well sounding, will not satisfy the requirement that the ultimate facts upon which the prayer for relief is founded must be stated fully, distinctly, and with particularity.

[5] The bill does not set out the original or amended certificate of incorporation, or any of the company's by-laws, nor does it allege that none of these contain any provision regulating the matter of reserving working capital from the net profits; and one is left in the dark concerning whether the incorporators, in the original certificate, or the stockholders, in the amended certificate or by-laws, have formulated any policy in regard to working capital. For aught that appears the directors, in declining to declare dividends out of the profits in question, acted in strict accordance with the provisions in such certificates and by-laws, and in that respect were only carrying out the duly authorized business policy of the corporation. This omission alone, in my judgment, is fatal. The presumption is that the directors' action in that respect is authorized, and it is not overcome by mere general allegations such as:

"There are 'accumulated profits which are not reserved for working capital.'"

"At least three-fourths of said accumulated earnings are not required in the prosecution of the business."

"Company is amply able to declare and pay large portions of all due and unpaid dividends."

"The company 'has assets sufficient to pay the same without injuring its business.'"

And (even this on information and belief):

"Complainant has never consented to any by-law permitting the directors to desist from declaring dividends."

The mere fact that a corporation has a large amount of surplus or net profits does not entitle the stockholder as of right to dividends. *N. Y., Lake Erie & W. R. R. v. Nickals*, supra; *Gibbons v. Mahon*, supra; *Trimble v. Amer. Sugar Ref. Co.*, 61 N. J. Eq. 340, 48 Atl. 912.

In *Gibbons v. Mahon*, supra, it became necessary to decide whether certain shares of stock, representing the accumulated profits of the corporation, were to be treated as capital or dividends. It was decided that they were capital. Mr. Justice Gray, in delivering the opinion of

the Supreme Court, used the following language, which, because of its pertinency to the question here considered, is quoted at length:

"Money earned by a corporation remains the property of the corporation, and does not become the property of the stockholders, unless and until it is distributed among them by the corporation. The corporation may treat it and deal with it either as profits of its business or as an addition to its capital. Acting in good faith and for the best interests of all concerned the corporation may distribute its earnings at once to the stockholders as income, or it may reserve part of the earnings of a prosperous year to make up for a possible lack of profits in future years, or it may retain portions of its earnings and allow them to accumulate, and then invest them in its own works and plant, so as to secure and increase the permanent value of its property. Which of these courses shall be pursued is to be determined by the directors, with due regard to the condition of the company's property and affairs as a whole; and, unless in case of fraud or bad faith on their part, their discretion in this respect cannot be controlled by the courts, even at the suit of owners of preferred stock, entitled by express agreement with the corporation to dividends at a certain yearly rate, 'in preference to the payment of any dividend on the common stock, but dependent on the profits of each particular year, as declared by the board of directors.' *New York, Lake Erie & Western Railroad v. Nickals*, 119 U. S. 296, 304, 307 [7 Sup. Ct. 209, 30 L. Ed. 363]."

Section 47 of the Corporation Act recognizes the probable need of working capital in addition to that subscribed, to a successful operation of the company's business; and what amount is required—irrespective of whether the stockholders directly, or indirectly through their agents, fix it—depends upon the character of the enterprise, the facilities for production, the cost of operating, the condition of existing markets, both as to demand and ability to make prompt settlements, and a forecast of what the market in the immediate future is likely to require. These and other considerations may impel an honest, competent directorate to withhold dividends; and the courts will not interfere in such determination, in the absence of clear and unambiguous allegation showing willful neglect or bad faith.

The defendant company, authorized to gather natural and manufacture artificial ice, may take such steps to avert an ice famine or extend their capacity to handle a growing business as in their discretion may be necessary, and if in doing so it appropriates some or all of the accumulated profits in increasing the capacity of existing, or in the acquisition of new, storehouses or manufacturing plants, this will be presumed, in the absence of a showing to the contrary, to have been necessary for the protection or betterment of the company's business.

The bill shows accumulated profits of \$2,000,000 and a surplus of \$3,000,000. These sums are only seemingly large; the profits being less than 10 per cent. of the outstanding capitalization. The bill further shows that during the first five years the net profits, save certain small dividends paid, have been put into improvements and surplus; that the average annual net profits have been less than 2 per cent. of the outstanding capital; that the net accumulations are the result of more than a decade's business, during which the dividends were small and intermittent; that during the last three years the company has expended more than \$1,500,000 for maintenance, improvements, and equipment, but how much is now in cash or "quick" assets, or in real

estate, equipment, or other "slow" assets, does not appear. For aught appearing, none of such accumulations are presently available for dividends. In order to distribute the accumulations here intended to be alleged to have been wrongfully withheld from the stockholders, it might be necessary to sell some of the new acquisitions or to borrow large sums, either of which might seriously menace the future welfare and integrity of the company.

Courts protect the minority against the oppression of the majority stockholders, because otherwise such wrongs would go unrighted and the injured be remediless. But the courts will also protect the majority against the oppression of the minority. The "strikes" of the minority against the majority are often as inequitable as the "freezing out" of the minority by the majority.

Vexatious suits, carrying in their wake, not only unnecessary expense, but exposure of internal management and business policy, of advantage to none but competitors, and often brought in the latter's interests, entailing serious loss, if not disaster, to the common interests of all the stockholders, have no place in a court of conscience.

That the dividends paid during a decade were few and scant, and that large expenditures for new plants, equipment, etc., were made during the same period, does not prove that this was improper; and merely setting forth such facts does not assert that it was. That the management of the company's affairs is in the complete control of the majority does not indicate that the minority is being oppressed. It is the duty, as well as the privilege, of the majority to control. The allegation that the holders of the majority stock for years have pursued a definite policy to force complainant to sell out is a conclusion, rather than a statement of fact. What are the overt acts? It is inconceivable that an enterprise using capital of the magnitude here described could have pursued a systematic plan to coerce complainant to sell his stock, without exposing sufficient of such plan to enable complainant to assert the facts underlying the conclusion here stated.

Furthermore, involved in the question whether the failure to declare dividends from known accumulated profits was improper is the one whether the complainant has exhausted all available means within the corporation before he came into court.

[6] The business of a corporation, within limitations, is to be managed by its board of directors, and as these are selected by the majority of stockholders and subject to their control, it is the duty, generally stated, of a minority stockholder having a grievance—fancied or real—against the conduct of such directorate or the business policy of the majority stockholders, to seek redress, in the first instance, from such directors, or their principals, the majority stockholders. *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Quincy v. Steel*, 120 U. S. 241, 7 Sup. Ct. 520, 30 L. Ed. 624; *Maeder v. Buffalo Bill's Co.* (C. C. Dist. N. J.) 132 Fed. 280.

Courts of equity are not for the purpose of correcting errors in the management or business policy of a corporation, in the absence of bad faith; and to maintain a bill in equity involving such considerations the complainant, in addition to showing that the company refused to

declare dividends out of net profits, must show, not only that such profits should be distributed among the stockholders, but that the company continues its refusal after having been seasonably requested to make such distribution, or that its hostility to the minority interests is so manifest that such request would be but an idle performance. This duty is not, as supposed by complainant, required only when the minority stockholder comes within equity rule 27 (198 Fed. xxv, 115 C. C. A. xxv) and files a bill "founded on rights which may properly be asserted by the corporation." This duty grows out of the very relation which such a stockholder bears to his associates and the corporation.

A minority stockholder is therefore required, on the fundamental equitable principle that he who seeks equity must do equity, to show that he has availed himself of his rights within the corporation, or that it would be unavailing to attempt to do so. This showing the complainant in this case has not made. The statement that complainant frequently demanded of the directors that such dividends be declared and that the same have been refused, though meetings of stockholders and of directors have been held since such demands, is not sufficiently full and certain to comply with the rule hereinbefore stated. When were the demands made with reference to such meetings, and what, if any, was the action upon which the pleader bases his conclusion that the refusal was improper? As the bill asserts that the accumulations were the product of a great number of years, were such demands made before, during, or after the devotion by the company of such profits to the acquisition of new plants, improvements, equipment, and new business, to all of which objects the bill, by at least necessary implication, asserts such profits were being applied? The bill, as noted, fails to disclose how much of the accumulated profits are in cash or "quick" assets, and there is an utter absence of any facts showing that the complainant has attempted seasonably to obtain redress within the corporation or that the refusal to declare dividends was improper. The omissions relate, not to mere matters of evidence, but to ultimate facts essential to maintain the jurisdiction of the court in reviewing the business management of a trading corporation, as well as to maintain a bill to compel the declaration of dividends from accumulated profits. Further, the bill does not show the reason for not making other or more attempts within the corporation to obtain such relief. The allegation that it would be useless to apply to the stockholders or directors to declare dividends, for the reason that a majority of each are opposed thereto, does not meet the requirement.

That the failure to declare more dividends is in accordance with the purpose of the majority is inferable from the fact that more has not been paid, and an express allegation that such majority are opposed to paying more dividends does not indicate such an hostility to the interests of the minority as to justify the failure to make further attempts to obtain the desired dividends. There is nothing in the case made by the bill that shows that anything done by those in control of the company's affairs is inimical to the interest of any class of stockholders. The putting profits into additional plants, improvements,

etc., is not *per se* inimical to such interests. The very life of the company may demand such a policy. While the payment of dividends is the desideration in trading corporations, to devote all or any of the profits at all times may be suicidal.

From these reflections, it is not to be inferred that a trading corporation may go on indefinitely, and apply its profits to plant, equipment, etc., to the exclusion of paying dividends. There is a limit to the directors' discretion in such matters. *Storrow v. Texas Cons., etc., Ass'n*, 87 Fed. 612, 31 C. C. A. 139. *Griffing v. Griffing Iron Co.*, 61 N. J. Eq. 269, 48 Atl. 910, is a case where the accumulated profits exceeded the total capital stock of the company (so shown by the bill, though not in the opinion), and, while this was not the only ground influencing the court to overrule the demurrer interposed by the directors in that case, yet it would be difficult to say that such fact alone did not show sufficient equity to require the defendants to make answer. The case at bar, however, shows no such condition of affairs. While the period during which no or few dividends have been paid is long, there is nothing in the amount of the surplus, in view of the large capital employed, that forces the conclusion that a scheme existed to enhance the interests of the common as against the preferred stock, or to coerce the holders of the minority stock to sell or dispose of such holdings. The complainant's holdings are very small—but .0018 of the capitalization involved—and, as well said by Vice Chancellor Pitney in *Trimble v. Amer. Sugar Ref. Co.*, *supra*:

"Admitting that the holder of so small a part of the stock is entitled to be heard in this court for the correction of any real grievance he may suffer by the misconduct of the majority, yet I think it is the duty of the court to require that he should show a clear case by distinct affirmative allegations, even if they should necessarily include some of a negative character. In short, he must anticipate and exclude all reasonably probable conditions which may bar his relief."

I am of the opinion that the bill lacks equity in the particulars considered, and, as they go to the foundation of the suit, it must be dismissed, unless the complainant can by amendment avoid such defects.

In re DUNFEE.

(District Court, N. D. New York. August 4, 1913.)

BANKRUPTCY (§ 391*)—PROCEEDINGS IN STATE COURT—STAY—VACATION—DISCHARGE.

A bankrupt obtained from a surety company a bond to certain executors to enable him to withdraw money in their hands, conditioned to repay so much thereof as was necessary to pay valid claims against the fund. The surety, having been compelled to pay a large sum to the executors under the bond, instituted suit against the bankrupt in the state court, claiming false representations by the bankrupt as to his assets and liabilities, made to it to obtain the bond. Judgment was rendered in the state court against the bankrupt by default. He moved to vacate the same, and secured an order from the bankruptcy court staying the surety from entering judgment and further prosecuting the action in the state

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

court, on the ground that the indebtedness to the surety was dischargeable in bankruptcy. The latter, however, claimed that it was a liability for obtaining property by false pretenses or false representations, or obtaining property on credit on a materially false statement in writing made to any person or his representative to obtain credit from such person, and was therefore a debt not chargeable in bankruptcy. *Held*, that a motion to vacate the order staying the surety from entering judgment and further prosecuting the action in the state court would be denied, to afford the bankrupt an opportunity to move the state court to vacate and open the default and try the merits of the issue whether the bond was obtained by false representations, with leave to renew the motion to vacate the stay on termination of such proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 637-655; Dec. Dig. § 391.*]

In Bankruptcy. In the matter of Joseph Dunfee, bankrupt. On motion to vacate an order staying the plaintiff from entering judgment and further prosecuting an action in the Supreme Court of New York against the bankrupt. Denied, with leave to renew.

Hirsh & Newman, of Brooklyn, N. Y., for the motion.

Lyman, Canough & Higbee, of Syracuse, N. Y., opposed.

RAY, District Judge. December 19, 1912, the Empire State Surety Company commenced an action in the Supreme Court of the state of New York against Joseph Dunfee, the above-named bankrupt, to recover damages in the sum of \$23,561.33 on the following alleged causes of action:

The plaintiff in such action, Empire State Surety Company, is a domestic corporation authorized to and engaged in writing indemnity bonds, and May 14, 1906, said John Dunfee made written application to said Empire State Surety Company for an indemnity bond in the sum of \$27,000, to be given to the executors of the John Dunfee estate to protect them in paying over to said Joseph Dunfee the sum of \$27,000, then standing to the credit of John Dunfee on a contract between Central New York Telephone & Telegraph Company and said John Dunfee for the construction of certain subways in the city of Syracuse, N. Y., and which contract the said Joseph Dunfee claimed to own together with the moneys due thereon. The conditions of the bond of indemnity entered into after the approval of the application were as follows:

"Whereas, heretofore, John Dunfee, now deceased, entered into a contract with the Central New York Telephone & Telegraph Company for the construction of certain subways in the streets of the city of Syracuse, N. Y., which said contract was accompanied by a bond executed by said John Dunfee to said telephone company to save said telephone company, under certain conditions, harmless from any damages which said company should suffer by reason of said work, or of any part thereof, or during the construction of the same; and whereas, said contract is claimed to be owned by said Joseph Dunfee, and he claims to be entitled to any moneys arising from the same after the payment of all obligations existing against said contract; and whereas, there remained on deposit to the credit of John Dunfee at the time of his death certain moneys derived from said contract, which said moneys, or a portion thereof, the said Joseph Dunfee desires should be paid to him:

"Now, therefore, the conditions of this obligation are such that if the executors of the last will and testament of John Dunfee, deceased, the obligees

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in this bond named, shall advance to said Joseph Dunfee, from said moneys on deposit as aforesaid, the sum of twenty-seven thousand dollars, or any part thereof, that the said Joseph Dunfee shall pay any and all claims of every name and nature outstanding by reason of the construction of said work and any and all sums which exist or may be established as a liability against the estate of John Dunfee, deceased, by reason of said contract, or any liability by reason of the bond signed by said John Dunfee accompanying the said contract, or any liability that may hereafter be established against the estate of John Dunfee by reason thereof, or connected therewith, or arising therefrom, or against said Anna Dunfee and John J. Cummins, as executrix and executor, or individually, by reason of said advancement, and, further, that in the event of any determination that any of said moneys so advanced belongs to the estate of John Dunfee, and not to Joseph Dunfee, then that said Joseph Dunfee shall refund the same and save said obligees and executors, both as executors and individually, harmless by reason of such advancement, then this obligation to be void; otherwise, to remain in full force and effect. It being understood, however, that the advancement of said money shall in no wise be construed as a concession of the ownership of said fund in said Joseph Dunfee, or any waiver of any right or claim to same by said obligees, and in the event that upon the account of said executors it should be determined that said money belongs to the estate of John Dunfee, deceased, then said accounting and determination shall be conclusive as against the surety herein and fix the liability of the surety hereunder."

In his application for said bond of indemnity the said Joseph Dunfee represented and stated in writing in answer to the following questions:

"12. Give description and value of *your* personal property? (A) Stock and bonds amounting to \$186,000.

"13. Have you any debts or liabilities, individual or otherwise? If so, give description and amount of same. (A) See statement attached."

The statement attached contained the following:

"4. The name of my firm is ———. (A) My partners are, none. * * *

"7. I own the following personal property, such as mortgages, stocks, bonds, etc. Various stocks and bonds amounting to \$186,000. * * *

"13. The following is a statement of the firm's assets and liabilities at date of:

Stocks and bonds	\$186,000
Real estate	27,300
Fixtures and machinery	6,000
Mortgages	3,500
Book accounts good	
Bills receivable	50,000
Cash in bank	8,000
Other assets consisting of:	
Due from John Dunfee estate.....	33,000
	<hr/>
	\$313,800
Liabilities.	
Mortgages on real estate.....	\$ 5,200
Bills payable	10,000
Book accounts	6,000
Other liabilities, consisting of.....	none
	<hr/>
	\$21,200

"The above statement is made for the purpose of inducing the Empire State Surety Company to give its obligation as above, and I hereby declare that I have therein stated the truth, without any mental reservation whatever.

"[Signed] Joseph Dunfee."

The allegation of the complaint is that:

"Upon information and belief, prior to the execution, sealing, and delivery of the bond (Exhibit C, the conditions of which are above stated) by plaintiff, and for the purpose and with the intent of inducing the plaintiff (the Empire Surety Company) to execute, seal, and deliver the same, this defendant falsely and fraudulently represented and stated to this plaintiff (the Surety Company) that at that time he had eight thousand dollars (\$8,000.00) cash in bank, and that his only liabilities at that time amounted to twenty-one thousand two hundred dollars (\$21,200.00), which he stated consisted of the following, and no others:

Mortgages on real estate	\$ 5,200 00
Bills payable	10,000 00
Book accounts	6,000 00

* * * * *

"That each and every such statement and representation are and were false and untrue, and were known by the defendant to be false and untrue, at the time he made them; that they were made by the defendant with the intent and for the purpose of inducing the plaintiff to execute and deliver the said bond 'Exhibit C'; that the plaintiff believed said statements to be true, and relying thereon did execute, seal, and deliver the said bond, 'Exhibit C.'"

Also that Joseph Dunfee at that time did not have \$8,000 in bank, but only \$231, and that his liabilities were more than \$21,200, and that over and above the liabilities stated he owed the Salt Springs Bank about \$24,000. The complaint also alleges that after such bond was given suit was brought in the Supreme Court of the state of New York by the executors of John Dunfee on said bond against said Joseph Dunfee and the Empire State Surety Company—

"in which action it was alleged and proved that the said obligees (said executors) paid the sum of \$20,810.88 by reason of a liability that existed against the estate of John Dunfee, deceased, by reason of the contract mentioned in said bond, and on the bond therein mentioned, of which action due notice was given this defendant."

That such sum, with interest and costs, the Empire State Surety Company, in all \$23,561.33, in suit brought by said executors was compelled to pay by reason of having signed such surety bond. It is also alleged that on receipt of said bond of indemnity executed by Dunfee and the said Surety Company the said sum of \$27,000 was paid over to said Joseph Dunfee by said executors. It therefore appears that in consideration of the giving of said bond by Joseph Dunfee to the executors of John Dunfee, deceased, with the said Empire State Surety Company as surety therein, the said Joseph Dunfee actually obtained the sum of \$27,000, and that by reason of the facts stated, becoming surety on such bond, the Empire State Surety Company became liable to pay and did pay \$23,561.33.

By section 17 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), "debts not affected by a discharge" include liabilities for "obtaining *property* by false pretenses or false representations," and by section 14b (3) of said act (as amended by Act Feb. 5, 1903, c. 487, § 4, 35 Stat. 797, and Act June 25, 1910, c. 412, § 6, 36 Stat. 839 [U. S. Comp. St. Supp. 1911, p. 1496]), it is provided that a discharge shall not be granted if the bankrupt has "obtained money or property on credit upon a materially false statement in writing, made by him to *any person*, or his representative,

for the purpose of obtaining *credit* from such person." Was the obtaining of the execution of this bond by the Surety Company in the first instance, and the obtaining of the \$27,000 on the strength of same from the executors of the John Dunfee estate, or the corporation owing it to the estate represented by them, (1) the "obtaining money or property on credit upon a materially false statement in writing made by him (Joseph Dunfee) to any person (the Empire State Surety Company) or his (its) representative, for the purpose of obtaining credit from such person" (the Empire State Surety Company) within the meaning of the Bankruptcy Act? or (2) if not, is the "liability" of Joseph Dunfee to the Empire State Surety Company one for "obtaining *property* by false pretenses or false representations" within the meaning of said law?

By giving this indemnity bond Joseph Dunfee obtained \$27,000 in money, not from the Surety Company to which the representations were made, but in fact from the executors of John Dunfee, deceased, and such executors gave him a certain credit, as the obligation of the bond was to repay to them such part of the \$27,000 as the estate represented by them might be found obligated to pay to others. The Empire State Surety Company became surety for the payment of such sum, and to it (any person) the representations were made. Who is "such person" referred to, when the act says "for the purpose of obtaining *credit* from such person?" Is it the one from whom the credit is obtained, or the one from whom the money is obtained? Or is it the one to whom the representations were made? The Empire State Surety Company gave Joseph Dunfee a certain kind of credit, for it became surety for him; but no money or property was then obtained from it. The money was obtained from another.

If A. makes materially false statements to B. for the purpose of inducing B. to indorse his note to be given to C. for a loan of money to A., and on the faith of such representations B. does indorse the note, and A. obtains the loan giving the note so indorsed to C., and B. is compelled to pay the note, and sues A., is the liability of A. to B. dischargeable in bankruptcy, or is A. entitled to his discharge?

To bring the bankrupt within the provisions of section 14b (3), he must have (1) "obtained money or property on credit, (2) upon a materially false statement in writing, (3) made by him to *any person* or his representative, (4) for the purpose of obtaining *credit* (not money or property) from *such person*," obviously credit from any person to whom the representations were made.

If A., desirous of obtaining money or property from B., and being unable to do so himself on his own promise or credit, makes materially false statements in writing as to his financial condition to C. for the purpose of inducing C. to become his indorser or surety to B., so he (A.) can get the money or property desired, and on the faith of such representations C. does become surety or indorser for A., and then A. on such surety bond or indorsement given or made by C., as the case may be, and delivered to B., obtains the money from B., has not A. obtained money "on credit" upon a materially false statement in writing made by him to C. (any person) for the purpose of obtaining

credit from C. (such person), viz., the signing of such bond as surety, or of such note as indorser? Has not A. in such case obtained "*credit*" from C., the indorser or surety, as the case may be, and has not A. obtained money on credit?

The statute does not say the money or property must have been obtained from the one to whom the materially false statements were made. However, in *Re Tanner* (D. C.) 27 Am. Bankr. Rep. 615, 192 Fed. 572, Rudkin, District Judge, held:

"Under section 14b (3) of the Bankruptcy Act, as amended in 1903, the obtaining of an indemnity bond by a bankrupt does not constitute an obtaining of property on credit, so as to bar his discharge, when it appears that materially false statements as to his financial condition were made by the bankrupt for the purpose of obtaining the bond."

In that case no money was obtained in the first instance by the bankrupt on the bond, as it was given to secure the faithful performance of certain contracts; but the surety company had to pay the bond on its liability incurred by signing it, the bankrupt not having performed the contracts. When that case was decided, the amendments of 1910 had not been adopted.

In 2 *Loveland on Bankruptcy* (4th Ed.) p. 1321, § 730, it is said:

"To prevent a discharge under this provision [section 14b (3)], two things must be established by the objecting creditor: First, the bankrupt must have obtained *property on credit*; and second, he must have made to the person *from whom he obtained it* [property or credit, which] a materially false statement in writing for the purpose of obtaining *it* on credit."

Assuming that the pronoun "*it*" in each instance, as used in the quotation, refers to *property*, and the learned author would agree with Judge Rudkin, *supra*; but if the author means that, "*second*," he must have made to the person from whom he obtained "*it*," to wit, "*credit*," a materially false statement, etc., he does not.

In *Gaddy v. Witt* (Tex. Civ. App.) 27 Am. Bankr. Rep. 457, 142 S. W. 926, it was held:

"Where a debtor by false and fraudulent representations has procured an additional guarantor to a written guaranty for the payment of his existing or subsequently accruing indebtedness to a bank, and such guarantor pays the indebtedness, the debtor's liability for reimbursement, under section 17a (2) of the Bankruptcy Act, is not affected by his discharge in bankruptcy."

Prior to the amendment of 1910, and as amended February 5, 1903 (32 Stat. 797), section 14b (3) read:

"Obtained property on credit *from any person* upon a materially false statement in writing made to *such person* for the purpose of obtaining *such property* on credit."

It is obvious that many of the cases decided prior to the amendment of 1910 have no application now. It is clear that, as the section then (1903) read, the statement must have been made to the person from whom the property was obtained on credit.

Is a surety bond, when executed by a surety company, to be delivered to another for the purpose of enabling the principal in such bond to obtain money for himself from such other, which the principal and surety in such bond obligate themselves therein to repay in a certain

event or in certain events, "property" within the intent and meaning of sections 14 and 17 of the Bankruptcy Act? If not, then obtaining the bond is not obtaining money or property. If such a bond, when duly executed, is property, within the meaning of the act, then Dunfee obtained property by means of the false and fraudulent representations directly from the person to whom such representations were made. If the bond is not property, then as the money was obtained from the executors to whom the bond was delivered, the property obtained and intended to be obtained was obtained from persons to whom no representations were made, but on the credit of the Surety Company, which extended such credit to Dunfee, the principal in the bond, on the strength of his representations; that is, by means of the false and fraudulent representations made in writing to the Surety Company, Dunfee obtained credit with it and its bond, and on giving or delivering the bond and on the credit of the Surety Company he obtained the money. It was not a loan of money, and it was not an attempt to obtain the money of the surety company or the money of some other person. Dunfee claimed that the contract and money due thereon were his, and that he was entitled thereto; but, as there were or might be claims against it, as a condition of paying it over then, the executors required a bond with surety to refund any such sum as might be subsequently found to be a claim on such fund, or the money of the estate of John Dunfee, deceased, and not the property of Joseph Dunfee.

It is obvious that under section 17 (2) a debt for a liability for obtaining property by false pretenses or false representations (oral or written), and which must have been made to the party of whom the property was obtained, or to another and communicated to the person from whom the property was obtained, is not released by a discharge in bankruptcy. If a discharge is granted to the bankrupt, it has no effect on such a liability. If a bankrupt has obtained money or property *on credit* upon a materially false statement *in writing* made by him to *any person*, or his representative, for the purpose of obtaining *credit* from such person, he is not entitled to a discharge, and it has been held that the liability of the bankrupt on such a claim is in no way affected by the bankruptcy proceedings. Should the objection to his discharge not be raised, and a discharge be granted, still the liability might remain, and the discharge not bar the remedy for the tort. This seems to be so, even when the claim on the contract liability is proved and a dividend paid and accepted. *Talcott v. Friend et al.*, 24 Am. Bankr. Rep. 708, 179 Fed. 676, 103 C. C. A. 80. I am of the opinion that obtaining the execution and delivery of a bond by a surety by means of false and fraudulent representations, verbal or in writing, made by the principal in such bond, and on which bond the principal procures money or property from a third person, which he claims to be his own, and some part or the whole of which he binds himself to repay in certain events, does not create a liability of such principal to the surety, in case the surety is compelled to pay the obligee in the bond for obtaining property by false pretenses or false representations. The false and fraudulent representations

had no influence in obtaining the property or money which was parted with on the credit of the surety, who in turn extended credit to such principal by reason of such false and fraudulent representations. Indirectly and later the principal gets the benefit of the money or property of the surety, which it pays to cancel its obligations to the obligee in the bond. But when we go back to section 14b (3), we have a different case. Here, applying the facts stated, the principal in the bond (now the bankrupt) has obtained money or property on credit—that is, on his promise to the obligee in the bond to pay at a future time and in a certain event—upon a materially false statement in writing made to the surety (a person) for the very purpose of obtaining, not money or property from such person (the surety), but for the purpose of *obtaining credit* from such person (the surety), and his signature, so as to obtain money, which he does obtain from the obligee in the bond.

I am of the opinion that, when A. induces B. to sign his bond or note *as surety*, he has obtained “credit” from such person. When he obtains that credit by false and fraudulent representations made in writing, and uses that credit to obtain money or property from another for himself on a promise to repay in a certain event, he has obtained such money or property on or by means of a materially false statement in writing made by him to the surety (any person) for the purpose of obtaining, not money or property from such person, the surety, which is not required by the statute, but for the purpose of obtaining *credit* from such person, the surety, which is all that section 14b (3) requires to defeat a discharge. Now, if the liability in such a case, reduced to judgment, will prevent a discharge, if shown on the application for a discharge, is it a liability for “obtaining property by false pretenses or false representations,” within the meaning of section 17a (2)?

When Joseph Dunfee procured the Empire State Surety Company to sign his bond as surety, a liability (contingent) of said Dunfee to said Surety Company was created, in case the Surety Company was compelled to pay anything by reason of signing such bond, and when the Surety Company in the suit against it was compelled to pay and did pay the \$23,561.33 which Dunfee should have paid, said Surety Company became an actual creditor of Dunfee, with a claim against him for that amount. In 2 Loveland on Bankruptcy, 1323, referring to section 14b, it is said:

“The amendment of 1910 amplified this section by inserting the words ‘money or’ before ‘property,’ and by providing that the statement must be made by the bankrupt to the creditor ‘or his representative for the purpose of obtaining *credit* from such person.’”

This statement was made to the Surety Company, which company was induced thereby to sign, and did sign, the bond, and by reason of such signing the Surety Company became a creditor of said Joseph Dunfee, the bankrupt, and was induced to become such creditor by means of the false and fraudulent representations made by the debtor (the bankrupt) to the Surety Company.

It must be conceded that in this case Joseph Dunfee, the bankrupt,

actually obtained the money or property paid over to him, and to secure the repayment of which the bond was given, on the faith of the bond itself and the signature thereto of the Surety Company, and hence literally he did not obtain such money on credit "upon" the materially false statement in writing made to the Surety Company for the purpose of obtaining credit from the Surety Company. The materially false statements were never communicated to nor acted on by the executors of John Dunfee, deceased, who parted with the money. In fact, what Joseph Dunfee obtained by means of his false and fraudulent representations in writing made to the Surety Company was its signature to, execution of, and delivery of the bond; that is, the credit of the Surety Company in the first instance, and, because of Dunfee's default in complying with the condition of the bond, the Surety Company was compelled to pay Dunfee's debt, and hence Dunfee became liable to reimburse the Surety Company.

As the Surety Company in signing the bond relied upon the representations, and would not have signed but for them, the liability relied upon is that of having obtained the signature of the Surety Company to the bond, and indirectly and ultimately the money of such Surety Company for his (Dunfee's) benefit. Is it at all material that Dunfee did not obtain the money of the Surety Company directly and immediately, but only ultimately, and on the happening of the event or contingency provided for? Is such a liability within the contemplation of the Bankruptcy Act?

"A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as * * * (2) are liabilities for obtaining property by false pretenses or false representations," etc.

We always arrive at the result that Dunfee did not obtain any money or property "upon" the alleged materially false statements, but only indirectly by reason thereof, and that the *liability* of Dunfee to the Surety Company is not one for obtaining money or property from it directly by false pretenses or false representations, but is one for obtaining its signature to the bond by means of such representations and eventually the payment of the liability of the (now) bankrupt by the surety. When the liability of Dunfee to the Surety Company ripens into a judgment, if it should, it will be an adjudicated liability for having obtained the credit of the Surety Company for his use and benefit upon materially false statements in writing made to the surety for the purpose of obtaining that credit; or, enlarging the word "credit" to include the obligation of the Surety Company to pay money in a certain event or upon a certain contingency, then it will become an adjudicated liability for having obtained the written obligation of the Surety Company to pay money in a certain event for Dunfee's benefit, upon materially false statements in writing made to such surety for the express purpose of obtaining such written obligation. When the obligation of Dunfee to repay, or to pay back, a part of the money which he obtained from the executors of John Dunfee, deceased, by virtue of giving the bond with the Empire State Surety Company as surety thereon, became fixed (a contingency within the contemplation of all the parties), and Dunfee failed to pay as

agreed, the Surety Company was compelled to pay and did pay because of its obligation as surety in writing, which obligation was obtained by Dunfee upon materially false statements in writing for his own use and benefit, and to enable him to obtain money which he claimed as his own, and which he did obtain, and which he agreed to repay in a certain event.

I think the question is to be determined by ascertaining whether or not so obtaining the signature or credit of a surety or surety company is the obtaining of *property* by false pretenses or false representations, or the obtaining of *money or property* on credit upon a materially false statement in writing. If obtaining the bond with the signature of the Surety Company thereto is not obtaining "property" within the meaning of the law, is it sufficient that through it the principal, Dunfee, eventually obtained indirectly, through the payment of his debt by the Surety Company, not the money or property, but the benefit of the money or property, of the Surety Company? He has certainly obtained *the benefit* of the money paid by the Surety Company, which was paid to make good money which he obtained on the bond and on credit, the credit of the Surety Company, and which credit was obtained upon a materially false statement made to such Surety Company for the purpose of obtaining credit from such Surety Company. But I doubt that it was intended by the amendments of 1910 to reach or cover the claims of persons who are induced by false pretenses or false representations to sign notes and bonds as *surety*, and who later are compelled to pay. May we interpolate so as to make section 17 read "liabilities for obtaining property or money, *or the payment of money or property for the bankrupt's benefit*, by false pretenses or false representations"? In section 14b (3) may be interpolate so as to make it read "obtained money or property on credit, or the benefit of the payment of money, upon a materially false statement in writing made by him to any person or his representative, for the purpose of obtaining credit, or made to the person compelled to make such payment of money"? However strong the desire of the court to bring a given case within the meaning of the statute as written, the courts are wisely forbidden to legislate. If Dunfee applies for a discharge, and obtains a discharge, he can plead same as a bar in case this action is stayed until the question of his discharge is determined, or if on his application for a discharge these matters are pleaded as a reason for refusing a discharge, all the facts can be shown to the court, and the matter decided on its merits, and the law applicable thereto.

The defendant Joseph Dunfee, the bankrupt here, claims that, if allowed to open the default in the Supreme Court, an inquest having been taken in the absence of his counsel and while another action was on trial, and before the case was reached for trial in its regular order, he can show that there was no materially false representation made to the Empire State Surety Company. The opening of such default and a trial of the case on the merits rests in the discretion of the Supreme Court. The action is brought for the fraud; that is, in tort. If the plaintiff is stayed from entering judgment, and to

enable the defendant to move to open the default and try the case on the merits, and he does so, and the motion is granted, and he succeeds on the trial, the whole question of refusing a discharge will be eliminated; but if Dunfee is not successful an adjudication of facts on a trial by jury will be presented, and all the court will have to do will be to determine whether such a judgment bars a discharge if pleaded by any one as a ground for refusing a discharge, or if that is not done, whether a liability on such a claim reduced to judgment is released by the discharge granted. I am of the opinion the ends of justice demand that Dunfee have an opportunity to move in the Supreme Court to vacate or open the default and try the case on the merits, and to that end the motion to vacate the stay is denied, with leave to the Empire State Surety Company to renew on the same papers used here and such additional papers as may be presented, and such renewed motion may be brought on for hearing at the December term of this court, to be held at Utica, N. Y., on the first Tuesday of that month. In the meantime Dunfee, if he so desires, can file his application for a discharge, and the Empire State Surety Company can, if it desires, present its objections to such application. This in effect postpones the final decision of this question to enable the bankrupt, Dunfee, to try the case on the merits, if the Supreme Court grants him leave so to do.

The injunction is so far modified as to permit the Empire State Surety Company to prosecute the action in the Supreme Court by trial, in case the default is opened, and entry of judgment in case it succeeds. If the application to open the default is denied, this court will take up this motion anew on the papers now before it, on a showing that such action has been taken by the Supreme Court.

So ordered.

UNITED STATES v. LAVENSON et al.

(District Court, W. D. Washington, N. D. June 13, 1913.)

No. 1,875.

MINES AND MINERALS (§ 45*)—PUBLIC MINERAL LANDS—CANCELLATION OF PATENT.

On application for a patent for six mining claims adjoining each other and lying lengthwise along a river in a forest reservation, notice was sent by the register to the superintendent of the reservation, who caused an examination to be made, and as a result there was filed in the General Land Office a letter from the acting forester, inclosing reports from the state geologist and a forest ranger, and recommending that a patent be denied on the ground that the claims were held for water power and not for mineral purposes. The report of the geologist was to the effect that the claims contained very little ore and were of no commercial value for mining purposes, but were very valuable for the water power thereon. Three weeks after the filing of such papers a patent was issued to the applicant. It appeared that no hearing was had upon the protest of the forester, probably because it erroneously stated that no patent for the claims to which it related had been applied for. *Held* that, if the facts on which it was based were established, they would

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

constitute ground for refusing a patent, and that whether it was not considered through inadvertence, or whether, through mistake of law, it was deemed insufficient, the United States was entitled to a cancellation of the patent, that such questions of fact might be considered and determined by the Land Department.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 131; Dec. Dig. § 45.*]

In Equity. Suit by the United States against Albert S. Lavenson and Jane Doe Lavenson, his wife, and the Whatcom County Railway & Light Company. Decree for complainant.

Charles F. Riddell, U. S. Dist. Atty., of Seattle, Wash., for the United States.

Myron A. Folsom, of Spokane, Wash., James B. Howe, of Seattle, Wash., and C. W. Howard, of Bellingham, Wash., for defendants.

CUSHMAN, District Judge. This suit is now for determination, after evidence taken. It was brought, asking cancellation of a patent heretofore issued by the United States to one E. C. Baird for certain mining claims situated in Whatcom county in the Mt. Baker mining district; the claims being known as "Rattler," "Mermaid," "Rising Current," "White Rapids," "Placid Water," and "Clear Water."

The grounds upon which the title is asked to be restored to the United States are that the alleged mining claims never did contain any valuable mineral deposits, nor any veins or lodes of quartz or other rock in place bearing any valuable mineral deposit whatsoever; that patent was procured by fraudulent representations of the discovery of valuable mineral deposits upon the claims, and each of them, and that the lands were of mineral character, and were located and claimed by the said Baird, and desired on account of their valuable mineral deposits, whereas, in truth and in fact, no such discovery of veins or lodes had ever been made, nor were said lands located as claims or desired on account of any mineral deposits therein.

The patent is further sought to be canceled on the ground that it was issued through inadvertence and mistake, while a protest was pending against its issuance by the Forest Service having jurisdiction in the reserve in which these claims were located. The following facts are established:

That the claims are situated adjoining each other for a distance of about a mile along the North fork of the Nooksack river, the length of the claims following the course of the river. That the claims involved in this case were at all times within a forest reserve of the United States. That the "Clear Water," "Rising Current," "White Rapids" and "Placid Water" were located in April, 1902; the other two claims, the "Rattler" and "Mermaid," being located in 1903. In September, 1905, J. J. Donavon, one of the locators, conveyed the six claims to the Bellingham Bay Improvement Company, which company conveyed the claims to one E. W. Purdy. The said E. W. Purdy conveyed the claims to E. C. Baird April 1, 1907. The claims were surveyed for patent in 1904; but no application for patent was filed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at that time. On December 12, 1907, E. C. Baird made application for patent, and on April 9, 1908, patent was issued to him.

On the hearing it was stipulated between the parties that Alfred S. Lavenson acquired the title to these mining claims from Mr. Baird, and transferred the same to the Whatcom County Railway & Light Company, one of the defendants, and that in the acquiring and transfer of said title the said Lavenson was acting solely as the agent and as a trustee for the Whatcom County Railway & Light Company and that he had no personal interest therein.

Mr. Baird did not acquire the claims for his own use, but took them at the request and, he presumed, for the benefit of an old acquaintance, to be handled and transferred as the latter directed. There is no direct evidence that this acquaintance acted for the Whatcom County Railway & Light Company.

The defendants admit that they are chargeable with notice of whatever Baird, the patentee, knew; that, if he did not acquire the claims in good faith, they are to be charged with knowledge of that fact.

Another group of patented claims, on the river immediately below those in question, was owned by the Bellingham Bay Improvement Company until 1905. That company commenced the construction of a power plant upon that property, and in the year 1905 the present defendant, Whatcom County Railway & Light Company, purchased that property with the uncompleted plant and completed the same.

At the time of filing the application for patent, notice was sent by the register to the superintendent of the Washington Forest Reserve. He made an examination of the property, and on March 17, 1908, there was filed in the General Land Office a letter from the acting forester, inclosing reports from the Washington state geologist and a deputy forest ranger. The letter of the acting forester recommended:

"That the locations be declared invalid, since it is clearly shown that the claims are held for water power purposes, and not for bona fide mining operations."

The inclosed report of the deputy forest ranger, approved by the forest supervisor, recommended that the claims "be listed for examination in accordance with the forester's letter, L—C, of March 23, 1907."

The report of the geologist, inclosed, was to the effect that:

"Upon the claims there are no distinct ledges or fissure veins, or instances of well-defined mineralized zones. Iron pyrite occurs in minute quantities disseminated through the country rock, as well as in occasional very small gash veins. In the slates there are at some points small stringers of quartz, carrying iron pyrite. The tunnels which have been driven on the claims have been located at convenient points wherever the rock was exposed in cliffs, and not because of the known occurrence of ore at these places. In other words, the tunnels do not follow ore bodies, nor are they cross-cuts to known bodies, but have been located and driven at points where the work could be done with the most convenience. The center line of the claims, marked 'lode line' does not mark the location of any ledge, or vein, or ore body which differs in any way from the general country rock of the claims entire."

That samples, taken from the tunnels on the claims, assayed, in gold, 40 cents per ton on the "Rattler," 60 cents per ton on the "Mer-

maid," 80 cents per ton on the "Rising Current," 40 cents per ton on the "White Rapids," 40 cents per ton on the "Placid Water," and nothing on the "Clear Water."

His report concludes:

"The examination of the Baird claims brings out the fact that they contain no well-defined veins, ledges, mineralized zones, or distinct ore bodies of any sort. Some portions of the country rock contain very small stringers of quartz carrying a little iron pyrite, and occasionally iron pyrite occurs disseminated through the different formations. The assay returns in every case are very low, and indicate that mining operation would be wholly unprofitable. The investigation shows that these claims are of no commercial importance whatever from a mining standpoint, and hence the patents are desired for other reasons. The claims are of no value for agriculture, of but little value for their timber, but are of great value because of their water power. Hence the conclusion is inevitable that the claims are desired, not for mining purposes at all, but exclusively for the valuable water power present in the Nooksack river at this point."

In the vicinity of these claims there was a mine, known as the "Great Excelsior," which, there is evidence tending to show, had produced upwards of \$50,000 in gold.

Defendants contend that the vein on which the "Great Excelsior" mine is located passes through the claims in controversy. There is evidence tending to show that the predecessors in interest to Baird spent some \$5,000 on the claims here in question in tunnel work. No money has been spent for the purpose of developing any water power on the claims in question. No work has been done upon the claims of any kind since 1907.

It is conceded that there is a valuable water power on these claims, near the city of Bellingham, Wash., and that the defendant Whatcom County Railway & Light Company is primarily engaged in power projects, rather than mining.

Claimant relies upon the following authorities: Revised Statutes, § 2325, 5 Fed. Stat. Ann. p. 31 (U. S. Comp. St. 1901, p. 1429); Revised Statutes, § 2320, 5 Fed. Stat. Ann. p. 8 (U. S. Comp. St. 1901, p. 1424); *King v. Amy, etc., Co.*, 152 U. S. 222, 14 Sup. Ct. 510, 38 L. Ed. 419; *Davis v. Weibbold*, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; *United States v. Central Pacific (C. C.)* 93 Fed. 871; Revised Statutes, § 2319, 5 Fed. Stat. Ann. p. 4 (U. S. Comp. St. 1901, p. 1424); *United States v. Iron Silver Min. Co. (C. C.)* 24 Fed. 568; *Id.*, 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571; *Lange v. Robinson*, 148 Fed. 799, 79 C. C. A. 1; *Chrisman v. Miller*, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770; *Steele v. Tanana Mines Company*, 148 Fed. 678, 78 C. C. A. 412; *U. S. v. Budd*, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384; *Germania Iron Co. v. U. S.*, 165 U. S. 383, 17 Sup. Ct. 337, 41 L. Ed. 756; *Williams v. United States*, 138 U. S. 515, 11 Sup. Ct. 457, 34 L. Ed. 1026; Act June 4, 1897, c. 2, 30 Stat. 36, 7 Fed. St. Ann. 315 (U. S. Comp. St. 1901, p. 1538); *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415; *Cosmos Exploitation Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 23 Sup. Ct. 692, 47 L. Ed. 1064; *Iron Silver Min. Co. v. Mike & S. Co.*, 143 U. S. 394, 12 Sup. Ct. 543, 36 L. Ed. 201; *Erhardt v. Boaro*, 113 U. S. 536, 5 Sup. Ct. 564, 28 L. Ed. 1113; 33 Land Dec. Dept. Int. p. 609;

Regulations of the General Land Office, approved October 23, 1903; *Alford v. Barnum*, 45 Cal. 482.

Defendants rely upon the following authorities: *Shoshone v. Rutter*, 87 Fed. 801, 31 C. C. A. 223; *Eureka Co. v. Richmond*, 4 Sawy. 302, Fed. Cas. No. 4,548; *Maxwell Land Grant Case*, 121 U. S. 325, 381, 7 Sup. Ct. 1015, 30 L. Ed. 949; *Barden v. N. P. Ry. Co.*, 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992; *Book v. Justice Mining Co. (C. C.)* 58 Fed. 106; *Cascaden v. Bortolis*, 162 Fed. 271, 89 C. C. A. 247, 15 Ann. Cas. 625; *Henderson v. Fulton*, 35 Land Dec. Dept. Int. 652, 658; *Creede Co. v. Uinta Tunnel Co.*, 196 U. S. 347, 25 Sup. Ct. 266, 49 L. Ed. 501; *Costigan Min. Law*, p. 585; *Tam v. Story*, 21 Land Dec. Dept. Int. 440, 442; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423; 10 Fed. Stats. Ann. 404; *U. S. v. N. P. Railway*, 95 Fed. 864, 882, 37 C. C. A. 290; *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798; *U. S. v. Marshall*, 129 U. S. 579, 9 Sup. Ct. 343, 32 L. Ed. 734; *Shaw v. Kellogg*, 170 U. S. 312, 18 Sup. Ct. 632, 42 L. Ed. 1050; *Thallmann v. Thomas*, 111 Fed. 277, 49 C. C. A. 317.

The question of the issuance of the patent through inadvertence and mistake will first be considered. In 1903, while the entire administration of the forest reserves was intrusted to the Interior Department, the following regulation was made by that department:

"All mineral entries on lands in the forest reservations presented for patent shall be investigated and reported upon by the officers in charge of the respective reservations before being passed to patent, and final action on all such cases shall be suspended until such investigations are made and reports forwarded to this office." Regulations of General Land Office, approved October 23, 1903.

Later the administration of forest reserves, with certain exceptions, pertaining to the acquiring of titles, was intrusted to the Department of Agriculture by the act of February 1, 1905, providing:

"That the Secretary of the Department of Agriculture shall, from and after the passage of this act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of the act entitled 'An act to repeal the timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, and acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands." Act Feb. 1, 1905, c. 288, 33 Stat. 628, 10 Fed. Stat. Ann. 404 (U. S. Comp. St. Supp. 1911, p. 635).

Subsequently the Department of the Interior promulgated the following rules:

"1. A government officer in charge of any national forest may initiate a contest or other proceeding before the Land Department, respecting the unlawful occupation or use of land within a national forest by reason of a claim made thereto under any of the public land laws.

"2. As a basis for such proceeding such officer shall file in the local land office for the district in which the lands involved are located a complaint signed by him in his official capacity, but not under oath or corroborated, setting forth facts respecting the alleged unlawful occupation or use of the public lands.

"3. Upon the filing of a sufficient complaint in any case in which final certificate has not issued, the register and receiver will issue a notice with a copy

of such complaint attached thereto to the defendant, notifying him that unless he within thirty days from the receipt of such notice files in their office a denial or answer to such charges in writing and under oath, the truth of such charges will be taken as confessed by him, and any entry, filing or claim asserted to such land, under the land laws by such party may be declared forfeited or canceled without further notice to him.

"4. When a complaint has been filed respecting any claim upon which final certificate has issued, or where denial under oath is filed in answer to a notice issued under the preceding paragraph, the same will be at once forwarded to the Commissioner of the General Land Office and the further progress of the matter will be in accordance with the circular of February 11, 1906 (34 Land Dec. Dept. Int. 439), defining the manner of proceeding upon special agents' reports."

It is probable, and the court finds, that no hearing was had in the land office upon the protest of the forester, and that no consideration was given to it by the Department of the Interior, for the reason that the protest itself incorrectly stated that no patent had been applied for, and that, because of this mistake, the protest was overlooked.

The powers and duties of the Secretary of the Interior have been considered by the Supreme Court of the United States, and by that court it has been said:

"In the main, we do not doubt those propositions of law; but there are certain equitable considerations which the department is authorized to recognize, and when recognized no court will ever disturb its action. * * * If all questions of jurisdiction and procedure were removed, would any court issue a mandamus to compel the officers of the Land Department to certify those lands to the state? Would not the equity developed by these facts forbid the court to issue such an order? The certification after selection by the state is to be approved by the Secretary of the Interior. This is no mere formal act. It gives to him no mere arbitrary discretion, but it does give power to prevent such a monstrous injustice as was sought to be accomplished by these proceedings. It gives the power to the Secretary to deny this application of the state, and refuse to approve its selection, and hold the title in the general government until, within the limits of existing law or by special act of Congress, a party who, misinformed and misunderstanding its rights, has placed such large improvements on the property, shall be enabled to obtain title from the government. We would not be misunderstood in respect to this matter. We do not mean to imply that any arbitrary discretion is vested in the Secretary; but we hold that the statute requiring approval by the Secretary of the Interior was intended to vest a discretion in him by which wrongs like this could be righted, and equitable considerations, so significant and impressive as this, given full force. It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies to do justice." *Williams v. U. S.*, 138 U. S. 514, at 523 and 524, 11 Sup. Ct. 457, at 460 (34 L. Ed. 1026).

In *Knight v. United States Land Association*, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974—the opinion being written by Justice Lamar—it is said:

"This contention is based upon the proposition that the Secretary of the Interior had no authority to set aside the order of the Commissioner approving and confirming the Stratton survey, especially in view of the fact that no appeal was taken from such order and the authorities of the city acquiesced in that survey. This proposition is unsound. If followed as a rule of law, the Secretary of the Interior is shorn of that supervisory power over the public

lands which is vested in him by section 441 of the Revised Statutes [U. S. Comp. St. 1901, p. 252]. That section provides as follows: 'The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * * Second. The public lands, including mines.' * * * The phrase, 'under the direction of the Secretary of the Interior,' as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department, of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims, and the issuing of patents thereon, and the administration of the trusts devolving upon the government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States. * * * When proceedings affecting titles to lands are before the department the power of supervising may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the department in the dispatch of business, not to defeat the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney General to take measures to annul. It would not be sufficient answer against the exercise of his power that no appeal had been taken to him, and therefore he was without authority in the matter. * * * 142 U. S. at pages 177 and 178, 12 Sup. Ct. at page 262 [35 L. Ed. 974]. It makes no difference whether the appeal is in regular form according to the established rules of the department, or whether the Secretary on his own motion, knowing that injustice is about to be done by some action of the Commissioner, takes up the case and disposes of it in accordance with law and justice. The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted, or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of public lands." 142 U. S. at page 181, 12 Sup. Ct. at page 264 [35 L. Ed. 974].

The powers of the Secretary and the discretion vested in him are not to be exercised by favor or at will. It is a legal discretion. The forester, in transmitting the charges, made them his own. It will not be presumed that the protest was ignored because of any informality in its presentation to the Department of the Interior. In view of the duties and powers of the Secretary of that department to enforce equity, or to refuse title for want of equity, and the divided responsibility between the Interior Department and the Department of Agriculture in the administration of forest reserves, nothing short of an express declaration by the Department of the Interior to that effect would warrant such a finding.

The defendants prefer to take the position that the protest was deemed insufficient on its face to warrant inquiry as to the facts charged therein, arguing that:

"The so-called protest which was filed was plainly insufficient, and did not tender any issue upon which a hearing should be ordered. The department is-

sued the patent after three weeks' consideration of the protest, conclusively determining that the land was mineral in character, and that the purpose for which the parties desired the claims was immaterial."

If the presumption attached upon the issuance of patent that this protest of the forester was considered by the Commissioner of the General Land Office and found insufficient to warrant a hearing, or consideration of the truth of the matters charged, it then becomes necessary to determine whether the allegations contained in the complaint and protest, if true, would defeat claimant's right to recovery, and if it be determined that they would defeat such right, and indulging in the presumption contended for, that the Department of the Interior reached a contrary conclusion, that would constitute a mistake of law, which would be corrected by the court. 32 Cyc. 1028, b; *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800; *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570.

This renders the result the same, whether it is found that a sufficient protest was inadvertently ignored by the Department of the Interior, or erroneously found insufficient as a matter of law. The substance of the protest was that, while the claims sought contained small quantities of gold, yet they were valueless for mining purposes, in that they could not be worked at a profit; that they were not taken for mining purposes, but solely for power purposes.

Defendants have argued:

"To sustain the validity of the lode mining claim, where there are no adverse claims, it is not necessary to show the existence of pay ore."

In this defendants assume that there was no adverse claim made. This assumption is not warranted—the forester's protest amounted to such a claim. Presumption arises from the creation of a forest reserve that the land in it is valuable for at least some of the purposes for which forest reserves are created. While the land remained a part of the forest reserve, the discovery of pay ore alone would warrant its being carved out of the reserve and disposed of under the mineral land laws.

Discovery is necessary to initiate a mining right. To constitute discovery, it is necessary that mineral-bearing rock in place be found, under such circumstances and of such a character that a reasonably prudent man, not necessarily a skilled miner, would be justified in expending time and money developing it, with the reasonable expectation of finding ore in paying quantities. This implies, not only that the conditions warrant a reasonably prudent man in so proceeding, with such reasonable expectation, but that the applicant for patent has that expectation. The claim may be valuable for other purposes and the applicant may, in part, be actuated by knowledge of its nonmineral values.

"It may be, as contended, that Stevens was moved in his advice to Sawyer as much by the existence of the valuable growth of timber on the land as by the existence of gold in the ground, and that the timber could be advantageously used by the Iron Silver Mining Company. If such were the fact, it would not affect the applicant's claim to a patent. Probably in a majority of cases, where a placer claim is located, other matters than the existence of valuable deposits of mineral enter into the estimate of its worth. Its accessibility to places where supplies and medical attendance can be obtained

for the men engaged in working upon it, and timber secured to support the drifting or tunneling which may be necessary, the facility with which water can be brought to wash the mineral from the earth, sand, or gravel with which it may be mingled, and the uses to which the land may be subjected when the claim is exhausted, may be proper subjects of consideration. A prudent miner, acting wisely in taking up a claim, whether for a placer mine or for a lode or vein, would not overlook such circumstances, and they may in fact control his action in making the location. If the land contains gold or other valuable deposits in loose earth, sand, or gravel, *which can be secured with profit*, that fact will satisfy the demand of the government as to the character of the land as placer ground, whatever the incidental advantages it may offer to the applicant for patent." Justice Field, in *U. S. v. Iron Silver Min. Co.*, 128 U. S. 673, at 684, 9 Sup. Ct. 195, at 199 (32 L. Ed. 571).

The statute itself reads:

"A patent for any land *claimed and located for valuable deposits* may be obtained in the following manner: * * *" Section 2325, R. S., 5 Fed. Stats. Ann. p. 31 (U. S. Comp. St. 1901, p. 1429).

The land must not only be located for valuable deposits, but claimed for such deposits, when patent is asked. If the sole purpose of location, or making claim to the land, when patent is sought, is to secure valuable water power or timber, a claimant is not entitled to it under the mineral land law. The decision of the Supreme Court by Justice Field, in the last-mentioned cause, does not justify any other assumption, for therein it is said:

"If the land contains gold * * * *which can be secured with profit*, that fact will satisfy the demand of the government as to the character of the land as placer ground, whatever the *incidental* advantages it may offer to the applicant for a patent."

If the claimant represents that he claims the land for its valuable deposits, when in fact he does not, and if, but for such representation, he would not receive a patent, but, relying on it, he is granted one, this is fraud. Against this, defendants contend:

"The question here involved is different from one which arises between a mineral claimant and a townsite applicant, or one which arises between a placer claimant and a lode applicant, or one which arises between an agricultural or timber claimant and a mineral applicant. In such cases, different statutes are involved, and the relative value is a factor. *Barden v. N. P. Ry. Co.*, 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992. But in the case here in controversy the land is conceded to be valueless either for agriculture or timber, and it is not claimed by others for a townsite or a placer mine. The sole question is whether the land is sufficiently mineralized to sustain valid locations, as between the government and a locator."

The following sections of the statute of 1891 show that relative values are involved as much as in the instances recited by defendants, and further show that discovery alone is not sufficient, and that nothing short of a probably commercially valuable mine will suffice in a forest reserve:

"All public lands heretofore designated and reserved by the President of the United States under the provisions of the act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said act, shall be as far as practicable controlled and administered in accordance with the following provisions:

"No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forests purposes." Act June 4, 1897, c. 2, 30 Stat. 34, 7 Fed. Stats. Ann. 312 (U. S. Comp. St. 1901, p. 1539).

The duties of the Secretary, provided in the following section, by the act of 1905, devolved upon the Secretary of the Interior:

"Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the state or territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained." Act June 4, 1897, c. 2, 30 Stat. 36, 7 Fed. Stat. Ann. 315 (U. S. Comp. St. 1901, p. 1542).

It has been said by the Supreme Court of the United States:

"It is in effect a suit by the government to restore to a tribunal to which it has committed exclusive jurisdiction over certain matters that jurisdiction which through inadvertence and mistake it has been deprived of. 'Relief, when deeds or other instruments are executed by mistake or inadvertence of agents, as well as upon false suggestions, is a common head of equity jurisprudence.' *Hughes v. United States*, 4 Wall. 232, 236 [18 L. Ed. 303]. Congress has intrusted to the Land Department the disposal of the public lands, and has invested the officers of that department with exclusive jurisdiction over many things in connection with such disposition. Their determination in respect to questions of fact in all matters of contest is exclusive and final. The issue of a patent is in effect the final determination of that department in favor of the patentee and against the contestants of all disputed questions of fact—a determination which it is not the function of courts to review except upon conditions of fraud, etc., which permit courts of equity to investigate and pass judgment upon all determinations of all tribunals. By inadvertence and mistake a patent in this case has been issued, and the effect of such issue is to transfer the legal title and remove from the jurisdiction of the Land Department the inquiry into and consideration of such disputed questions of fact. The contention of the appellants is substantially that the courts must consider and determine those disputed questions of fact, and exercise a jurisdiction not committed to them, before they restore to the Land Department the jurisdiction of which it has been wrongfully deprived. But why should the courts be called upon to consider and determine questions of fact, and after a determination adversely to the patentee relegate the matter for re-examination and determination in the Land Department? Is not the duty of the court fully performed when it ascertains that through such inadvertence and mistake the department which has jurisdiction over such matters has been deprived thereof? It restores to such department its lost jurisdiction and leaves to the tribunal designated by Congress the full power to discharge the duties conferred upon it. It is true that it does not affirmatively appear in this case that the patentee was not entitled equitably to the land, or that the contestants had any superior right thereto; but his rights and their rights depend upon questions of fact, such as priority of application, etc., the determination of which by

act of Congress has been committed to the Land Department. It and not a court of equity is the tribunal intrusted by the law with jurisdiction over such matters, and the latter may not inquire what ought to have been the determination of the former, but whether it has been wrongfully deprived of the power to make such determination." *Germania Iron Co. v. U. S.*, 165 U. S. 379, at 383 and 384, 17 Sup. Ct. 337, at 339 (41 L. Ed. 754).

The questions of fact involved in this proceeding, presented by the protest of the forester, concerning the character of the land and the good faith of the claimant, are matters to be determined by the Department of the Interior; no hearing having been had by that department upon the charges made in the protest.

Decree will be entered canceling the patents.

LEE v. KANSAS CITY SOUTHERN RY. CO.

(District Court, W. D. Arkansas, Texarkana Division. Jan. 11, 1913.)

1. EVIDENCE (§ 548*)—MEDICAL EXPERTS—OPINIONS ON STATEMENTS MADE TO THEM.

The testimony of a physician as to statements made to him by plaintiff as to an accident in which it is claimed plaintiff was injured, and as to feelings and sensations of plaintiff subsequent to the time of the accident and prior to his examination by the doctor to qualify him to testify for plaintiff, and the doctor's opinion, based as well on such statements as on his personal examination, is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2365; Dec. Dig. § 548.*]

2. EVIDENCE (§ 548*)—MEDICAL EXPERTS—OPINIONS ON STATEMENTS MADE TO THEM.

The symptoms of neurasthenia, whether it be traumatic or acquired, being the same, and no physician being able to classify a case of neurasthenia as traumatic unless he has a history of the case, from which he can say that an accident occurred, a physician, stating that he formed his opinion from the history of the case given him by plaintiff, may not give his opinion that plaintiff is suffering from traumatic neurasthenia.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2365; Dec. Dig. § 548.*]

At Law. Action by R. M. Lee against the Kansas City Southern Railway Company. On motion by defendant to set aside verdict and grant a new trial. Motion granted.

W. H. Arnold, of Texarkana, Ark., and Sain & Sain, of Nashville, Ark., for plaintiff.

Read & McDonough, of Ft. Smith, Ark., for defendant.

YOUMANS, District Judge. There are two points in defendant's motion for a new trial which demand investigation: (1) The objection to certain testimony given by expert neurologists; and (2) the sufficiency of the evidence to sustain the verdict.

The plaintiff alleges in his complaint that he sustained an injury in a collision on the defendant's road on the 22d day of September, 1909, while he was a passenger on one of its passenger trains. He

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes

introduced testimony tending to show that he is now, as a result of the injury sustained in that collision, suffering from a nervous disease called traumatic neurasthenia. This suit was brought on the 30th day of May, 1910.

Dr. J. L. Greene, a witness for the plaintiff, testified that he made an examination of the plaintiff on the 29th day of October, 1912. It clearly appears from the testimony that this examination was made for the purpose of qualifying the witness to testify for the plaintiff at the trial of this case. In reply to a question asking him to state what is meant by traumatic neurasthenia, Dr. Greene said:

"Neurasthenia is a word that is used to convey the idea of a condition of nerve exhaustion, or lack of nerve strength. If you put to it the qualifying 'traumatic' neurasthenia, it would mean that it was that element which had been caused by the injury. The word 'trauma,' literally means an injury. Sometimes it would be simply a bruise, but it would be a neurasthenia which would be from an injury or traumatism."

The witness stated that he had examined a quantity of plaintiff's urine, voided in the presence of the witness, and that he found in the urine neither albumen nor tube casts. By reason of their absence he came to the conclusion that the plaintiff did not have Bright's disease. He was then asked the following question:

"Now, doctor, did you then go into his history to a sufficient extent to reach a conclusion as to what his disease was?"

To this he answered:

"Why, he was suffering from neurasthenia the day I examined him."

He was then asked the following question:

"Did you reach that conclusion from a physical examination, looking at him?"

To which he answered:

"Partially physical, and depending upon his statement of his subjective symptoms."

This was objected to by the defendant. The ruling of the court on the objection was as follows:

"My ruling on that is this: That the statements made by the plaintiff to the witness will not be allowed to have with the jury any probative force. However, the witness will be allowed to state those facts which were presented to him, and upon which he based an opinion."

Further, in the course of the trial, the court instructed the jury that statements made by the plaintiff to experts in the course of their examination of him outside of the courtroom were allowed to be stated by the experts, but such statements should not have any probative force with the jury of the facts thus stated, but would be admitted to show upon what the experts based their respective opinions. To these rulings the defendant excepted. The witness was then asked to state what the plaintiff had said to him. In reply to that, the witness said:

"He gave me a history of having been present when there was a railroad accident, in September, I think it was, 1909—I am not vouching for those dates—and that he was a well, strong man up to that time, and was prosecuting

the business of an insurance solicitor, I believe; that he weighed some several pounds more than he now weighs, and that, following his experience in that railroad accident, he had had to come on him some pain thereafter, suffering neck and head and shoulder pain; that after that time he had nervousness; that he was wakeful and irritable, and unable to apply himself constantly to business, and, indeed, he did not since, or had not since, applied himself constantly; that he was weak, depressed, and miserable. Now, that would be a description of the condition that was brought out by questions and his statement—loss of physical power, loss of mental power; that he had a loss of power to apply himself, and with aches in many parts of his body; and that is what a physician, who is accustomed to hearing the story of a long train of neurasthenia, would expect to hear, and what we do hear when patients want to tell their stories, just as pain is typical, just as headache, just as pressure—just as pain is a typhoid circumstance—he had both, and loss of appetite. They all tell about the same story. Looking at the man, it was manifest that he was ill.”

Continuing, the witness said:

“He told me that he was in an ordinary day coach, and I have forgotten if he told me whether it was a chair car or an ordinary seated coach, and that some of the train ran into a switch, and some of the other cars were on the siding, and immediately stopped; that he believed he was dozing, or half dozing. It was in the nighttime, if I remember correctly what he said; that the first thing he remembered he was standing in the aisle, I believe, and he said he seemed to have pain, or some pain, afterwards, perhaps within 24 hours, or within the next 24 hours had the pain developed in the back of his neck, and it radiated through his shoulder and head, and continued for some time, and he had a physician treat him for it.”

Counsel for the plaintiff then stated to the witness a hypothetical question, which was objected to. This question practically restated the facts which the witness testified the plaintiff had told him at the time of the accident. The objection was overruled. Counsel for the plaintiff then asked the witness this question:

“Now, I will ask you to state, doctor, taking the statement, the hypothetical statement, that I have made to you, and your examination of this patient, and the other statement that you have already made, what your opinion is as to what disease he is suffering from?”

This question was also objected to, which objection was overruled. The answer of the witness was:

“From my examination, I think the man has a profound neurasthenia at this time. At that time, I will say I made use of the same word, ‘profound;’ it was neurasthenia.”

It will be noted from the foregoing that the opinion of the physician was based both upon his examination and the statements made to him by the plaintiff. It appears from the testimony of this witness that neurasthenia is classified as traumatic neurasthenia and acquired neurasthenia. This classification does not depend upon symptoms, but depends upon the origin of the disease; traumatic neurasthenia being that neurasthenia which results from an injury, and acquired neurasthenia being that which arises in some other way. The question here is whether the court erred in admitting this testimony, even with the caution given to the jury as stated.

[1] In the case of *Heald v. Thing*, 45 Me. 392, the question arose as to the admissibility of the testimony of an expert medical witness,

based upon his examination, and the statements of the nurse, wife, and attending physician of the patient. The court said:

"The declarations of the nurse, wife and attending physician are all clearly inadmissible, and were rightly excluded as hearsay. What those declarations were we do not know. They might have been of facts which the declarants had observed personally, or they might have been the idle gossip of ignorant and garrulous women. It is because such hearsay cannot be subject to the ordinary tests of truth in courts of justice that it is excluded, as too uncertain and unreliable to constitute a basis for judicial action. But in this case, while it is admitted that the declarations above referred to were properly excluded, it is strenuously contended that an opinion based wholly upon them (for the witness was permitted to give his opinion based upon his own examination and observation) should go to the jury as competent evidence, upon which they would be authorized to act, on the ground that the witness, being a person of skill, is authorized to determine the proper sources, in connection with his personal examination, from which to derive those opinions. The proposition contains two fundamental errors: First, it makes the witness decide the question of the competency of evidence, thus putting him in the place of the court; next, while it excludes the declarations as incompetent testimony to go to the jury, it receives, as competent evidence, an opinion, based upon that incompetent testimony, thus attempting to elevate the stream above the fountain, to make a corrupt tree bring forth good fruit."

This case differs from the case at bar in that the plaintiff testified for himself substantially to the facts stated by Dr. Greene as having been related to him by the plaintiff at the time of the examination. It will be seen, however, from an examination of later authorities, that this distinction makes no difference with regard to the application of the rule.

In the case of *Atchison, T. & S. F. Ry. Co. v. Frazier*, 27 Kan. 463, the Supreme Court of Kansas, in an opinion delivered by Judge Brewer, said:

"It is insisted that the testimony of a physician, so far as it is expert testimony, must be based either upon personal examination, or upon the facts as proved before the jury, or else upon an hypothetical statement. Doubtless this proposition is correct. It is true that within what is meant by the phrase 'personal examination' is properly included information derived from statements by the patient of present feeling and pain. In 1 Greenleaf, par. 102, it is stated that 'the representations of a sick person of the nature, symptoms, and effects of the malady under which he is laboring at the time are received as original evidence.' See, also, the case of *Bacon v. Charlton*, 7 Cush. (Mass.) 581, in which it is held that anything in the nature of assertion or statement is to be carefully excluded, and the testimony confined strictly to such complaints, exclamations, and expressions or groans as usually and naturally accompany and furnish evidence of a present existing pain or malady; and generally what a patient says to the physician in describing a present bodily condition is admissible. *Insurance Co. v. Mosley*, 8 Wall. 397, 19 L. Ed. 437; *Railroad Co. v. Sutton*, 42 Ill. 438, 92 Am. Dec. 81; *Earl v. Tupper*, 45 Vt. 275; *Towle v. Blake*, 48 N. H. 92; *Taylor v. Railroad Co.*, 48 N. H. 304, 2 Am. Rep. 229; *Fort v. Brown*, 46 Barb. (N. Y.) 366. So that it would have been perfectly competent for the physician to have testified, not merely to the appearance of the wound as he saw it, but also to all statements made by Mrs. Frazier as to her present bodily condition, and to have given to the jury his opinion, based upon such examination and statements. But it would not have been competent for the physician to testify to the jury as to her statements in respect to the cause of the injury, her past experience in connection with the wound, or any statements of her husband in her presence of like character. In other words, he could not give to the jury as evidence her history of the case as detailed to him outside the courtroom; neither was his opinion based upon such history of the case proper matter of evidence."

The Supreme Court of Wisconsin has passed upon this question in a number of cases. In the case of *Stewart v. Everts*, 76 Wis. 35, 40, 44 N. W. 1092, 1094 (20 Am. St. Rep. 17), that court said:

"The counsel for the plaintiffs in error took exceptions to the statements made by the expert witness, Dr. Clevenger. The doctor was consulted by the plaintiff after this action was commenced, for the purpose of being a witness on the trial of this action on the part of the plaintiff, and not for the purpose of medical advice or treatment. Against the objection of the defendants, this witness was permitted to detail all the statements made to him by the plaintiff of his sickness, pains, feelings, and his condition, from time to time, from the date of his injury down to the time of his consulting with him. From an examination of the plaintiff's testimony given upon the trial as to his symptoms, pains, feelings, and the condition of his health, since the accident, and the testimony of Dr. Clevenger as to his statements to him upon the subject, it will be seen that what the doctor testified to as to the statements made to him correspond almost literally with those made by the plaintiff on the trial. There was therefore no necessity that the statements made by the plaintiff to Dr. Clevenger should be detailed by him on the trial, in order that he might form a correct opinion whether the troubles of the plaintiff were properly attributable to his injuries received at the time of the accident. It will hardly be contended that the plaintiff could have introduced these statements, made by himself long after the action was commenced, as evidence on his part to prove the effect which the accident had upon his health, or to corroborate his statements made under oath as a witness on the trial of the action; and, if they were not admissible for these purposes, we fail to see how they are admissible at all, unless they were admissible in order to enable the expert witness to determine as to what was the real nature of his troubles at the time he was examined by him. It is clear that they were not admissible for the purpose of determining whether such present condition of the plaintiff was attributable to the accident, and it was mainly for that purpose that such statements were admitted. The statements of a party made in his own favor are seldom, if ever, received as evidence in his own behalf, except when they are made at such times and under such circumstances as to be a part of the *res gestæ*. It may be urged that this evidence could not have prejudiced the defendant, because the plaintiff made the same statements to the jury as a witness on the trial. This fact has never been held a sufficient reason for holding that the statements of the party made out of court, and not under oath, may be received in evidence on the trial. It is a method of both bolstering up or sustaining the evidence of a party which has never received the sanction of the courts, and is clearly not admissible. That this evidence was improperly received is clearly shown by the following authorities: *Illinois Cent. R. Co. v. Sutton*, 42 Ill. 441 [92 Am. Dec. 81]; *Roosa v. Boston Loan Co.*, 132 Mass. 439; *Railroad Co. v. Huntley*, 38 Mich. 543 [31 Am. Rep. 321]; *Heald v. Thing*, 45 Me. 392; *Quaife v. C. & N. W. R. Co.*, 48 Wis. 513 [4 N. W. 658, 33 Am. Rep. 821]; *Kreuzinger v. C. & N. W. R. Co.*, 73 Wis. 158 [40 N. W. 657]. Whatever may be the rule as to the admissibility of the statements made by a party when consulting a physician or surgeon for the purpose of obtaining advice or treatment for his disease or injury, we are clear that, when such statements are made by the party after action commenced to an expert, for the sole purpose of calling such expert as a witness for himself on the trial of the action to give an opinion as to the nature of his complaint or injury and its connection with certain alleged causes, such statements are inadmissible in his own behalf. To allow such statements to be given in evidence would be to allow the party to give in evidence his declaration; made not under oath, to bolster up and confirm his statements made on the trial under oath, which all courts hold to be incompetent and not permissible. This rule of exclusion is especially applicable to the case where the person whose state of health or whose injuries are the subject of controversy is himself a competent witness in the case, and is sworn and examined in regard to his health or injuries."

The same question came before the Supreme Court of Wisconsin again in the case of *Abbott v. Heath*, 84 Wis. 314, 54 N. W. 574, and again in the case of *Stone v. C., St. P., M. & O. R. Co.*, 88 Wis. 98, 59 N. W. 457, and again in the case of *Keller v. Gilman*, 93 Wis. 9, 66 N. W. 800, and in each instance such testimony was held inadmissible.

In the case of *Roosa v. Boston Loan Co.*, 132 Mass. 439, the court said:

"While a witness, not an expert, can testify only to such exclamations and complaints as indicate present existing pain and suffering, a physician may testify to a statement or narrative given by his patient in relation to his condition, symptoms, sensations, and feelings, both past and present. In both cases these declarations are admitted from necessity, because in this way only can the bodily condition of the party, who is the subject of the injury, and who seeks to obtain damages, be ascertained. But the necessity does not extend to declarations by the party as to the cause of the injury, which is the principal subject-matter of inquiry, and which may be proved by other evidence."

In the case of *Penn. Co. v. Files*, 65 Ohio St. 403, 62 N. E. 1047, the court said:

"The principal error assigned is on the admission of evidence at the trial. The plaintiff introduced as a witness Dr. Bland, who testified as to an examination he had made of the plaintiff before the trial, and as to statements made by the plaintiff at that time, in regard to his suffering from the injury. This was excepted to by the defendant as incompetent, but admitted over its objection. It appeared that the examination was not made for the purpose of treating the plaintiff, but for the purpose of enabling the physician to testify as an expert at the trial. This evidence, we think, was incompetent. It is to be distinguished from evidence of a like character given by a physician called on for treatment. In such case, what the patient may say to his medical adviser as to his condition and how he suffers may be admitted. It is to be presumed in such case that he states the truth, as it is to his interest that he should do so, and not mislead the physician by false statements as to his condition. He is under a strong motive in such case to state the truth, and it is on this ground that such evidence is admitted. But where the physician is called on, not for the purpose of treatment, but to enable him to give evidence in a pending, or proposed suit, no such sanction of the truth of what he says exists; on the contrary, he is under a strong motive to deceive the physician, and, not being under oath, may with impunity make such statements as he sees fit. What he says to a physician under such circumstances is self-serving in character and should not be admitted."

In the case of *McKormick v. West Bay City*, 110 Mich. 265, 68 N. W. 148, the court said:

"But this rule has been strictly limited, and it has been uniformly held that statements relating to past suffering, or the causes of suffering, are not admissible; and it is just as firmly established that physicians or others, called to examine or confer with the injured party with reference to the trial of a pending case, are not permitted to testify to the exclamations made at the time, as far as they are voluntary exclamations."

In the case of *Greinke v. Chicago City Ry. Co.*, 234 Ill. 564, 85 N. E. 327, the court said:

"The rule, however, is well settled that a physician, when called as a witness, who has not treated the injured party, but has examined him solely as a basis upon which to found an opinion to be given in a trial to recover damages for the injury sustained by the injured party, cannot testify to the state-

ments made by the injured party to him, or in his presence, during such examination, or base an opinion upon the statements of the injured party. Ill. Cent. R. Co. v. Sutton, *supra*; West Chicago Street Railway Co. v. Carr [170 Ill. 478, 48 N. E. 992]; West Chicago Street Railway Co. v. Kennelly, 170 Ill. 508, 48 N. E. 996; Stevens v. People, 215 Ill. 593, 74 N. E. 786. An expert witness called under such circumstances must base his opinion upon objective, and not subjective, conditions."

In the case of *Shaughnessy v. Holt*, 236 Ill. 485, 86 N. E. 256, 21 L. R. A. (N. S.) 826, the Supreme Court of Illinois, again passing upon the question, said:

"Counsel for appellee attempt to distinguish this case from those cited in the opinion just referred to (*Greinke v. Chicago City Railway Co.*, 234 Ill. 564, 85 N. E. 327), on the ground that in this case appellee was first asked on the witness stand if the answers she had given the physicians during these tests were true, and she replied that they were; that, in the cases where expert testimony based upon subjective symptoms was held improper, such opinions were based upon the unsworn statements as to such subjective symptoms. Counsel misapprehend the basis of such decisions. The law admits in evidence the declarations of the injured party as to the physical condition given to a physician during treatment because it is presumed that the injured person will not falsify in his statements made to the physician when he expects and hopes to receive medical aid; but no such presumption arises where he is examined by an expert for the purpose of giving evidence in a case about to be tried. The reasons for this distinction are fully set forth in the *Greinke Case*, *supra*, and must control here."

In the case of *Union Pac. R. Co. v. McMican*, 194 Fed. 393, 114 C. C. A. 311, the Circuit Court of Appeals for the Eighth Circuit, in passing upon the admissibility of expert medical testimony, said:

"This evidence was clearly inadmissible, for the reason that it was based, in part at least, upon what plaintiff told the doctor at the time of the examination relative to his previous history and how the injury occurred. The rule is well settled that, where a physician is called to professionally treat a party, he may give his opinion, based upon subjective as well as objective symptoms; but where he is called, not for the purpose of treating the party for the ailment, but for the purpose of giving testimony in the case, he can only testify to objective symptoms. Statements made by the plaintiff at such examination are mere self-serving declarations, not made under oath."

As sustaining this proposition, the court cited the following cases: *Shaughnessy v. Holt*, 236 Ill. 485, 86 N. E. 256, 21 L. R. A. (N. S.) 826; *Keller v. Gilman*, 93 Wis. 9, 66 N. W. 800; *Penn Co. v. Files*, 65 Ohio St. 403, 62 N. E. 1047; *McKormick v. West Bay*, 110 Mich. 270, 68 N. W. 148; *Lawson on Exp. and Op. Ev.* (2d Ed.) 162, rule 30.

From the foregoing authorities it clearly appears that the testimony of Dr. J. L. Greene, in so far as it included statements made to him by the plaintiff as to the accident, and feelings and sensations subsequent to the time of the accident and prior to the examination by Dr. Greene, and the opinion of Dr. Greene, based both upon such statements and his personal examination, was inadmissible, and should not have been allowed to go to the jury.

[2] Objection was also made by the defendant to certain testimony of Dr. W. C. Green, introduced on behalf of the plaintiff. This witness did not narrate in his deposition what had been told him by the plaintiff. He does say, however, that he formed an opinion from the

history of the case given him by the plaintiff. He stated his opinion to be that the plaintiff is suffering from a disease known as traumatic neurasthenia. Since the symptoms of neurasthenia are the same, whether traumatic or acquired, no physician can classify a given case as traumatic unless he has a history from which he can say that an injury occurred. Therefore that testimony of Dr. W. C. Green was also inadmissible.

Since a new trial must be granted on account of the error of the court in admitting inadmissible testimony, it is not necessary to consider the question of the sufficiency of the evidence to sustain the verdict.

The verdict will be set aside, and a new trial granted.

McKINNEY et al. v. KANSAS NATURAL GAS CO.

FIDELITY TITLE & TRUST CO. v. KANSAS NATURAL GAS CO. et al.

(District Court, D. Kansas, First Division. June 5, 1913.)

1. COURTS (§ 497*)—PRIORITY OF JURISDICTION—SUITS IN REM OR QUASI IN REM.

The commencement of a suit, the object of which is to affect specific real or personal property, and where in the progress of the litigation the court may be compelled to assume the possession and control thereof, effectually withdraws this property from the authority of other tribunals, although there has been no actual seizure before a second suit is instituted in another court; and the rule applies with equal force when the objects of the two suits are different.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1386, 1397, 1398, 1404-1406; Dec. Dig. § 497.*]

2. COURTS (§ 489*)—JURISDICTION OF STATE COURT—APPOINTMENT OF RECEIVER—FOREIGN CORPORATION.

Under Gen. St. Kan. 1909, § 1728, which authorizes a court to dissolve a domestic corporation which abuses its corporate privileges, or, in case a dissolution is not necessary or advisable, to appoint receivers to manage the corporate property until the abuses are corrected, and section 1724, which provides that foreign corporations authorized to do business in the state shall be subject to the same provisions and judicial control as domestic corporations, a state court may appoint receivers of the property of such a foreign corporation, so far as situated within the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

3. COURTS (§ 489*)—POWER TO APPOINT RECEIVER—FOREIGN CORPORATION—KANSAS STATUTES.

Under the Kansas Anti-Trust Act (Gen. St. 1909, § 5146), which provides that every person or corporation within or without the state, violating its provisions within the state, shall be denied the right to do business in the state, and authorizes the enforcement of such provision "by injunction or other proceeding," a state court has power to appoint receivers of the property within the state of a foreign corporation charged with violation of the act, and under the state practice such remedy is not precluded because the legal relief of ouster is sought in the action.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

4. COURTS (§ 366*)—FEDERAL COURTS—AUTHORITY OF DECISIONS OF STATE COURTS.

Such remedial procedure is essentially one of local law, and where the Supreme Court of the state has decided that the power exists, as incidental to the enforcement of the statute, the question should be held thereby concluded by a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. § 366.*]

5. COMMERCE (§ 80*)—INTERSTATE COMMERCE—INTERFERENCE WITH BY STATE.

The appointment by a state court of a receiver of the property within the state of a foreign corporation engaged in interstate commerce does not amount to an unlawful interference with the right of such corporation to transact interstate commerce.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 80.*]

6. CONSTITUTIONAL LAW (§ 169*)—COURTS (§ 489*)—OBLIGATION OF CONTRACTS—IMPAIRMENT BY STATE.

A state law, authorizing a court of the state to appoint receivers of the property of a corporation, is not unconstitutional, as impairing the obligation of contracts, as against a mortgagee, as depriving it of the right to foreclose its mortgage in some other court.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 474, 476, 478-481, 502, 511-514, 522; Dec. Dig. § 169;* Courts, Cent. Dig. §§ 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

In Equity. Suits by John L. McKinney and the Fidelity Title & Trust Company against the Kansas Natural Gas Company and the Delaware Trust Company. On petition of the Attorney General of Kansas and the state receivers of the Kansas Natural Gas Company, praying for delivery of its property into their possession. Petition granted.

John H. Atwood, of Leavenworth, Kan., John S. Dawson, of Topeka, Kan., Chester I. Long, of Wichita, Kan., and O. P. Ergenbright and T. S. Salathiel, both of Independence, Kan., for petitioners.

John J. Jones, of Chanute, Kan., and John F. Philips, of Kansas City, Mo., for receivers appointed by Federal Court.

Charles Blood Smith, of Topeka, Kan., for complainants.

John J. Jones, of Chanute, Kan., for defendants.

MARSHALL, District Judge. In these suits a petition is filed by the Attorney General of the state of Kansas and by the receivers of the Kansas Natural Gas Company, heretofore appointed by the district court of Montgomery county, Kan., for an order from this court directing the receivers heretofore appointed by it of the property of the Kansas Natural Gas Company to surrender the possession of the same to the receivers appointed by the state court.

It appears that the suit which resulted in the appointment of receivers by the state court was instituted January 5, 1912, by the state of Kansas against the Independence Gas Company, the Consolidated Gas, Oil & Manufacturing Company, and the Kansas Natural Gas Company. The petition in substance alleged that the first two defendant corporations were public service corporations organized under the laws of Kansas, and that the Kansas Natural Gas Company was a foreign corporation authorized to transact business in Kansas;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the defendants had entered into certain agreements, trusts, and combinations, which were specified in the petition, and were alleged to be in violation of the anti-trust acts of the state of Kansas, and had thereby abused and misused the corporate powers and privileges granted to them by that state; that the two first-named defendants had transferred all of their property alleged to be essential to the discharge by them of their duties as public service corporations, and without authority of law, and that this property, which was described, had become vested in the Kansas Natural Gas Company; that the managing officers of the defendant corporations willfully and intentionally abused and mismanaged the corporate property and business, and thereby caused each of the defendants to pervert its corporate privileges, and that each of the defendants threaten and will continue to abuse and misuse its corporate privileges, unless its said officers be by order of the court removed, or a receiver be appointed to manage the corporate property under the supervision of the court until said abuses are fully corrected. Wherefore it was prayed that an order be made ousting the defendants from the exercise of corporate powers and privileges within the state of Kansas, and that a receiver be appointed to manage the corporate property and business and to wind up the affairs of said defendants.

On January 17, 1912, a motion was filed for the appointment of a receiver of the property of the Independence Gas Company and of the Consolidated Gas, Oil & Manufacturing Company; but this motion was not pressed to a hearing.

On October 7, 1912, John L. McKinney, claiming to be a bondholder under a second mortgage executed by the Kansas Natural Gas Company, and acting in behalf of other creditors similarly situated, filed a suit in this court for the marshaling of the assets of said company and the payment of its debts. He prayed for the appointment of receivers of the property of the company to preserve it during the pendency of the litigation. In form the bill was the usual bill for an administrative receivership. The defendants appeared, admitted the averments of the bill, and consented to the appointment of receivers. Thereupon the court appointed receivers, who qualified and immediately entered into possession of the property. The Fidelity Title & Trust Company, a trustee under a first mortgage of the property of the Kansas Natural Gas Company to secure bondholders, was then permitted to intervene in this suit, and sought the same relief as the plaintiff. By order of this court the receivership theretofore existing was extended to the intervening petition of the Fidelity Title & Trust Company.

On February 3, 1913, the Fidelity Title & Trust Company filed its bill in this court to foreclose a mortgage executed to it, as trustee, by the Kansas Natural Gas Company; the default justifying the suit having occurred after the institution of the McKinney suit. The property mortgaged was situated in part in the Western district of Missouri, in part in the Eastern district of Oklahoma, and in part in the district of Kansas. By a compliance with the conditions prescribed in section 56 of the Judicial Code, the receivers here appoint-

ed have been vested with jurisdiction and control of the property in Missouri and Oklahoma, as well as that within the state of Kansas.

On February 15, 1913, the district court of Montgomery county, Kan., entered a decree in the suit there pending in favor of the plaintiff, and as a part of the adjudged relief appointed R. S. Litchfield and John M. Landon, two of the petitioners in this proceeding, receivers of all of the property of the Kansas Natural Gas Company; and it having been made to appear to the court that the receivers heretofore appointed by this court were in the actual possession of the property of that company, the said receivers appointed by the state court were ordered and directed, in conjunction with the Attorney General of the state of Kansas, to appear in the District Court of the United States and request a delivery of said property to them. In the opinion filed by the judge of the state court, the court said with respect to the corporate defendants in that suit that:

"The relationship of this case to the public is such that complete judgment of dissolution and ouster would punish the public rather than the offending company. A dissolution of the Consolidated Gas, Oil & Manufacturing Company is not advisable, nor would a complete ouster of the Kansas Natural Gas Company be advisable. So that the court will take charge of all the gas business of the Consolidated Company and all the business of the Kansas Natural Gas Company by its receivers, and manage the corporate property and business, protecting the gas consumers and the public until the abuses are fully corrected; and here is presented the question of conflicting jurisdiction. It is brought to the attention of this court in the arguments that receivers have been appointed for all the property of the Kansas Natural Gas Company in the federal court for the district of Kansas, and that such receivers are now in charge. * * * This court cannot enjoin the receivers of the federal court, or render any effective judgment, because the Kansas Natural Gas Company is not in the possession of the property. In a word, this court is powerless to execute its decree herein."

[1] It is this question of conflicting jurisdiction here referred to that is presented now for determination. The general principle involved was declared by Mr. Justice Shiras, speaking for the Supreme Court in *Farmers' Loan & Trust Co. v. Lake Street Railroad Co.*, 177 U. S. 51, 61, 20 Sup. Ct. 564, 568 (44 L. Ed. 667), in these words:

"The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court; but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to federal and state courts."

The different phases of the question have been so frequently before the Circuit Court of Appeals of this circuit and so authoritatively determined that no general discussion seems admissible. *Gates v. Bucki*, 53 Fed. 961, 4 C. C. A. 116; *Merritt v. Steel Barge Co.*, 79

Fed. 228, 24 C. C. A. 530; *Zimmerman v. So Relle*, 80 Fed. 417, 25 C. C. A. 518; *Sullivan v. Algrem*, 160 Fed. 366, 87 C. C. A. 318.

This general principle is not questioned; but it is contended that, where the suits are different in their nature, in their objects, and the rights sought to be enforced, an exception occurs, "and the court that first actually seizes the res and takes possession retains it, notwithstanding a prior suit has been commenced and service made affecting the property." This claimed exception rests on no principle. The nisi prius courts, both federal and state, exercise jurisdiction over the same persons and property within the same territory. They are co-ordinate in the sense that one is not clothed with control over the other. Established by different sovereignties, the pendency of a suit in the one is no ground for the abatement of a suit in the other, although between the same parties and for the same cause of action. But with respect to suits in rem or quasi in rem, the nature of the proceeding excludes dual action; and this is equally the case if the suits are between different parties and on different causes of action. A rule that property should only be considered in custodia legis when physically seized, or there is an equivalent of physical seizure, would be practicable. The objection to it is that it would frequently entail an unseemly race for possession, and the fact of priority might be involved in uncertain testimony. Further, there are suits in which it is apparent from the beginning that actual possession of the res may be eventually necessary, but where this possession is not initially essential. Such suits can only be effectively proceeded with if the subject-matter of the litigation is not in the meantime removed or changed in condition or ownership by the decrees of other courts, so that when a decree is rendered it will be operative.

These objections seem to have influenced the courts to declare that the commencement of a suit, the object of which is to affect specific real or personal property, and "where, in the progress of the litigation, the court may be compelled to assume the possession and control" thereof, effectually withdraws this property from the authority of other tribunals. *Merritt v. Steel Barge Co.*, 79 Fed. 228, 24 C. C. A. 530. These objections to the rule of determining priority by actual seizure apply with equal force when the objects of the two suits are different.

[2] It is contended with great force that the district court of Montgomery county in the suit first brought had no jurisdiction to appoint a receiver of the property of the Kansas Natural Gas Company, and hence the principle invoked by the petitioners has no basis. If the premise be correct, the conclusion must follow. The argument in support of the premise is that this suit in the state court was based on section 1728 of the General Statutes of 1909; that that section only applies to domestic corporations, which the court is authorized for certain causes to dissolve, but has no application to a foreign corporation, and hence afforded no statutory authority for the appointment of receivers of the property of such a corporation. There are several answers to this contention, each of which seems to me sufficient:

(a) Without questioning that section 1728, by necessary intendment, relates only to domestic corporations so far as it has not been given a

broadier operation by some other statutory provision, the question naturally arises as to the effect to be given to section 1724, which provides:

"Any corporation organized under the laws of another state, territory, or foreign country, and authorized to do business in this state, shall be subject to the same provisions, judicial control, restrictions, and penalties, except as herein provided, as corporations organized under the laws of this state."

By section 1728, in case a domestic corporation abuses its corporate privileges and thereby subjects itself to a decree of dissolution, the court is authorized, if a dissolution be not necessary or advisable, and if the abuses can be corrected without dissolution, to appoint receivers to manage the corporate property under the supervision of the court until the abuses be corrected. The judicial control of the court is thus exercised over domestic corporations to correct such abuses. By section 1724, a foreign corporation is subjected to the same judicial control for the correction of the same character of abuses. It is true a foreign corporation cannot be dissolved, as could a domestic corporation; but there is no impediment to the appointment of receivers of the property of such corporation, so far as situated within the state.

[3] (b) The jurisdiction of the state court to appoint receivers does not rest exclusively on section 1728. The Kansas anti-trust act (Gen. Stat. 1909, § 5146), after defining the trusts and combinations prohibited by it, provides:

"Every person, company or corporation within or without this state, their officers, agents, representatives or consignees, violating any of the provisions of this act within this state, are hereby denied the right and are hereby prohibited from doing any business within this state, and all persons, companies and corporations, their officers, agents, representatives and consignees within this state, are hereby denied the right to handle the goods of or in any manner deal with, directly or indirectly, any such person, company or corporation, their officers, agents, representatives or consignees, and it shall be the duty of the attorney general and the county attorney of any county in the state where any violation of this act be committed, or either of them, to enforce the provisions of this section by injunction or other proceeding. * * *"

It is not denied that the district court of Montgomery county had jurisdiction of an equitable proceeding under this statute to enforce its provisions by injunction or other appropriate means. The grant of equitable jurisdiction is commensurate with that embodied in section 4 of the federal statute (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3201]) to protect trade and commerce against unlawful restraint and monopoly, commonly called the "Sherman Anti-Trust Act" whereby the several Circuit Courts of the United States were "invested with jurisdiction to prevent and restrain violations of this act." In neither statute is express authority conferred to appoint receivers. The power, if it exists, results from the fact that it is an appropriate method of restraining a violation of the statute. That the power exists with respect to violations of the federal statute has been settled by the court of last resort. *U. S. v. American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663; *U. S. v. U. P. R. R. Co.*, 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. —. This being so, it must follow that the district court of Montgomery county had ju-

risdiction to apply the same means to effect the same result. The suit in the state court cannot be considered a simple suit of ouster. The abuses of corporate privileges sought to be corrected were violations of the anti-trust act. Under the Kansas statutes legal and equitable relief may be obtained in one action, and the fact that the legal relief of ouster was sought did not so dominate the proceeding as to preclude equitable remedies.

[4] (c) The proper remedial procedure is essentially a question of local law. The methods by which rights are vindicated and violations of law are restrained are, subject to constitutional limitations and in respect to state courts, exclusively within the province of the state. If, contrary to the current of authority, the Supreme Court of Kansas has decided, in a quo warranto proceeding based on an abuse of corporate privilege, that as a means of effectuating the judgment a receiver may be appointed, or an injunction be issued against a continuation of the acts complained of, it is not perceived why the question becomes one of general law, to be decided in this court by a resort to common-law rules. We are not here dealing with rights, but with the means by which such rights are protected and vindicated, and violations of law prevented. By the Constitution of Kansas, it is declared that:

"The Supreme Court shall have original jurisdiction in proceedings in quo warranto, mandamus and habeas corpus."

Neither the Constitution nor any statute in terms confers any jurisdiction on that court to appoint a receiver in a quo warranto proceeding. But in *State v. Brewing Association*, 76 Kan. 184, 90 Pac. 777, a suit to oust the Brewing Association, a foreign corporation, from doing business in Kansas, that court held that it had the power to appoint a receiver, as it might be necessary to prevent the company from transferring its property and resuming business in an indirect manner, and also for the purpose of subjecting the property to the costs of the proceeding. This jurisdiction was deduced as incidental to the exercise of jurisdiction in quo warranto. In *State v. International Harvester Co.*, 81 Kan. 610, 106 Pac. 1053, the same court held that in a similar suit it had the power to enjoin the defendant from engaging in specific practices which were contrary to the laws of Kansas. The jurisdiction of the district court of Montgomery county in suits of quo warranto, while statutory, is granted in language generally similar. There appears no basis for the distinction between the Supreme Court and the district court as to the incidental power resulting from this grant. The decisions of the Supreme Court of Kansas, I think, conclude the question here raised.

[5] It is next objected that the appointment of receivers by the state court was invalid, for the reason that the Kansas Natural Gas Company was engaged in interstate commerce, and that we have here an exercise of the power of the state of Kansas, acting through the court, over interstate commerce, in violation of the commerce clause of the federal Constitution. It is not claimed, if I understand the argument correctly, that the Kansas anti-trust act, when applied to cor-

porations engaged in interstate commerce, is violative of the federal Constitution, or that it cannot be so construed as to relate to restraints and unlawful combinations respecting intrastate trade, and so given a legitimate operation. But it is asserted that the seizure of property used in carrying on interstate commerce under the order of a state court acting under a valid statute is an unlawful interference by the state with interstate commerce. It does not cast any light on this question to limit the contention to statutes to enforce the penal laws of the state. It must be recognized that interstate commerce corporations may incur obligations, contractual and other, and that such obligations can only be enforced by the action of some court; that if it be a public service corporation it may also owe certain duties to the public, but that there is no necessary incompatibility between the enforcement of the first class of obligations and the discharge of those duties. So in *Davis v. Railway*, 217 U. S. 157, 30 Sup. Ct. 463, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907, it was held that a writ of attachment from a state court might be properly levied on cars of a railroad company used in interstate commerce. But the question is foreclosed here by the case of *Palmer v. Texas*, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435, where it was held that the appointment by a state court of a receiver of the property of a foreign corporation engaged in interstate commerce did not amount to an unlawful interference with the right of such corporation to transact interstate commerce.

[8] It is further asserted that, if the Kansas statutes are so interpreted as to authorize the appointment by the state court of a receiver of the Kansas Natural Gas Company, as applied to the mortgages sought to be foreclosed in this court, they are in contravention of section 10, art. 1, of the federal Constitution, which prohibits any state from passing a law impairing the obligation of contracts; and attention is called to the rule that the obligation of a contract includes the means provided by law for its enforcement. I fail to see the application of this principle here. If the remedy of the bondholders in this court be suspended while the mortgaged property is in custodia legis by virtue of a suit in the state court, it is suspended because of a general principle of law existing and recognized when the bonds were issued, even if the situation calling for the application of the principle results from a statute subsequently enacted. The complainants here have the right to pursue their remedy in the court having the prior right to the possession of the property. An intervention pro interesse suo furnishes an adequate remedy for their protection. It must be assumed that their rights will be fully recognized by the state court, and that they will be accorded just such priority as they are entitled to. If not, the proper remedy is by appeal. When the bonds were issued it was the law that the mortgages could only be foreclosed in a court having the power to seize the property mortgaged, and that, if the property was already in the possession of a court, foreclosure had to be there prosecuted, or else must await the action of that court. So a pending suit to foreclose a second mortgage might temporarily preclude a first mortgagee of the same property from the prosecution

of a subsequent suit to foreclose his mortgage in a different court, but could in no sense be said to impair his contract.

I think the objections to the jurisdiction of the state court to appoint receivers cannot prevail, and that the petition must be granted as to such of the property of the Kansas Natural Gas Company as was situated in the state of Kansas at the time the receivers were appointed by this court, and which was therefore potentially in the custody of the district court of Montgomery county.

In re LANE LUMBER CO.

(District Court, D. Idaho, N. D. July 7, 1913.)

1. BANKRUPTCY (§ 458*)—REFEREE'S RULINGS—REVIEW.

Formal exceptions to a referee's ruling allowing fees to a bankrupt's attorneys were not essential to a review thereof on appeal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 918; Dec. Dig. § 458.*]

2. BANKRUPTCY (§ 482*)—BANKRUPT'S ATTORNEY—FEES—"DUTIES."

Bankr. Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), provides for the payment out of the bankrupt's estate of the costs of administration, including one reasonable attorney's fee for professional services actually rendered to the bankrupt in involuntary cases while performing the duties prescribed in the act. *Held*, that the "duties" referred to in such section are those prescribed by section 7, requiring the bankrupt to attend the first meeting of creditors if so directed, to prepare schedules, and to submit to examination at such other times as the court shall order concerning the conduct of his business, etc.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. § 482.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2283, 2284; vol. 8, p. 7646.]

3. BANKRUPTCY (§ 482*)—ATTORNEY FOR BANKRUPT—FEES—ALLOWANCE.

Fees are only allowable to a bankrupt's attorney out of the estate in bankruptcy, where the services are such that by operation of law an obligation to pay for them is imposed on the estate, and where reasonably necessary to enable the bankrupt to discharge his duties under the law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. § 482.*]

4. BANKRUPTCY (§ 482*)—ATTORNEY FOR BANKRUPT—SERVICES—NATURE AND CHARACTER—EVIDENCE.

Evidence of a bankrupt's attorneys that certain charges for advice to the bankrupt on three different occasions referred to proceedings to recover the bankrupt's books from a receiver after bankruptcy proceedings had been instituted and prior to the time schedules were filed, without showing that any application had been made to the court for an order concerning the books, was not sufficiently certain to authorize an allowance therefor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. § 482.*]

5. BANKRUPTCY (§ 482*)—BANKRUPT'S ATTORNEY—FEES.

Where a bankrupt's trustee was opposing the allowance of a claim of the bankrupt's receiver for fees, expenses, and attorney's fees, as were

also some of the bankrupt's creditors, the bankrupt's attorneys were not entitled to assist in such proceedings at the expense of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. § 482.*]

6. BANKRUPTCY (§ 114*)—COERCION BY COURT.

Where a federal court receiver, in charge of the assets of a bankrupt corporation, refuses to permit inspection of the books of the bankrupt by its trustee, appointed in the same court, the receiver may be compelled to give access to the books by an order made to the court on an informal application.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 164–166; Dec. Dig. § 114.*]

7. BANKRUPTCY (§ 482*)—SCHEDULES—EXPENSE—ATTORNEY'S FEES.

Where the schedules of the assets and liabilities of a bankrupt corporation covered approximately 100 pages of typewritten matter and could have been prepared by any competent accountant, the fact that they were prepared by the bankrupt's attorneys did not entitle them to charge for attorney's services in preparing the same; and hence they were not entitled to more than \$285 for such work.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. § 482.*]

8. BANKRUPTCY (§ 482*)—BANKRUPT'S ATTORNEY—PROFESSIONAL SERVICE—COMPENSATION.

In determining the reasonable value of services rendered to a bankrupt by its attorneys, neither the assets nor the liabilities of the estate represent or measure the value of the matter involved.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. § 482.*]

9. BANKRUPTCY (§ 482*)—BANKRUPT'S ATTORNEY—SERVICES—ATTENDANCE ON HEARINGS—RIGHT TO FEES.

Since a bankrupt, when ordered to appear for examination at the first meeting of creditors and sessions of the court, either to give information or submit to examination under oath, is not ordinarily entitled to counsel, where there was no order of the referee requiring the bankrupt's counsel to attend a charge of \$1,850 for attendance in the bankruptcy court at irregular intervals from August, 1911, to November, 1912, 37 different days at \$50 a day, during which time the bankrupt's officers were being examined, would be reduced to \$100.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. § 482.*]

In the matter of bankruptcy proceedings of the Lane Lumber Company, bankrupt. On objections to a referee's order allowing a claim for fees to the bankrupt's attorneys. Referee's order reversed, with directions to allow the claim for a reduced amount.

Whitla & Nelson, of Cœur d'Alene, Idaho, for claimant.

E. N. La Veine, of Cœur d'Alene, Idaho, for trustee.

James A. Wayne, of Wallace, Idaho, for objecting creditor.

DIETRICH, District Judge. A general creditor and the trustee, feeling aggrieved by an order of the referee allowing in full a claim of the attorneys for the bankrupt for fees aggregating \$2,750, have brought the matter here upon a petition for review, in which they both join.

[1] The respondents' objection that the order cannot be reviewed because no exception was taken at the time is not well founded in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

law. While the course pursued by the trustee and the objecting creditor in not appearing and resisting the claim at the hearing before the referee cannot be commended, it is thought that formal exceptions are not essential to the right of review. The general rule, with its qualifications, is correctly stated in Collier on Bankruptcy (9th Ed.) p. 609, where it is said:

"A referee's findings of fact may be reviewed, although no formal exceptions to his decision are filed, where such filing is not required by a rule or order of the court. The court will not ordinarily consider for the first time questions not raised below, or issues not presented by the record; if a point is presented by the record the District Court may consider it although it was not discussed before or by the referee. The court is not barred by or confined to the matters certified by the referee; under its broad general powers it may consider any point presented by the record."

See, also, Loveland on Bankruptcy, vol. 1, §§ 94, 95.

[2] I pass to a consideration of the merits. The provision of law upon which the claimants rely is found in section 64b of the Bankruptcy Act, where it is declared that costs of administration, including "one reasonable attorney's fee, for the professional services actually rendered * * * to the bankrupt in involuntary cases while performing the duties" in the act prescribed, must be paid in preference to certain other of the indebtedness of the estate. The "duties" referred to are imposed by section 7 of the act, which, in so far as it is thought by the claimants to be material, is as follows:

"Sec. 7. Duties of Bankrupt. (a) The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; * * * (8) prepare, make oath to, and file in court, within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, * * * a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate."

[3] In considering the several items of the claim, it must be borne in mind that while no objection is made because it is in the name as well as upon behalf of the attorneys, and is not presented directly by the bankrupt itself, there is no contractual relation between claimants and the court or the estate; they were employed, not by the trustee, but by the bankrupt. For any service rendered to and accepted by the bankrupt it is doubtless liable, but here we are concerned only with the liability of the estate, and its liability is limited to a reasonable compensation for such services, and no others, as fall within the terms of the statute. In *re Connell & Sons* (D. C.) 120 Fed. 846. To warrant any allowance it must first appear not only that services were rendered and were valuable, but that the conditions were such

that by operation of law an obligation to pay therefor is imposed upon the estate. The inquiry here, therefore, has three branches: Was a service performed? Was such service reasonably necessary to enable the bankrupt to discharge its duties under the law? And what was it reasonably worth? The burden is upon the claimants to make a prima facie showing upon each of these three heads.

The first items in the account are as follows:

1911.

Aug. 4. Advice relating to bankruptcy proceedings instituted against the bankrupt	\$25 00
Aug. 7. Advice and services relative to bankruptcy proceedings.....	15 00
Aug. 12. Advice and services relative to bankruptcy proceedings.....	15 00

[4] The adjudication was made upon August 1, 1911, and to what the advice and service here charged for pertained is by the statement of account left wholly to conjecture. The only evidence pertaining to the items is the testimony of one of the claimants, as follows:

"And in regard to the advice for which we charged \$25 in one instance, and \$15 in two other instances, these were matters connected with the Connolly receivership after the bankruptcy proceedings had been instituted and prior to the time schedules were filed or application made to the court for an order. It was relative to getting possession of the books so that we could decide certain matters and things, and in connection with that I can't say at this time in detail what they were, but I made the charge at the time the services were performed, and I considered them reasonable at the time."

But this evidence is altogether too vague and uncertain to serve as the basis for a conclusion that the services were reasonably necessary to enable the bankrupt to perform its duties, or for a finding of the value thereof. In the most favorable view the testimony may be construed as suggesting, not showing, that the advice may have related to the preparation of the requisite schedules; but for all services connected with that duty a distinct charge of \$750 is made, which charge, it is to be inferred from the testimony, was also intended to cover the proceedings to secure possession of the bankrupt's books and papers from the receiver. It is therefore held that the showing was insufficient to warrant the referee in allowing any one of the three items.

[5] We next consider the following charge:

"Aug. 24. Preparing proceedings, including objections and brief on objections, and contesting receiver's claim for the allowance of fees and expenses to himself and attorney's fees, \$100.00."

However commendable the motive which prompted the bankrupt to participate in this contest, its zeal was misdirected. It was certainly under no legal obligation in the premises. It was the trustee's function and his duty, and it was also the right of the creditors, to oppose baseless claims, including any such claim, when put forward by the receiver; the extent of the bankrupt's obligation was to furnish to the trustee such material information as was in its possession. As a matter of fact, the trustee was making opposition to this claim, as were also some of the creditors, and to permit the bankrupt to employ counsel at the expense of the trustee when the trustee was already represented by counsel would be to sanction a wholly unnecessary charge against the estate.

The next is an item of \$750 for the preparation of the schedules. This being a duty clearly imposed upon the bankrupt, we have but to consider the nature and extent of the legal services necessarily involved therein and the reasonable value thereof. Unquestionably a measure of professional knowledge and skill is required for the proper discharge of such a duty, and perhaps in almost every case some allowance upon this account may properly be made, but I had supposed that rarely, if ever, could the amount exceed \$100, and commonly a much smaller sum would be adequate. In re Mayer (D. C.) 101 Fed. 695; In re O'Hara (D. C.) 166 Fed. 384; In re Christianson (D. C.) 175 Fed. 867; In re Connell & Sons (D. C.) 120 Fed. 846.

It is, however, contended that the case is an unusual one, and assuming it to be such we shall consider it upon its own merits. It is to be borne in mind that the duty of preparing the schedules is primarily imposed upon the bankrupt. He may secure such clerical and legal assistance as are reasonably necessary, but he cannot at the expense of the estate employ attorneys and shift to them the entire burden and responsibility. The statute provides that the *bankrupt* shall "prepare, make oath to, and file in court" the schedule, setting forth certain facts; and it was contemplated that he should at least furnish the requisite information, and that the assistance provided for him at the expense of the estate would extend only to the matter of putting the information into the prescribed legal form.

It is not thought to be necessary to attempt a fine distinction between the duties which are strictly professional and those which are merely clerical, in the preparation of a schedule, but in estimating the compensation which should be allowed respect must be had to the nature of the work, for the compensation should be measured with regard to the character and quality of the service rather than the calling or profession of him by whom the service is rendered. Now it is not to be questioned that ordinarily the work of preparing a schedule is in the main that of an intelligent accountant. In re Goldville Mfg. Co. (D. C.) 123 Fed. 579, 586. With a few simple instructions touching the required contents of the schedule, the various headings under which assets and liabilities should be classified, and the formalities of execution, no competent accountant should experience serious difficulty in substantially complying with the law. In so far as we are advised by the record, the present case is no marked exception to the general rule in so far as necessary legal services are concerned; and indeed it is difficult to see how any difficult or intricate questions could be involved in any such case. It is not for the bankrupt carefully to consider whether his title to property claimed by him is vulnerable or invulnerable, or with nicety to determine the exact status of debts which it is claimed he owes. The officers of the court, as well as parties in interest, are chiefly concerned in being advised of the facts to such an extent that they may make intelligent investigation. The schedule adjudicates nothing, and is binding upon no one; at most, it may in certain contingencies be regarded as *prima facie* evidence of the facts therein stated. It must therefore be held, I think, that in the main the services here rendered were such as a competent clerk or

accountant might have performed, and compensation must be awarded upon that basis. I cannot attach much importance to the fact that the books and papers were in the hands of a receiver at the time the order was made requiring the bankrupt to file schedules, for I am unable to see how or why any considerable amount of service could have been required to get possession of the books.

[6] The receiver was an officer of this court, and if he was, either in good faith or bad, withholding the books from the inspection of the bankrupt, I must assume that upon the most informal application to the referee an order would have been made requiring him, under proper conditions, to give access to the books.

[7] Unfortunately there is wanting definite information touching one, if not the most important, factor entering into the consideration of the amount to be allowed upon this account, and that is the time which was actually and necessarily spent. If there were any assurance of more specific data upon the subject, I would be inclined to refer the matter back for further testimony, but apparently no account was kept, and nothing better than the general estimate of the claimants, testifying from memory, is available. The schedule covers approximately 100 pages of typewritten matter, and there is some testimony relating to what would be a reasonable charge for the services of a stenographer in doing the clerical work; but this estimate rests upon the unwarranted assumption that the work was done by what is ordinarily called a public stenographer, whose charges, it is well known, greatly exceed the prevailing compensation of salaried office stenographers. There is no evidence that the work was done in that way, and it is to be presumed that it was performed by the claimants' regularly employed stenographer. Assuming a reasonable compensation for a competent office stenographer to be \$100 per month, an allowance of \$35 would cover a period of practically 10 days, and I am satisfied that that amount of time is quite ample in which to do all the work preliminarily and finally required of a stenographer and typist in the preparation of the schedule. For the labor of gathering together and classifying the data I shall allow compensation as for the services of an accountant, at the rate of \$15 per day for 10 days; and as a retainer, and for legal advice incidental to the supervision of the work, \$100—making a total for the preparation of the schedule of \$285. This amount may be somewhat larger than should have been authorized if the extent of the required service and the compensation to be allowed therefor had been prescribed in advance, but in view of all the circumstances, and taking into consideration the benefit to the estate of the service rendered, it is thought that the conclusion reached is not unreasonable and does substantial justice. It should be added that, in considering the compensation to be allowed for this service, as well as for other services to the bankrupt covered by the claim, I am not able to concur in the view, apparently entertained by the claimants, that there is any very material or direct relation between the mere aggregate of the assets and liabilities of a bankrupt estate, as shown by the schedules, and the compensation to be allowed to the bankrupt's attorneys.

[8] The value of the matter involved is generally taken into consideration as an important factor in determining what is a reasonable charge for legal advice or professional service; but, so far as concerns service rendered to the bankrupt, neither the assets nor the liabilities of the estate represent or measure the value of the matter involved. Certain interests of the bankrupt and certain duties imposed upon him by the law constitute the subject-matter of the service. The degree of solvency of the estate may possibly be considered to the same extent as is the ability of a client to pay a reasonable fee, but here as yet it is wholly uncertain what dividend, if any, will be realized by the unsecured creditors; apparently, however, not a large one. The schedule itself is no criterion. Here for illustration the schedule discloses assets valued at \$771,201.50, and liabilities aggregating \$532,940; but within a few months after the filing of the schedule, upon an appraisal in the manner prescribed by law, the official appraisers reported the entire value of the assets as being only \$217,996.63.

[9] There remains for consideration the claim of \$1,850 for "attendance in bankruptcy court" at irregular intervals during the period from August, 1911, to November, 1912, 37 different days, at the rate of \$50 per day. The magnitude of the item, if not startling, at least challenges our attention, and gives sharp emphasis to the inquiry whether it is contemplated by the bankruptcy act that estates shall be burdened with the expense of furnishing a legal attendant for the bankrupt while he is present pursuant to an order of the court at the first meeting of creditors, and sessions of the court, either to give information or to submit to examination under oath. While contingencies doubtless may arise where the assistance of counsel may be reasonably required, it is thought that there is no presumption of such need, and that ordinarily attorney's fees for such services are not chargeable against the estate. It is urged that in certain reported decisions (*In re Michel* [D. C.] 95 Fed. 803; *In re Kross* [D. C.] 96 Fed. 816; *In re Mayer* [D. C.] 101 Fed. 695; and *In re Anderson* [D. C.] 103 Fed. 855, being cited) the contrary view has been held; but upon analysis it will be found that no one of these cases lends strong support to the proposition that under all circumstances compensation for such a service is a matter of right. In the *Michel* Case, which was presented ex parte, no such charge was involved. In the *Kross* Case, Judge Brown, in rendering the decision, expressly states that:

"Ordinarily I cannot regard attendance by counsel for the bankrupt at all the various examinations as necessary. The restraints on discharge being confined to acts either criminal or most plainly fraudulent and wrong, the honest and straightforward debtor has rarely need of 'counsel,' unless falsely attacked, when professional aid may become proper and necessary, and should then be compensated. There is often, however, too much interference and objection by the bankrupt's attorney in the ordinary examinations in behalf of creditors, which operates in every way injuriously."

In the *Mayer* Case the question was not in issue, and was discussed only in arguendo. While in the *Anderson* Case it is not very clear just how the question arose, the conclusion of the court seems to have been that a bankrupt should be allowed such services of counsel "to the extent of protecting his rights on the inquiries" made of him. It may

be that it is not unusual for a small allowance to be made upon this account; but I have no present recollection that such a charge has ever before been called to my attention, and in the great majority of cases I can see no reason why the bankrupt should have the assistance of counsel in the performance of the simple duty required, or the burden of fees therefor imposed upon the estate. Quite obviously the purpose of requiring the attendance of the bankrupt is that he may give information, either voluntarily or under oath, touching any matter which may affect the administration and the settlement of the estate. He has no obligation except to disclose facts within his knowledge. He attends primarily as a witness, and there is ordinarily no more reason why he, as a witness, should have the protecting care of attendant counsel, than that any other witness under any other circumstances should have such protection. It is not perceived why, as is somewhere suggested, the bankrupt needs to be guarded against unwittingly or inadvertently doing or saying something which might be prejudicial to his right to a discharge in bankruptcy; if he is willing frankly to disclose the facts, he can, as a rule, suffer no prejudice. But here even that consideration is of little moment, for no one can be greatly concerned in the question whether or not a corporation shall be discharged, or in opposing such discharge. Nor could there here arise any question touching the matter of exemptions, for a corporation is not entitled to exemptions. Ordinarily, why should not the bankrupt put himself at the service of the trustee, who is presumably not antagonistic, and who should not, and presumably does not, have any motive or incentive to injure him or prejudice him in any of his rights? Instead of laying the facts before counsel especially employed by him, why should he not disclose them directly to the trustee or the attorney for the trustee?

If it were shown that the trustee and his attorney were disposed unjustly to attack him or to treat him unfairly, possibly he should have the assistance of counsel, but ordinarily it may be assumed that if any such disposition were shown the referee or judge would check it and see that his rights were protected while acting as a witness or informant, as the court will protect a witness against wrong or abuse in any other case or proceeding in which he appears in obedience to process. It is doubtless true that the claimants here spent at least a large part of the time in attending the bankruptcy proceedings for which they claim compensation, and lest injustice be done to them I have taken the trouble to go through the voluminous stenographic report of the proceedings had before the referee; but in the main it is not apparent how their attendance was either of benefit to the estate or was needed by the bankrupt. At one time criminal prosecutions were instituted against the officers of the bankrupt in attendance, and it may be that an allowance can with propriety be made for counsel in connection with that feature of the proceedings; but surely it was unnecessary to have counsel in attendance all the time in anticipation of such a need. The same contingency might arise any time in the course of the examination of a witness in court, and in a proper case the court would doubtless give the witness an opportunity to procure counsel.

It is, however, urged by claimants that their presence was in compliance with the express order and direction of the referee. It is true that in the order made by the referee (but apparently drafted by claimants) allowing the claim there is a recital to the effect that the attendance "was under the direction and order" of the referee; but I do not find that the record justifies such a finding. One of the claimants testified that the referee asked them to attend all the hearings; but if it were to be assumed that the referee has authority to require counsel for the bankrupt to be present, surely such direction, to be efficacious, should be made of record, and oral testimony thereof must be rejected as being incompetent. Upon examining what is furnished to me as the referee's docket, containing a large number of orders pertaining to the proceeding, I find no order or direction requiring counsel to be present. There is in the order of August 22, 1911, appointing the time for the first meeting of creditors, September 7, 1911, a requirement that the bankrupt and certain of its officers therein named be present at the first meeting of creditors, and also a direction that notice of the order be sent to the bankrupt and its officers and its attorneys of record, the claimants here. Upon the same day—that is, on August 22, 1911—a specific order was formulated and entered requiring the bankrupt and its officers to appear on September 7th, and this is expressly directed to the bankrupt and to P. H. Wall, its president, and N. K. Wall and B. F. O'Neil, its secretary and treasurer respectively; it makes no mention of the bankrupt's counsel. I find no other order bearing upon the subject.

With the one exception noted, I am unable to find from the whole record that there was any reasonable need for the attendance of the claimants at the meetings of creditors or the sessions of the court, as counsel for the bankrupt, and considering all services under this head, which were of benefit to the estate or which fall within the rule hereinbefore stated, it is thought that \$100 is all that can properly be allowed upon this account. In that view it becomes unnecessary specifically to find upon the issue whether the attendance covered 37 days, as contended for by the claimants, or only 30 days, as asserted by the trustee. Nor need we determine what would be a reasonable per diem allowance for such attendance, taking into consideration the actual amount of time spent upon each of the several days and the character and scope of the business then under consideration. It is doubtless true, and it is much to be regretted, that the amount allowed is in any view inadequate reasonably to compensate for the time claimants have actually spent, but, as was said by Judge Phillips in *Re Harrison Mercantile Company* (D. C.) 95 Fed. 123:

"While the court personally would be pleased to exercise a spirit of large liberality both towards the attorneys and its officers assisting in the administration of bankrupt estates, it must be understood that the court is impressed with a sense of the obligation imposed upon it by the bankrupt act, to so administer it as to preserve both the letter and the spirit of the statute, and produce the best results in behalf of creditors."

That economy of administration is enjoined by the spirit of the act cannot be gainsaid. In *re Curtis*, 100 Fed. 792, 41 C. C. A. 59.

The order appealed from will therefore be reversed, with directions to allow claimants \$385, the same to be paid in due course of administration, if there are sufficient funds available therefor; otherwise the claim is to share ratably with others of like dignity.

In re HASIE.

In re WAGGONER.

(District Court, N. D. Texas, at Dallas. June 5, 1913.)

No. 933.

1. BANKRUPTCY (§ 213*)—PROPERTY SUBJECT TO TRUST DEED—SUMMARY SALE UNDER POWER—VALIDITY.

Under the law of Texas a deed of trust is merely a mortgage, and a summary power given therein to the trustee to sell the property on notice is only a cumulative remedy, which does not exclude foreclosure by suit. Such power is also revocable, and is revoked either by the death of the grantor or a seizure of the property under process, in which case the deed can only be foreclosed by judicial decree, and a summary sale by the trustee is void. *Held*, that a sale by a trustee under such a power, after the bankruptcy of the grantor and while the property is in the possession of his trustee as a part of the estate, without the consent of the bankruptcy court, is void, and does not divest the title of the trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 334-542; Dec. Dig. § 213.*]

2. BANKRUPTCY (§ 209*)—LIENS—REMEDIES FOR ENFORCEMENT.

The provision of Bankr. Act July 1, 1898, c. 541, § 67, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), that valid liens shall not be affected by the act, relates only to the obligation of the contract, and not to the contract remedies for its enforcement, which may be changed without impairing the contract.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 318; Dec. Dig. § 209.*]

In the matter of M. C. Hasie, Jr., bankrupt. On certificate of referee in the matter of the claim of D. E. Waggoner. Order affirmed.

Leake, Henry & Robertson, of Dallas, Tex., for claimant.

Chilton & Chilton, of Dallas, Tex., for trustee in bankruptcy.

MEEK, District Judge. The bankrupt, prior to the institution of this proceeding in bankruptcy, executed a deed of trust on certain land to secure an indebtedness to the Guaranty State Bank & Trust Company, by the terms of which the trustee named in the instrument, in case of default, was empowered summarily to sell the land by posting notices of the time and place of sale, and to apply the proceeds in satisfaction of the indebtedness. After the adjudication of the bankrupt the trustee in the deed of trust posted notices and sold the property. At the sale D. E. Waggoner, the claimant herein, became the purchaser. These steps were taken without the consent of the trustee in bankruptcy, and without the permission and approval

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the bankruptcy court, and without notice to the creditors and other parties in interest in the bankruptcy proceedings, who had the right to redeem, and while the trustee was in possession of the property and seeking to realize upon it for the benefit of the bankrupt's general creditors. Notwithstanding the sale by the trustee under the deed of trust, the trustee in bankruptcy has collected the rents accruing upon the land and claims the same as a part of the assets of the bankruptcy estate. After the sale by the trustee under the deed of trust, claimant made application to the referee to order the trustee in bankruptcy to turn over to claimant the rents which had accrued since the sale. This the referee, after full hearing, declined to do, and entered an order dismissing the application. Claimant thereupon applied for and obtained this certificate for review, and insists that the order of the referee should be set aside and the rents turned over to him.

[1] The right of claimant to these rents depends upon the validity of the sale of the property by the trustee under the deed of trust. Thus a most important question, and one directly and materially affecting procedure in bankruptcy cases and the respective rights of the trustee and lien claimants, is submitted in this certificate. It is as follows: May a trustee, acting under summary powers conferred by a deed of trust, sell real property while such property is in the lawful possession of the trustee of a bankruptcy estate; and will such a sale, if made outside of any court of competent jurisdiction and without the consent of the bankruptcy court, divest title out of the trustee in bankruptcy and place it in the purchaser?

There appears to be no controversy as to the right of the trustee to the rents which had accrued before the sale. The claim as made by the claimant is in effect that the proceedings under the deed of trust vested him with title to the property and divested the equity of redemption of the trustee and creditors in the bankruptcy proceeding. To this the trustee answers that the sale of the property, having been made without the authority of the bankruptcy court, and while it was in his possession as such trustee, and while he was proceeding to administer on it in the belief that there was a substantial equity over and above the incumbrance thereon, was void, and conferred no rights on the purchaser to the rents and profits.

There is no substantial controversy over the material facts, except as to whether the value of the property was in excess of the incumbrance thereon. This issue is unimportant, in view of the real question involved, since, if the sale under the power in the deed of trust operated to foreclose the bankrupt's equity of redemption, the right of claimant to the rents and profits accruing thereafter is indisputable. If the opposite is true, and the sale was void, then the trustee in bankruptcy would be entitled to the rents and profits until either the equity of redemption is barred by appropriate proceedings instituted for that purpose, or he relinquishes administration upon it for the reason that the equity of the bankrupt is of no value to the general estate.

It is well settled in Texas that such instruments as the deed of trust in question are mere mortgages with power to sell, and that the power

to sell is only a *remedy* for enforcing rights and obligations of the contract—a remedy that is cumulative and does not supersede another given by law. The creditor, therefore, may elect to proceed to enforce his lien under the power to sell or foreclosure by suit. *Blackwell v. Barnett*, 52 Tex. 326; *Morrison v. Bean*, 15 Tex. 269. The power to sell by a trustee is also revocable. It is revoked *ipso facto* by the death of the grantor, and is thereafter only enforceable in a judicial proceeding. And in this connection the well-established rule in Texas is that in case of the death of the grantor a sale by the trustee of property conveyed under a deed of trust pending administration on the estate of the grantor is absolutely void. *Whitmire v. May*, 96 Tex. 317, 72 S. W. 375; *Williams v. Armistead*, 41 Tex. Civ. App. 35, 90 S. W. 925. This is also true in those cases where the property mortgaged is seized by judicial process. Accordingly it has been held in Texas, following the doctrine laid down in the United States Supreme Court in *Wiswall v. Sampson*, 14 How. 52, 14 L. Ed. 322, that a sale by a trustee under a deed of trust of land in the possession of a receiver is void. *Scott v. Crawford*, 16 Tex. Civ. App. 477, 41 S. W. 697; *Ellis v. Vernon Waterworks Company*, 86 Tex. 109, 23 S. W. 858. It is also a well-settled rule in Texas that a mortgagee out of possession is not entitled to the rents or profits until the mortgage has been foreclosed. The mortgagor contracts to pay interest, not rents. The law in this respect is the same as the rule laid down in *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415. Therefore, when the trustee in bankruptcy is appointed, he succeeds to all the rights of the bankrupt mortgagor. He has the right to the rents and profits upon the property mortgaged until the mortgagee asserts his right of entry, and forecloses his lien, and bars the equity of redemption.

The power of sale under a deed of trust being a remedy, and subject to change, suspension, or revocation in event of a legal administration or seizure of the property incumbered by the deed of trust, it is not therefore an unalterable constituent of the contract. Where the power is revoked or suspended, a sale made thereafter by the trustee under a deed of trust acting under the power without the sanction of an order of court is void. Such sale would consequently confer no rights upon the purchaser, and it follows that a mortgagor or his legal representative would be entitled to rents and profits arising out of the mortgaged property until foreclosure proceedings or their equivalent had been instituted in some court having jurisdiction over the parties and the subject-matter. Such is the general status of the power of sale in a deed of trust under the system obtaining in Texas.

When a mortgagor is adjudicated a bankrupt, his trustee in bankruptcy takes the mortgaged property in the same plight it was held by the bankrupt. It is subject to the valid liens thereon, but the mortgagee under and by virtue of the bankruptcy enjoys no different or greater rights. It is apparent that, if the trustee in bankruptcy is required to pay the rents accruing before the mortgagee has foreclosed his lien to the latter, to that extent the mortgagee would enjoy a more favorable position and higher rights in the property mortgaged than

if bankruptcy proceedings had not been instituted. This is not in consonance with the well-settled policy of Bankr. Act 1898, § 67. Under the present bankruptcy law there is no principle more uniformly recognized and rigidly enforced by the courts than that valid liens, untainted by fraud, shall not be disturbed by the institution of bankruptcy proceedings. But this has reference entirely to the validity and obligation of the contract, and not to the remedies for enforcing the lienholder's rights. These can be changed without impairing the obligation of the contract. *In re Williams' Estate*, 19 Am. Bankr. Rep. 389, 156 Fed. 934, 84 C. C. A. 434; *In re Utt*, 5 Am. Bankr. Rep. 383, 105 Fed. 754, 45 C. C. A. 32; *Matter of Huggins*, 24 Am. Bankr. Rep. 715, 179 Fed. 490, 103 C. C. A. 70, 29 L. R. A. (N. S.) 737. In Texas we have seen the remedy by sale provided for in a deed of trust, in event of the grantor's death or seizure of the property, *ipso facto et eo instanti* changes, yet the obligation remains. It is simply enforced in another way.

Upon the filing of a petition in bankruptcy, all the property of the bankrupt upon which there is a mortgage or other lien passes to the trustee in bankruptcy, and is consequently in the custody of the court of bankruptcy and subject to administration for the benefit of general creditors. *In re Rochford*, 10 Am. Bankr. Rep. 608, 124 Fed. 182, 59 C. C. A. 388; *In re Kellog*, 10 Am. Bankr. Rep. 7, 121 Fed. 333, 57 C. C. A. 547; *Chauncey v. Dyke Bros.*, 9 Am. Bankr. Rep. 444, 119 Fed. 1, 55 C. C. A. 579; *Sanford v. Lackland*, Fed. Cas. No. 12,312; *Spindle v. Shreve*, 111 U. S. 542, 4 Sup. Ct. 522, 28 L. Ed. 512. But it does not follow that the bankruptcy court or the trustee will administer upon the property, if its value is insufficient to pay off the valid liens. The trustee may elect to refuse to take possession of property incumbered by liens to such an extent that there is not sufficient equity to justify administration thereon; and this, not because of any want of power or jurisdiction in the court, but because it would be an abuse of official discretion on the part of the court and its officers to administer upon the property so situated. Until the trustee makes his election, all the property of the bankrupt is in the custody of the court by operation of law. Where the value of property is insufficient to pay off incumbrances, the practice is to declare it burdensome, or, in the alternative, to hold it subject to such application as the mortgagee may make to the court for the satisfaction of his lien. Where there is a substantial equity in the property, a trustee may sell it free from or subject to the incumbrance thereon, transferring the lien to proceeds, and pass as good title to the purchaser as the bankrupt had.

On the other hand, the mortgagee, where there will be no substantial equity after paying off his mortgage, may apply to the bankruptcy court for a sale of the mortgaged property, and have the validity of his debt established by the bankruptcy court, and the proceeds of the sale credited on his debt. Where there is a residue of his debt still remaining, he may prove it against the general estate, and obtain all the relief which the plastic processes of a court of equity afford, when its jurisdiction is properly invoked. This is done in

bankruptcy under the authority of general order 28 of the Supreme Court of the United States (18 Sup. Ct. viii) upon a simple notice to all parties who have under the law the right to redeem. The remedy thus provided is expeditious and economical. It is revealed to be far more economical than a sale under the deed of trust, as the expenses of such sale are disclosed by this record. Under general order No. 28 in bankruptcy of the Supreme Court of the United States, it is clear that not only the bankrupt, but the trustee, or any creditor who has proven his claim, may, whenever it is for the benefit of the estate, redeem any mortgage or lien upon the bankrupt's property. Therefore it would seem that, after the adjudication of the mortgagor, it is necessary to cut off the right of the bankrupt, the trustee, and the creditors to redeem in order to perfect the mortgagee's title. Of this the mortgagee should not be heard to complain, since the field of redemption is broadened, and the opportunity to have his lien satisfied is enlarged. Under ordinary foreclosure proceedings outside the bankruptcy court, the power to redeem would be restricted to the mortgagor or some junior lienholder. The mortgagee may also apply to the bankruptcy court for authority to institute a foreclosure proceeding in any court having competent jurisdiction over the subject-matter and parties and may make the trustee a party thereto.

These are some of the remedies which may be invoked by mortgagees when their security is placed, as it is in bankruptcy, in custodia legis. They are complete and effective, and far more reliable and quite as economical as any that are provided for by contract. The fact that the bankruptcy act seeks to preserve unimpaired contractual liens made in good faith is no warrant for the claim that the bankruptcy court also should be obliged to adopt or enforce the remedies the parties have agreed upon to enforce these liens.

There are strong, and in my view controlling, reasons why the bankruptcy court should not be so obliged. Among others are these: The remedy agreed upon may seriously obstruct and impede administration. It might afford a method of operating for dishonest bankrupts, who wish to put valuable property beyond the reach of creditors. It would permit the withdrawal of property from administration before opportunity is offered for full and fair investigation, and cloud the title before a sale can be effected by a trustee in bankruptcy. These observations are general in their nature, and it is but fair to say that, where there is a suggestion of possible acts involving moral obliquity, they do not apply to the instant case.

[2] In my opinion the provisions of the act with reference to the preservation of valid liens relate only to the obligation of the contract, and not to the remedy provided therein, which is cumulative, and is susceptible to change without impairing contractual rights of the lienholder. In the Case of the Jersey Island Packing Company, 14 Am. Bankr. Rep. 689, 138 Fed. 625, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560, where this question was under consideration, the Circuit Court of Appeals, speaking through Gilbert, Circuit Judge, makes the following pertinent observations:

"It is true that the Bankruptcy Act provides that liens such as the lienholder had under the trust deeds in this case shall not be affected by bank-

ruptcy; but that is far from saying that such lienholders may, after the commencement of the proceedings in bankruptcy against the debtor, proceed to enforce their liens or contracts in the manner prescribed in the instruments which create them. And this is true, whether such lien is an ordinary mortgage, or a deed of trust with provision for a strict foreclosure by a notice and sale. The provision of the Bankruptcy Act that such a lien shall not be affected by the bankruptcy proceedings has reference only to the validity of the lienholder's contract. It does not have reference to his remedy to enforce his right. The remedy may be altered without impairing the obligation of his contract, so long as an equally efficient and adequate remedy is substituted. Every one who takes a mortgage, or deed of trust intended as a mortgage, takes it subject to the contingency that proceedings in bankruptcy against his mortgagor may deprive him of the specific remedy which is provided for in his contract."

Following the construction placed upon deeds of trust by the highest court of this state, I am constrained to hold that the sale of the land by the trustee under the deed of trust while it was in the custody of the bankruptcy court was void, and, being void, the right of the trustee to the rents and profits has not thereby been divested.

The order of the referee will be affirmed, with costs of this certificate against claimant.

In re BOSTON-CERRILLOS MINES CORPORATION.

(District Court, D. New Mexico. April 12, 1913.)

No. 163.

1. BANKRUPTCY (§ 14*)—COURTS—JURISDICTION.

A summary order by a bankruptcy court of the district of Massachusetts directing the Bank of Commerce, located in the district of New Mexico, to pay over money to complainant, the bankrupt's trustee in Massachusetts, was without efficacy in New Mexico, since the process of a bankruptcy court is restricted to the territorial limits of the district.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. § 14.*]

2. BANKRUPTCY (§ 154*)—RECOVERY OF ASSETS—SUMMARY PROCEEDINGS.

Where, in a proceeding against a bank to recover money alleged to belong to the bankrupt's estate, it was alleged that the bank received the money prior to the adjudication and held it on a claim of set-off, in that the bankrupt had converted certain property of which the bank was the real owner, and that the bank was entitled to set off such claim against the bankrupt's claim for the money, it sufficiently appeared that the bank's claim was adverse, and could be determined only in a plenary suit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 451-455; Dec. Dig. § 154.*]

3. BANKRUPTCY (§ 279*)—BANKRUPT'S ASSETS—RECOVERY—SUMMARY PROCEEDINGS—PLENARY SUIT.

The bankruptcy court in the district of Massachusetts having entered a summary order against the Bank of Commerce in New Mexico, requiring the bank to pay over funds to the bankrupt's trustee, a proceeding was instituted to enforce the order, in which an ordinary summons issued against the bank at law as a suit for money judgment. The complaint stated a cause of action for moneys of the bankrupt held by the bank passing to the trustee, though the prayer was for a summary order for payment, and it was further alleged that the bank was claiming a set-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

off for conversion of property by the bankrupt. *Held*, that the proceeding was not subject to a motion to dismiss or to quash the service, but would be regarded as a plenary suit, and amended, so as to comply with the requirements thereof.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 419-424; Dec. Dig. § 279.*]

In *Bankruptcy*. In the matter of bankruptcy proceedings of the Boston-Cerrillos Mines Corporation. On motion to quash the summons and service. Denied.

Catron & Catron, of Sante Fé, N. M., for plaintiff.

E. W. Dobson and A. B. McMillen, both of Albuquerque, N. M., for defendants.

POPE, District Judge. This cause is pending upon a motion to quash the summons and service thereof upon a number of grounds stated in the motion.

[1] Relying first upon the ground that this is a proceeding to enforce a summary order for the payment of money from the Bank of Commerce to the complainant, trustee, made by the bankruptcy court of the district of Massachusetts, it is contended that such order made by the Massachusetts court is without efficacy, for the reason, among others, that this order, proceeding as it did upon process running into New Mexico, was and is void for lack of jurisdiction over the Bank of Commerce, against which corporation such order was directed. This contention in my judgment is well made. The process of the bankruptcy court is restricted to the territorial limits of the district. *Babbitt v. Dutcher*, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; *In re Waukesha Water Co.* (D. C.) 116 Fed. 1009; *Staunton v. Wooden*, 179 Fed. 61, 102 C. C. A. 355; *Collier on Bankruptcy* (9th Ed.) p. 25.

The case of *In re Peiser* (D. C.) 115 Fed. 199, cited by the plaintiff, trustee, does not hold to the contrary. There the federal courts of Pennsylvania proceeded to exercise jurisdiction in aid of the United States District Court for the Southern District of New York, which latter court had made an order committing the respondent for contempt. The Pennsylvania court, in dealing with the matter, did not recognize as of any validity such order of commitment made by the New York court, but simply made an order, in the exercise of its ancillary jurisdiction, upon the party to show cause why the relief originally prayed should not be granted. The party proceeded against resided in Pennsylvania, so that such action by the federal court in Pennsylvania was not a declaration of jurisdiction against a nonresident, and was thus not authority for plaintiff's position here. The holding there made was very far from a holding that an order for the delivery of property or money to a trustee may be made against a nonresident of the district. The proper course would seem to be by ancillary proceeding in the district where the holder of such fund is to be found. *Staunton v. Wooden*, *supra*.

The case of *In re Granite City Bank*, 137 Fed. 818, 70 C. C. A. 316,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is also sometimes cited in support of the position here contended for by plaintiff. In that case, however, the res was in the possession of the trustee, and the question was simply as to the latter's right to sell it and thereby to affect the interest of a nonresident bank holding a mortgage thereon. The court held that notice to such creditor by mailing was sufficient to confer jurisdiction to dispose of the res under the express provisions of section 58 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]), which, in terms, allows notice to be given in that way of "all proposed sales of property." That, however, is a very different matter from the one at bar, where it is sought to extend the process of a federal court of Massachusetts to New Mexico, and thus require a citizen of the latter state to defend its holding in the state of Massachusetts. The decision of the United States District Court for Massachusetts, therefore, cannot be deemed of any force and effect in this proceeding.

[2] Considering this, however, as it is, not simply a proceeding to enforce a order of the bankruptcy court for Massachusetts, but as having a wider scope, may it be sustained as a summary proceeding in aid of the Massachusetts court to secure an order on the Bank of Commerce to pay over to the trustee in that court the amount claimed to be held belonging to the bankrupt? Upon the face of the complaint herein there is not only an allegation that the Bank of Commerce holds money belonging to the bankrupt, but there are further allegations which show that this money was received by the bank at a time antedating the adjudication, and that it is being held by the bank upon a claim of set-off, apparently bona fide, proceeding upon the claim by the bank that the bankrupt had converted to its own use certain property of which the bank was the real owner, and that the bank thereby is entitled to a set-off to the extent of the value of such property. This contention by the bank, revealed by the plaintiff's own pleading, seems to me to present a case of an adverse claim, and thus a matter which may not be reached by summary order. Claims of that character must be prosecuted by plenary suit in the court of proper jurisdiction. In *re Rathman*, 183 Fed. 913, 106 C. C. A. 253 (C. C. A. Eighth Circuit); *Mimms v. Parham* (D. C.) 193 Fed. 276; *Johnston v. Spencer*, 195 Fed. 215, 115 C. C. A. 167 (C. C. A. Eighth Circuit); *First Nat. Bk. v. Hopkins*, 199 Fed. 873, 118 C. C. A. 321. In so far as *In re Michaelis & Lindeman* (D. C.) 196 Fed. 718, is contrary to the cases just cited, it cannot be followed.

[3] This may, therefore, not be prosecuted as a summary proceeding, and the only theory upon which it may be maintained is that the pleadings herein presented are sufficient to constitute it a plenary suit, giving to the bank all the rights of a trial according to the ordinary course of the law. The process issued in this case is an ordinary summons at law as upon a suit asking for a money judgment. It is thus perfectly adequate for all the purposes of a plenary suit. The complaint also states a cause of action at law for moneys of the bankrupt held by the bank, and thus belonging to the trustee. True, the prayer is apparently for a summary order, rather than for a money judgment; but that does not control. In cases at law the federal

courts follow the state practice. In New Mexico the fact that the complaint concludes with the wrong prayer, or with no prayer at all, does not detract from its efficacy in invoking the exercise of the court's power in accordance with the facts pleaded. *Kingston v. Walters*, 14 N. M. 368, 93 Pac. 700.

It is true that under section 23 of the Bankruptcy Act a plenary suit of this character may not be prosecuted in the federal courts (save by consent), unless it be such a case as, had no bankruptcy supervened, might have been prosecuted by the bankrupt in the federal court. But this seems to be such a case. The bankrupt apparently is a nonresident and the defendant a corporation of New Mexico. The sum involved is over \$2,000, and the cause of action apparently arose prior to January 1, 1912, and thus before the Judicial Code increasing the minimum jurisdictional limit of this court from \$2,000 to \$3,000. With the necessary diversity of citizenship and the necessary jurisdictional amount, this is a case which might have been brought by the bankrupt against the Bank of Commerce in this court, had the adjudication of bankruptcy not been made. It is sufficient, therefore, as a plenary suit, and with the proper process outstanding, and served, there is no reason why it should not proceed as such. The title of the case as it appears upon the papers is indeed informal, and some of the matters above referred to—as, for instance, the diversity of citizenship and the date of the inception of the cause of action—appear only imperfectly. These defects, however, seem to call, not for so extreme a remedy as quashing the process, but rather for the filing of an amended complaint, which is a mere incident of procedure.

The motion to quash the service and to dismiss the proceeding will accordingly be overruled, with leave to file an amended complaint within 20 days conforming to what has been above stated. Upon the incoming of said complaint the cause will proceed upon the present process as a plenary suit for the recovery of the amount named, under the title of *Mason H. Stone, Trustee, v. Bank of Commerce*. The question as to whether the bank's claim of set-off is maintainable as a matter of law can be determined equally in such suit as in the summary manner contended for by plaintiff, trustee, and at the same time such course will not be lacking in deference, as would a summary proceeding, to the rule so frequently announced by the federal courts as distinguishing summary from plenary proceedings in bankruptcy.

In re STARKWEATHER & ALBERT.

(District Court, W. D. Missouri, S. W. D. April 25, 1913.)

No. 313.

1. BANKRUPTCY (§ 164*)—PREFERENCES—SET-OFF.

Bankrupts being indebted to a bank, on the maturity of one of their notes, the bank insisted on payment, threatening to charge the note against the bankrupts' deposit account. To prevent this, the bankrupts gave a check, postdated four days, so as to permit a recuperation of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

account to an extent sufficient to meet outstanding checks. The bank received such postdated check, and on its maturity cashed the same, and with the proceeds paid and retired the note. *Held*, that the bank, not having exercised its right to set off the note against the bankrupts' deposit account, having received payment of the note by means of a check, could not successfully claim that the payment was not preferential because of such right of set-off.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. § 164.*]

2. BANKRUPTCY (§ 159*)—"PREFERENCE"—REQUISITES.

To constitute a "preference," within Bankr. Act July 1, 1898, c. 541, § 60, subd. "b," 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), the bankrupt must have made a transfer of his property within four months of the filing of the petition in bankruptcy, he must have been insolvent at the time, the transfer must have operated as a preference, and the person benefited must have had reasonable cause to believe that the enforcement of the transfer would effect a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248, 262, 268-281; Dec. Dig. § 159.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5498, 5499; vol. 8, p. 7759.]

3. BANKRUPTCY (§ 164*)—PREFERENCES—EVIDENCE.

The cashier of a bank, to which certain bankrupts were indebted, with full knowledge of their financial condition and knowing them to be insolvent, refused to extend a maturing note and threatened to charge it against their deposit account unless paid. Under these circumstances, the bankrupts executed a postdated check, which the bank accepted in payment of the note on its maturity, charging the same against the bankrupts' deposit account, all of which was within four months prior to bankruptcy. *Held*, that such payment constituted a voidable preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. § 164.*]

In the matter of bankruptcy proceedings of Starkweather & Albert, a copartnership composed of Herbert Starkweather and John Albert. Application to set aside an alleged voidable preference to the National Bank of Webb City, Mo. On review of a referee's order in favor of the trustee. Affirmed.

Thomas & Hackney, of Carthage, Mo., for creditors.

Currey & Farris, of Webb City, Mo., for Starkweather & Albert.

POPE, District Judge. Starkweather & Albert, the bankrupts, borrowed \$10,000 in the fall of 1910 from the National Bank of Webb City, Mo. There was no further amount borrowed, but the notes representing the transaction were renewed from time to time without any payments, except perhaps interest, thereon, so that in December, 1911, the original indebtedness still existed. Upon December 7, 1911, a note for \$2,500, representing part of the original loan, fell due, and the cashier of the bank requested Starkweather & Albert to pay it, threatening to charge it against their account if they did not do so. Starkweather & Albert did not wish the amount charged against them, because, while the bank books showed on that date more than \$2,500 to their credit, there were outstanding checks, some of which would go to protest if the amount were immediately charged against the ac-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

count. The matter was finally adjusted by the giving of a check, postdated to and payable on December 11th, so as to permit meanwhile a recuperation of the account to an extent sufficient to meet outstanding checks and this check given the bank. On December 11th the check was cashed by the bank and the note was paid and retired. On December 27, 1911, Starkweather & Albert gave a further check to the bank for \$253.75, also in part payment of the indebtedness. This was paid on December 27th, the date it was given, and the note appropriately credited.

[1] The question here presented is whether these constitute voidable preferences under section 60 of the Bankruptcy Act. The trustee contends that they were; the bank, on the other hand, contends that they were in effect merely the exercise of the right of set-off given the bank by section 68 of the Bankruptcy Act, as construed in *New York County Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380. Much of the argument for the bank is directed to demonstrating that a right of set-off exists, and that nothing in subsection "b" of section 68 detracts from the exercise of this right. The referee held that the right of set-off was not exercised, that the payments were preferential, and that the bank might not prove its claim save upon surrender of the payments. The facts as disclosed by the record and as above briefly outlined denude the case, in my opinion, of any question of the right of set-off. It is to be noted that, at least to some extent, the amounts deposited with the bank, and against which the check for \$2,500 was to operate, were not deposited in the usual course of business, but were deposited with the specific understanding that they were to be used in meeting this check. While, as held in the *Massey Case*, *supra*, money deposited with the bank in the ordinary course of business creates a relation of debtor and creditor, and while in that case it is held that money so deposited may be applied by the bank as a set-off against any indebtedness by the bankrupt to it, it is distinctly indicated by the *Massey Case* that where a deposit is not made for general purposes, but for the purpose of creating a fund to be used in set-off, the privilege of set-off does not exist, and that the application of such money pursuant to such an arrangement is preferential. *In re V. & M. Lumber Company* (D. C.) 182 Fed. 231, so construes and applies the *Massey Case*, and in my judgment does so properly. It would follow, therefore, that so far as the deposit was made for purposes of this \$2,500 check, and not for general purposes, it was tantamount to a payment direct to the bank, and possesses none of the elements of an allowable set-off.

However, it is not necessary to rest the case upon this ground, which perhaps only partially reaches the fund which the bank is alleged to hold preferentially. The matter may be disposed of upon a broader ground: That the bank did not stand upon its right of set-off. It simply threatened to exercise that right. The matter terminated, however, on the basis of voluntary payments by Starkweather & Albert, in giving checks which were received by the bank as payments. While the distinction seems narrow between a payment resulting from the exercise of the right of set-off and a payment by check given in the

presence of the power by the bank to exercise this right of set-off and application, yet the legal distinction exists, in that in the one instance the act is that of the bank, and in the other that of the debtor. The distinction seems to be recognized by the authorities. *Ridge Ave. Bank v. Studheim*, 145 Fed. 798, 76 C. C. A. 362; *Irish v. Citizens' Trust Co.* (D. C.) 163 Fed. 880; *Germania Co. v. Loeb*, 188 Fed. 289, 110 C. C. A. 263. The precise question seems to have been considered by the Supreme Court of the United States in *Traders' Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832. In that case the bank had \$325.20 on deposit to the credit of the bankrupt; the latter gave the bank a check therefor, which was credited on the indebtedness. The bank contended that, as it could have applied this amount in the exercise of its right of set-off, it was immaterial that the amount reached it through the medium of a check issued by the bankrupt. The court held, however, that under such circumstances the situation was one of a payment, and that there was no question of set-off to be considered. The language is as follows (italics ours):

"There was in the bank on deposit to the credit of Hitchcock & Endicott, on the day they gave the judgment note, the sum of \$325.20. This sum was not computed or deducted when the note was given. On the next day, before the bank caused the judgment to be entered up, they credited this amount on the note, and took judgment for that much less. *They now assert that this was what they had a right to do, and that it should remain a valid set-off. But this does not appear to have been really what was done. It appears that Hitchcock & Endicott gave the bank a check for the sum, and by virtue of that check it was indorsed on the note as a payment.* Now, as both the bank and the bankrupts knew of the insolvency of the latter, this was a payment by way of preference, and therefore void by the thirty-fifth section of the Bankrupt Act. *In this case, as in the other, if they had stood on their right of set-off, it might possibly have been available; but when they treat it as the bankrupts' property, and endeavor to secure an illegal preference by getting the bankrupts to make a payment in the one case, and seizing it by execution in the other, when they knew of the insolvency, both appropriations are void.*"

The case just cited impresses me as excluding any question of set-off, and leaves the matter to be determined upon the question of whether the payments made were voidable preferences. This necessitates some quotation from the Bankruptcy Act. It is provided by section 57g, as amended (Act Feb. 5, 1903, c. 487, § 12, 32 Stat. 799 [U. S. Comp. St. Supp. 1911, p. 1504]), as follows:

"The claims of creditors who have received preferences, voidable under section 60, subdivision 'h,' or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section 67, subdivision 'e,' have been made or given, shall not be allowed unless such creditor shall surrender such preferences, conveyances, transfers, assignments, or incumbrances."

Section 60, subd. "b," referred to in the section just quoted, is, so far as here material, as follows:

"If a bankrupt shall have * * * made a transfer of any of his property and if, at the time of the transfer, * * * and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such * * * transfer

would effect a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." U. S. Comp. St. Supp. 1911, p. 1506.

[2] Section 67, subd. "c," also referred to in section 59g, above quoted, is not here relevant. The question, therefore, is whether these payments are voidable under section 60, subd. "b," just quoted. To constitute a voidable preference under this provision of statute, the following must concur: The bankrupt must (1) have made a transfer of its property (2) within four months of the filing of the petition in bankruptcy, and (3) at the time of the transfer the bankrupt must have been insolvent. (4) The transfer must have operated as a preference; i. e. (section 60a), its effect must have been to enable the bank to obtain a greater percentage of its debt than other creditors of the same class received. *Swarts v. Fourth National Bank of St. Louis* (C. C. A. 8th Cir.) 117 Fed. 1, 54 C. C. A. 387. Further, the bank or its agent must (5) at the time of the transfer have had reasonable cause to believe that the enforcement of such transfer would effect a preference.

[3] If all five of these conditions were present, the two payments were each voidable preferences. As to condition (1), there was evidently a transfer of property, for money is property within the meaning of this section. *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. Each payment was within four months of the filing of the petition in bankruptcy, so condition (2) exists. It is stipulated that at the time of the giving of these checks Starkweather & Albert were insolvent, so condition (3) existed. It is also evident from the record that allowing the bank to receive and retain these amounts will give it a greater percentage upon its claim than some other creditors of the same class will receive, and will thus destroy the equality of distribution which constitutes one of the cardinal features of the bankruptcy act. Condition (4), therefore, is present. As to condition (5), the referee by his finding against the bank necessarily found in the affirmative. There is testimony both ways upon this issue. The fact that the business of Starkweather & Albert was next door to the bank, and the bank thus necessarily knew that an adjusters' sale was being conducted; the further fact that the cashier of the bank was intimately acquainted at all times with the financial condition of the business, by reason of its being the sole bank with which Starkweather & Albert did business; the testimony of the representatives of two creditors that the bank cashier admitted to them, on or about January 30, 1912, that he had for months known of the insolvency of Starkweather & Albert, and that he knew they were insolvent when he received the payments—all these concur to support the finding of the referee that the bank had reasonable cause to believe that the payments would effect a preference to the bank.

It is true that there are circumstances developed by the record supporting the other view and tending to indicate that the bank had no such reasonable cause to believe that it was receiving a preference. Nor do we overlook in this connection the fact that the cashier of the bank denies making the statements attributed to him by the par-

ties representing the creditors. The referee, however, had all these matters before him. He heard and saw the witnesses as they testified before him. His finding is presumably correct. It is a proper rule of procedure that such will not be disturbed, unless there is a misinterpretation of the law or an evident misapprehension of the facts. *Coder v. McPherson* (C. C. A. 8th Cir.) 152 Fed. 951, 82 C. C. A. 99; *In re Cox* (D. C.) 199 Fed. 952. The present record affords no ground within the rule for overturning the finding of the referee upon this question of fact.

The result is that the order of the referee appealed from must be affirmed.

In re TENNESSEE RIVER COAL CO.

(District Court, E. D. Tennessee, S. D. September 21, 1912.)

No. 1,412.

CORPORATIONS (§ 656*)—FOREIGN CORPORATIONS—VALIDITY OF MORTGAGE—
"DOING BUSINESS" IN STATE.

Shannon's Code Tenn. §§ 2546, 2547, which provide that it shall be unlawful for any foreign corporation to do business in the state without first filing a copy of its charter in the office of the Secretary of State, do not render invalid a mortgage on property in Tennessee, made in New York by a corporation of that state which had not complied with such statute to another New York corporation as trustee to secure an issue of bonds, since under the general rule, and also the Tennessee decisions, the execution of the mortgage, although on Tennessee property and there recorded, did not constitute "doing business" in that state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2578-2587; Dec. Dig. § 656.*]

In the matter of the Tennessee River Coal Company, bankrupt. On petition of George M. Candler and others to review order of referee. Reversed.

Brown, Spurlock & Brown, of Chattanooga, Tenn., for trustee.
Chas. C. Moore, of Chattanooga, Tenn., for interveners.

SANFORD, District Judge. This petition is brought by the petitioners to review an order of the Referee dismissing the original and amended petitions filed by them in which they claimed priority as secured creditors under a deed of trust, termed in the record a mortgage, wherein the bankrupt conveyed certain real estate and other property in Tennessee to secure an issue of bonds. The petitions setting up the lien claimed under this mortgage were answered by the Nashville, Chattanooga & St. Louis Ry. Co. in the name of the Trustee in Bankruptcy, pursuant to leave granted by the Referee. Various defenses were set up in this answer, among others, that this mortgage was executed and recorded in Tennessee before the bankrupt, which was a New York corporation, had recorded or filed its charter in the office of the Secretary of State of Tennessee, as required by law, and that during the interval of about seven months between the date of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mortgage and the date the charter was recorded in Tennessee, the bankrupt had a resident agent in Tennessee and was engaged in developing the property covered by the mortgage in erecting buildings, opening mines and doing other acts constituting a doing of business in Tennessee.

The Referee being of opinion that as the mortgage had been executed and recorded in Tennessee before the charter of the bankrupt was recorded in the office of the Secretary of State, it was, under the laws of Tennessee, void, without passing upon the other defenses raised by the answer, ordered and adjudged that the intervening petitioners were not secured creditors and had no lien or priority against the property described therein, and dismissed their original and amended petitions with costs; and the present petition was thereupon filed to review this order.

The mortgage in question is dated June 1, 1909. It was executed by the bankrupt, a New York corporation, to the Windsor Trust Co., another New York corporation, as trustee. The Referee in his opinion, which is handed up with his certificate, does not find either the date or place of its execution or delivery, nor by whom it was recorded or caused to be recorded in Tennessee, nor that the bankrupt prior to the time its charter was recorded in the office of the Secretary of State had a resident agent in Tennessee or was actually engaged in carrying on business therein, nor where the bonds were sold or negotiated; nor do any of these matters appear from any of the testimony incorporated in the Referee's opinion or cited in the briefs of counsel. (See former rule 82 of this court; new rule 45, cl. 7.)

The mortgage, however, shows on its face that it was acknowledged by the officers of the bankrupt and of the trustee, in the city of New York, on July 12 and 13, 1909; and further that it was executed to secure the payment of bonds payable at the office or agency of the bankrupt in the city of New York. It was recorded in Tennessee on July 21, 1909.

Sections 2 and 3 of the Tennessee Act of 1891, c. 122, p. 264, as amended by sections 1 and 2 of the Act of 1895, c. 81, p. 123 (Shannon, §§ 2546, 2547), provide:

"That each and every corporation created or organized under, or by virtue of, any government other than that of this state, for any purpose whatever, desiring to own property or carry on business in this State, of any kind or character, shall first file, in the office of the Secretary of State, a copy of its charter;" and "That it shall be unlawful for any foreign corporation to do business, or attempt to do business, in this state without first having complied with the provisions of this chapter; and a violation of this statute shall subject the offender to a fine of not less than \$100.00 nor more than \$500.00, in the discretion of the jury trying the case."

After careful consideration I am constrained to hold that the mere fact that the bankrupt, a foreign corporation, is shown to have executed and delivered to another foreign corporation a mortgage conveying property in this state, which was acknowledged in the State of which such two corporations were residents, and was given to secure an indebtedness payable in such other State, is not sufficient to render such mortgage void under the provisions of the Tennessee Acts above

quoted, even though it appears that such mortgage was subsequently recorded in Tennessee.

1. Even though a foreign corporation has not complied with the provisions of a domestic statute requiring its charter to be filed or recorded before it shall engage in business within the State, a contract entered into by it is presumed not to have been made in violation of law, and even though the contract be one in reference to property within the State, in order to render it void, it must be made affirmatively to appear that the contract was entered into within the State. *Railway Co. v. Fire Assoc'n*, 55 Ark. 163, 173, 18 S. W. 43; *White River Lumber Co. v. Improvement Assoc'n*, 55 Ark. 625, 626, 627, 18 S. W. 1055; *Friend v. Gin Co.*, 59 Ark. 86, 93, 26 S. W. 374. Thus in *White River Lumber Co. v. Improvement Assoc'n*, *supra*, it was held that a foreign corporation which had not complied with the provisions of the Arkansas statute prescribing the conditions under which foreign corporations might do business in the State, could nevertheless recover the rents due under a contract for the lease of land situated in the State, as it did not appear that the lease had been entered into within the State. The court said:

"Now it is not alleged in the complaint or answer, nor shown by the proof admitted or that excluded, that the contract sued on was made in this State or in the course of business done here; for aught that appears it may have been made in a foreign State in the course of a business lawfully done there, and in the absence of a showing the law will not imply facts disclosing the illegality of the contract. If it was lawfully made abroad, there is nothing in the laws of this state to preclude a recovery upon it in our courts. *The prohibition relied upon is against doing business here, and not against doing business abroad that relates to property here.* And the making of a lease abroad and taking an obligation for the rent is not doing business here within that prohibition, although the demised premises are in this State. The law was designed to regulate corporations that come within the State to transact business with its citizens, and not such as might be found and dealt with abroad."

In the case at bar there is not only no presumption that the mortgage was executed and delivered in Tennessee, but the reasonable inference from the meagre facts which do appear is that it was in fact executed and delivered by the bankrupt to the trustee in the city of New York where it was acknowledged. And as such execution and delivery of the mortgage would have been sufficient to convey title under the mortgage, as between the bankrupt and the trustee, it may well be presumed, if this should be material, that the registration of the mortgage in Tennessee was subsequently done at the instance of the trustee, after the mortgage had been executed and delivered to it.

2. In 13 Am. & Eng. Enc. of Law (2d Ed.) 881, it is said:

"The statutes under consideration have no application to contracts made outside of the domestic States and present no bar to the right of a foreign corporation to enforce such contracts in the domestic courts."

This question is furthermore controlled, by direct analogy, by the case of *Neal v. New Orleans Assoc'n*, 100 Tenn. 607, 46 S. W. 755, in which it was held that where a building and loan association of Louisiana having no office or agency in this State, made direct from its home office in Louisiana a loan payable in Louisiana and to be secured

by a mortgage on real estate in Tennessee, the Tennessee statute did not apply. The court said:

"The loan secured by the mortgage executed by complainant to defendant company is payable in New Orleans, in the State of Louisiana, and each of the installment notes is so payable. The contract is essentially a Louisiana contract, and does not contravene any statute of this State. The defendant company, at the time this contract was made, was domiciled in the State of Louisiana; it had no local board or agency here, and was not carrying on business in this State in the sense of the statute. It was therefore not amenable to the statute requiring a foreign corporation to register its charter as a condition of doing business in this State."

So in *Norton v. Union Bank*, 46 S. W. 544, it was held by the Tennessee Court of Chancery Appeals, in an opinion which was affirmed orally by the Supreme Court of Tennessee, that a foreign corporation having no agent or place of business within the State, which loaned money on applications sent to it by loan brokers who were agents of the borrowers, was not doing business in the State within the meaning of the Act of 1891, and that notes and mortgages so taken might be enforced by it.

And in *State v. Insurance Co.*, 106 Tenn. 282, 287, 61 S. W. 75, 76, a case arising under the Tennessee statute imposing a privilege tax on foreign insurance companies doing business in the State, the court said:

"We think it clear that a foreign insurance company which issues to a citizen of Tennessee a policy is not doing business in Tennessee, if it receives the application in a foreign State, and without solicitation in Tennessee, and if it, in addition, executes and delivers the policy and receives the premiums in such foreign State. In such case there cannot be said to be any 'doing of business' in Tennessee by the foreign corporation that would subject it to tax."

In this connection it is to be noted that in the earlier case of *New York Assoc'n v. Cannon*, 99 Tenn. 344, 41 S. W. 1054, in which a mortgage executed in Tennessee to a foreign building and loan association was held invalid, it not only affirmatively appears from the opinion that the mortgage was executed in Tennessee, but that the loan was made and the mortgage taken in the ordinary and regular course of the business of the association, carried on, it may be fairly inferred, in the light of the subsequent opinions of the Supreme Court of Tennessee, through a local office and resident agents. And see *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743, and *Harris v. Water & Light Co.*, 108 Tenn. 245, 246, 67 S. W. 811, in which the invalidity of contracts entered into by a foreign corporation which has not complied with the provisions of the Acts, is declared only as to contracts entered into by it in this State; also *State v. Telephone Co.*, 114 Tenn. 195, 201, 86 S. W. 390.

In 13 Am. & Eng. Enc. Law (2d Ed.) 872, it is said:

"The following acts have also been held not to constitute doing business within the meaning of the statutes: * * * A loan of money to a resident of the domestic State through brokers domiciled outside of the State, the whole transaction being consummated outside of the domestic State (citing *American Mtg. Co. v. Pierce*, 49 La. Ann. 390 [21 South. 972]; *Scottish Mtg. Co. v. Ogden*, 49 La. Ann. 8 [21 South. 116]; *Reeves v. Harper*, 43 La. Ann. 518 [9 South. 104]; and *Scruggs v. Mtg. Co.*, 54 Ark. 566 [16 S. W. 563]); loaning money to a citizen of the domestic State secured by mortgage on land in that State

where the bond secured is dated and made payable in the State of the domicile of the corporation (citing *Caesar v. Capell* [C. C. W. D. Tenn.] 83 Fed. 403)."

And, in general, the doing of a single act of business in the domestic State by a foreign corporation does not constitute the doing or carrying on of business within the meaning of the statutory provisions. 13 Am. & Eng. Enc. Law (2d Ed.) 869, citing various cases in note 3.

3. It follows that under the authorities above cited, it must be held that under the facts appearing in the record, as above set forth, the mortgage in question is not affirmatively shown to have been executed and delivered in violation of the Tennessee statutes in question, and that the Referee was in error in adjudicating its invalidity upon that ground and dismissing, for that reason, the original and amended petitions in which the petitioners sought to enforce their lien under the mortgage. It is therefore unnecessary to determine whether if the mortgage had been shown to have been invalid under these statutes the Trustee would be in a position to question the validity of the mortgage, under the general rule that the bankrupt corporation having executed the mortgage in question could not set up as a defense thereto the fact that it was not authorized to execute it because of non-compliance with the statutory requirements. 15 Am. & Eng. Enc. Law (2d Ed.) 898, and cases cited in note 6. And see *Harris v. Runnels*, 12 How. 79, 13 L. Ed. 901.

4. A decree will accordingly be entered overruling the order of the Referee in question upon the ground upon which the same was based, as shown in his opinion, and, since the Referee did not make any adjudication as to the other defenses set up in the answer of the Trustee, returning the record to him with instructions to take further proceedings in reference to such other defenses as may not be inconsistent with this opinion.

5. In this connection the attention of counsel is called to the character of the briefs submitted in support of and in opposition to the petition for review. Former Rule 82, which was in force when the Referee's certificate was filed and which has since been superseded by Rule 45 promulgated September 12, 1912, contemplates that after the filing of the Referee's certificate briefs in support of and in opposition to the petition to review shall be filed in this court, which shall deal only with the questions arising under the petition to review, and which shall contain appropriate citations to the record. None of the briefs comply with this rule in reference to citations. The brief in opposition to the petition to review was furthermore filed before the brief in support thereof had been filed, and is in large measure not responsive thereto and deals principally with questions not passed on by the Referee.

MITCHELL et al., Town Board of Trustees, v. NATIONAL SURETY CO.

(District Court, D. New Mexico. May 2, 1913.)

No. 223.

1. CORPORATIONS (§ 672*)—ACTION AGAINST SURETY COMPANY—COMPLAINT—CONSTRUCTION.

A complaint against a foreign surety company, alleging that defendant was incorporated under the laws of New York, and by virtue of compliance with the laws of New Mexico was at all times mentioned in the complaint duly authorized to transact business in New Mexico, sufficiently charged that defendant had appointed the superintendent of insurance in writing to be its true and lawful attorney on whom process might be served, as required by Laws N. M. 1909, c. 48, § 4, making such appointment a prerequisite to the right of a foreign surety company to do business within the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2645-2649; Dec. Dig. § 672.*]

2. INSURANCE (§ 10*)—INSURANCE COMMISSIONER—ABOLITION OF OFFICE—STATUTES—SERVICE ON COMMISSIONER.

Since by Laws N. M. 1909, c. 48, numerous duties are imposed on the superintendent of insurance in connection with insurance companies of underwriters engaged in the insurance business, such office was not abolished by Const. N. M. art. 11, § 6, creating the Corporation Commission and transferring to that body exclusive power over corporations, together with all charters, papers, and documents relating thereto on file in the office of the commissioner of insurance; and hence such provision did not affect the efficacy of subsequent service on the superintendent of insurance in an action against a foreign surety company having appointed that officer as its agent on whom service might be made, as required by Laws N. M. 1909, c. 48, § 4, making such appointment a prerequisite to the transaction of business by a foreign surety company within the state, and declaring that the appointment shall remain in force so long as any liability remains outstanding against the company in the state.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 10; Dec. Dig. § 10.*]

3. PROCESS (§ 137*)—SERVICE—PRIVATE PERSON—"AFFIDAVIT."

Laws N. M. 1912, c. 56, § 1, provides that civil process may be served by the sheriff of the county where the defendant may be found, or by any person not a party to the action over 18 years of age, and, when served by a person other than the sheriff, proof thereof shall be made by affidavit. *Held* that, since an "affidavit" is defined to be a voluntary oath before some judge or officer of the court to evince the truth of certain facts, a declaration on oath in writing, sworn to by the party before some person who has authority under the law to administer oaths, an affidavit of service by a private person in the form of a certificate, to which a jurat was attached reciting that the same was subscribed and sworn to, etc., before a notary public, was not defective because it did not recite in the body that the affiant was declaring under oath.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 177-180; Dec. Dig. § 137.*]

For other definitions, see Words and Phrases, vol. 1, pp. 240-245; vol. 8, p. 7568.]

Action by James P. Mitchell and others, constituting the Board of Trustees of the Town of Las Cruces, N. M., against the National Surety Company. On motion to set aside the service. Overruled.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Mark B. Thompson and Holt & Sutherland, all of Las Cruces, N. M., for plaintiffs.

Frank Herron, of Las Cruces, N. M., for defendant.

POPE, District Judge. [1] The complaint in the present cause alleges that the defendant "is a corporation incorporated under the laws of the state of New York, * * * and as plaintiffs are informed and believe, by virtue of compliance upon the part of said corporation with the laws of New Mexico, is, and at all times hereinafter mentioned was, duly authorized to transact business in New Mexico." This last allegation of compliance with the New Mexico law, and of authority by reason thereof to do business in the state, is tantamount to an allegation, among other things, that the defendant company has appointed in writing "the superintendent of insurance to be the true and lawful attorney of such company in and for said state, upon whom all lawful process in any action or proceedings against the company may be served with the same effect as if the company existed in this state"; for section 4 of chapter 48 of the New Mexico Laws of 1909 require such appointment as a prerequisite to the transaction of business. Such appointment presumably made also presumably contained—for the law so requires—a provision that it should continue "in force so long as any liability remains outstanding against the company in this [state]." The complaint is sufficient evidence of such outstanding liability. The record thus suffices *prima facie* to show a defendant corporation that has designated the superintendent of insurance as the agent upon whom process against it may be served. The process in this suit, asserting an outstanding liability, has been so served, and the defendant now attacks the service as insufficient.

[2] It is said that the service is ineffectual, because there is now no such officer as the superintendent of insurance. The contention is that this office was abolished by the creation, under article 11, § 6, of the state Constitution, of a corporation commission. It is urged that this commission is vested with exclusive power over corporations, as evidenced by the constitutional provision that "all charters, papers and documents relating to corporations on file in the office of the commissioner of insurance shall be transferred to the office of the commission." It is urged with much force that, since all papers relating to corporations are by the Constitution taken from the insurance superintendent or commissioner and turned over to the corporation commission, the latter must as to corporations be deemed to have superseded the insurance officer, since the commissioner can, of course, not conduct his office without papers, and in so far as papers are taken away from him his functions are likewise taken away. If, therefore, the duties of the insurance commissioner or superintendent relate only to corporations, there is much to support the view that the corporation commission superseded him and abolished his office.

But has he not some basis of existence in addition to his duties in connection with insurance corporations? It would so seem. By chapter 48 of the Laws of 1909 numerous duties are imposed upon the superintendent of insurance in connection with "insurance compa-

nies." The latter are defined by section 6 of this act of 1909, not only as including all corporations engaged in insurance, but "all * * * associations, partnerships or individuals engaged as principals in the insurance business, excepting fraternal and benevolent orders and societies." It is within judicial notice that, while the writing of insurance is done principally by corporations, it is not confined to such, but that to some extent it is handled by individuals or legal entities not possessed of corporate powers. Even if it be true that insurance business in New Mexico is at present done solely by corporations, this does not detract from the fact that it may in the future to some extent be done by others, and indeed the Legislature has so contemplated by its definition of insurance companies subject to the insurance commissioner, above quoted.

As to insurers other than corporations, the functions of the superintendent of insurance are left intact by the constitutional provision creating the corporation commission, so that, while the greater part of his duties have been transferred, there is enough left of the office to justify the view that the old territorial law creating it remains in force under article 22, § 4, of the Constitution "until altered or repealed." This seems to be the view entertained by the legislative department, for there have been since the organization of the state appropriations for the office of insurance superintendent and for his clerical force. The executive department has likewise adopted this view, for the Governor of New Mexico at the recent session of the Legislature made an appointment to this office. In cases of doubt the construction of laws by the state authorities charged with their execution are well recognized sources of light.

It seems immaterial to the present question that the defendant in this case is a corporation. The question is not whether the superintendent of insurance is still charged with administration of matters connected with a corporation, but whether the corporation's power of attorney, given as a result of statute, designating the superintendent of insurance as an official upon whom service may be made, still is an existing officer upon whom service may be made pursuant to the power of attorney. For reasons above given, we think that the insurance commissioner still exists, and that the service made upon him is, in view of the allegations of the complaint, *prima facie* a proper service.

[3] What has been said above disposes of grounds 2, 3, and 5 of the motion to quash the return of service. Ground 4 having been abandoned, it only remains to consider ground 1, which is directed to the question of whether the return sufficiently shows service upon the insurance superintendent by section 1 of chapter 56 of the New Mexico Laws of 1912.

It is there provided that in civil cases summons "may be served by the sheriff of the county where the defendant may be found, or by any person not a party to the action, over the age of eighteen years." It is further provided that, when served by a person other than the sheriff, "proof thereof shall be made by affidavit." It is contended that the return here made is not an affidavit, and thus not sufficient to prove service. The indorsement or return is as follows:

"State of New Mexico, County of Santa Fé—ss.:

"I, Edwin F. Coard, the undersigned, do hereby certify that the within summons came to my hands on the 4th day of December, A. D. 1912, and that I executed the same at Santa Fé, Santa Fé county, N. M., on the 4th day of December, 1912, by then and there delivering a copy of same, together with a copy of the complaint in said cause, to the state superintendent of insurance; and I do further certify that I am over the age of eighteen years, that I am not a party to said cause, and not interested in the issues involved therein.

"Edwin F. Coard.

"Subscribed and sworn to before me this 4th day of December, 1912.

"Evelyn D. Castle,

"[Seal.]

Notary Public, Santa Fé County, N. M.

"My commission expires February 16, 1916."

It is claimed that this is no affidavit, for the reason that, although the jurat shows that the statement was sworn to and subscribed by the affiant, the body thereof fails to state that the affiant is declaring under oath. It is urged that a paper is not an affidavit unless in the body thereof there is a recital that it is under oath, and that a recital in the jurat does not supply the defect. This is to be determined by the meaning of the word "affidavit." It is defined by Blackstone as:

"A voluntary oath before some judge or officer of the court, to evince the truth of certain facts." 3 Bl. Comm. 304.

It is similarly defined by numerous other writers. In *Harris v Lester*, 80 Ill. 307, an affidavit is defined to be:

"A declaration on oath, in writing, sworn to by the party before some person who has authority under the law to administer oaths."

So in *Bouvier, Law Dictionary*, title "Affidavit," it is defined to be:

"An oath or affirmation reduced to writing, sworn or affirmed before some officer who has authority to administer it."

In 2 Cyc. 4, it is defined to be:

"A declaration on oath, reduced to writing and affirmed or sworn to by affiant before some person who has authority to administer oaths."

The definition given in 1 *Bacon's Abridgment*, title "Affidavit," introduces an element not found in the foregoing definitions, to wit, the signing by the affiant, for the definition there found is as follows:

"An affidavit is an oath in writing, signed by the party deposing, and sworn to before and attested by him who hath authority to administer the same."

This additional element has been declared by numerous courts as not justified by the ancient definition; these courts holding that the signature of the affiant is unnecessary. *Gill v. Ward*, 23 Ark. 16; *Crist v. Parks*, 19 Tex. 234; *Lutz v. Kinney*, 23 Nev. 279, 46 Pac. 257, 258.

In *Patridge v. Bank*, 78 N. J. Eq. 297, 81 Atl. 1134, affirming the same case in 77 N. J. Eq. 208, 77 Atl. 410, a definition embodying still another element is given in the following language:

"An affidavit is a statement in writing declared to be true by the party who makes it, and certified to have been sworn to by the officer who takes it."

It will be noted that this last definition adds an element not found in the ancient definitions, in that it requires that the affiant shall de-

clare the statement to be true. This element of the definition, however, was not an issue in the case just quoted, and no authorities are cited in support of the definition. In discussing the elements of an affidavit, it was said by the Supreme Court of North Carolina in *Alford v. McCormac*, 90 N. C. 151, 152:

"The essential requisites are, apart from the title in some cases, that there shall be an oath administered by an officer authorized by law to administer it, and that what the affiant states under such oath shall be reduced to writing before such officer. The signing or subscribing of the name of the affiant to the writing is not generally essential to its validity; it is not, unless some statutory regulation requires it, as is sometimes the case. It must be certified by the officer before whom the oath was taken before it can be used for legal purposes; indeed, it is not complete or operative until this is done. The certificate, usually called the jurat, is essential, not as part of the affidavit, but as official evidence that the oath was taken before a proper officer. The object of such an instrument is to obtain the sworn statement of facts in writing of the affiant in such official and authoritative shape, as that it may be used for any lawful purpose, either in or out of courts of justice. The signature of the affiant can in no sense add to or give force to what is sworn, and what is sworn is made to appear authoritatively by the certificate of the officer."

So in *Lutz v. Kinney*, *supra*, referring to the execution of an affidavit, it is said:

"He [the affiant] must make it; that is, he must swear to the facts stated, and they must be in writing. It is then his affidavit, and, as evidence that it was sworn to by the party whose oath it purports to be, it must be certified by the officer before whom it was taken, which certificate is commonly called the 'jurat' and must be signed by such officer."

It is to be noted that in none of the definitions or authorities above referred to is there found any requirement that the body of the statement shall recite that it is under oath. Of course, it is a matter inherent in the affidavit that it must be under oath; but, where that fact appears from the jurat, is not the paper complete as an affidavit? Does it not, under such circumstances, show a statement in writing, signed by the party and sworn to before a competent officer? And, showing this, is it necessary to go still further, and to recite in the body of the instrument the fact that it is under oath? The authorities upon this point are very few. It is stated as the rule in 2 Cyc. 24, that:

"The fact that affiant makes his statement on oath or affirmation should be stated in the body of the affidavit."

Only two American cases are cited to this doctrine: *Kehoe v. Rounds*, 69 Ill. 351, and *Cosner v. Smith*, 36 W. Va. 788, 15 S. E. 977. An examination of these fails to convince that they support the text. A number of English cases are there cited as being to the same effect. So far as accessible, these have been read, and are found to hold that the formal part of the affidavit should contain a recital that it is on oath, and is not remedied by such a statement in the jurat. *Allen v. Taylor*, L. R. 10 Eq. 52; *Phillips v. Prentice*, 2 Hare, 542, 24 Eng. Ch. 542, citing *Oliver v. Price*, 3 Dowl. P. C. 261.

It is pointed out, however, in a number of American cases, that the rule in England is largely influenced by rules of court, and for this

reason American courts have not felt, upon general principles of law, impelled to adopt the strict view prevailing in England. An illustration of this is the divergence of the American courts, above noted, from the view apparently prevailing in England that an affidavit must be signed. *Crist v. Parks*, supra; *Gill v. Ward*, supra; *Veal v. Perkinson*, 47 Ga. 92.

This is quite fully discussed in *Miller v. Caraker*, 9 Ga. App. 255, 257, 71 S. E. 9, 10, as follows:

"Under the practice in the British courts, great strictness was formerly required as to the forms of affidavits, and any departure from the prescribed form would vitiate the affidavit. But none of the American courts, so far as our investigation goes, has ever given any great weight to mere form in these matters, and it is well recognized in this state that no particular form is required, provided the facts sworn to are committed to writing and signed by the affiant, if, as a matter of fact, the oath was administered. Now, on account of the requirement in England that in the body of the affidavit itself the words 'upon oath,' or 'being sworn,' should be used, it has been held in a number of English cases that the omission of these words is fatal, even though the jurat attests the fact that the statements of the affidavit were made under oath or were sworn to."

In the last-cited case it is held, citing *Loeb v. Smith*, 78 Ga. 504, 3 S. E. 458, a decision written by Chief Justice Bleckley, as follows:

"A signed statement of facts, purporting to be the statement of the signer, followed by the certificate of an officer authorized to administer oaths that it was sworn to and subscribed before him, is a lawful affidavit. It is not necessary that it should be stated in the instrument, prior to the signature of the affiant, that the declaration was made under oath, if in fact the oath was administered."

The only other American decision which has come to our notice bearing upon this point is *Woods v. Pollard*, 14 S. D. 44, 84 N. W. 214, 217, wherein the court, in construing a statute requiring an affidavit as a basis for service by publication, holds that a verified complaint is an affidavit within the meaning of the law. As a pleading does not ordinarily in the body thereof recite that it is under oath, but derives its character as a sworn statement solely from the jurat, it will be readily seen that this case is in point. In this state (C. L. 1897, § 2685, subsec. 24) a sworn pleading is by statute put upon the same basis as an affidavit as a foundation for constructive service. The foregoing cases illustrate, and we believe correctly state, the more liberal rule, and the prevalent one in the American courts, that evidence by the jurat of the administering of the oath is sufficient to make it a written statement under oath, and thus an affidavit, notwithstanding the affiant fails to state over his signature that he is declaring under oath. It is true that the jurat is no part of the affidavit, in the sense that it is no part of what the affiant states; but its very function, as stated in *Lutz v. Kinney*, supra, is to show that the statement has been made under oath before a competent officer. Using it for that purpose, it is efficient to show that the statement was made under oath, even if the affiant fails so to recite.

United States v. McConaughy (D. C.) 33 Fed. 168, is relied upon by defendant. That, however, was a criminal case, dealing with the tech-

nical sufficiency of an indictment, and a careful reading of it fails to disclose anything contrary to what is here held.

The motion to quash the return of service will accordingly be denied, defendant to plead within 20 days.

DOYLE-KIDD DRY GOODS CO. et al. v. SADLER-LUSK TRADING CO.

(District Court, W. D. Arkansas, Ft. Smith Division. August 4, 1913.)

1. BANKRUPTCY (§ 63*)—CORPORATIONS—INVOLUNTARY PROCEEDINGS—ACTS OF BANKRUPTCY—RECEIVERS—APPLICATION BY OFFICERS AND DIRECTORS.

Where the officers and directors of a corporation, constituting a majority of the stockholders, and holding a large majority of the stock, filed a petition in the state court for the appointment of a receiver, and, though there was no appearance in writing by the corporation, the secretary and manager appeared before the chancellor at the time the appointment was made, and there was no showing that other stockholders made any objection, or that they intended to oppose the proceeding, it would be construed to be the act of the corporation.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 63.*]

2. BANKRUPTCY (§ 81*)—INVOLUNTARY PETITION—CONSTRUCTION.

An allegation in an involuntary bankruptcy petition against a corporation, that it had made an assignment by filing a petition admitting its insolvency and inability to pay its debts, and asking for the appointment of a receiver, was in effect an allegation that the corporation, being insolvent, applied for a receiver of its property, within the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113-118, 125; Dec. Dig. § 81.*]

3. EVIDENCE (§ 386*)—PAROL EVIDENCE—RECORD.

Where a petition for the appointment of a receiver of a corporation alleged that it was insolvent, and the court's order appointing a receiver recited that "on consideration of the foregoing petition" the receiver was appointed, and he was required at once to notify all creditors, parol evidence was inadmissible to show that the receiver was not appointed on the ground of the corporation's insolvency, but rather to conserve the assets of its estate, as such evidence tended to contradict, vary, and explain the record, though the order of appointment did not recite the ground on which the receiver was appointed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1678-1697; Dec. Dig. § 386.*]

4. BANKRUPTCY (§ 20*)—INSOLVENT CORPORATION—ADMINISTRATION OF ASSETS.

Creditors of an insolvent corporation, for which a receiver had been appointed at the instance of its officers and directors on the ground of insolvency, are entitled to have the corporation's assets administered in the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. § 20.*]

5. BANKRUPTCY (§ 91*)—CORPORATIONS—INSOLVENCY.

In involuntary bankruptcy proceedings against a corporation, evidence held to require a finding that the corporation was insolvent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 137-139; Dec. Dig. § 91.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Bankruptcy. Petition by the Doyle-Kidd Dry Goods Company and others for an involuntary adjudication of bankruptcy against the Sadler-Lusk Trading Company. Petition granted.

S. T. Poe, of Little Rock, Ark., and George W. Dodd, of Ft. Smith, Ark., for creditors.

Hill, Brizzolara & Fitzhugh, of Ft. Smith, Ark., for Sadler-Lusk Trading Co.

YOUMANS, District Judge. Three creditors of the Sadler-Lusk Trading Company, a corporation, have filed a petition against it, alleging certain acts of bankruptcy, and praying that it be adjudged a bankrupt. The acts of bankruptcy charged and relied upon are:

(1) That the corporation made an assignment of its property to Charles X. Williams, as receiver, by filing a petition in the chancery court for the Southern district of Logan county, Ark., admitting its insolvency and inability to pay its debts, and asking for and causing a receiver to be appointed to take charge of its assets, and that the said Charles X. Williams, as such receiver, is now in possession of all of its assets.

(2) That a receiver was appointed by the chancery court for the Southern district of Logan county, Ark., to take charge of the assets of the Sadler-Lusk Trading Company, upon the ground of insolvency, and that, pursuant to the orders of the said chancery court, Charles X. Williams, as such receiver, is in charge of its assets.

These allegations are denied in the answer. A certified copy of the petition in the state court, and the order thereon, were introduced in evidence. R. A. Sadler, H. G. Sadler, and H. G. Hampton, Jr., were the plaintiffs in that case. They alleged that they were stockholders, and that there were two other stockholders of the corporation. The petition in this case alleges that R. A. Sadler, H. G. Sadler, and H. G. Hampton, Jr., were stockholders and officers of the Sadler-Lusk Trading Company. This allegation is not denied. It appears from the testimony that H. G. Sadler was president of the corporation, that R. A. Sadler was secretary and manager, and that those two and H. G. Hampton, Jr., constituted the board of directors.

[1] Was the act of these officers and stockholders in filing the petition in the state court the act of the corporation? The petitioners in the state court were a majority in number of the stockholders, and they held a large majority of the stock of the corporation. There was no appearance in writing by the corporation in the state court. R. A. Sadler appeared before the chancellor at the time the appointment was made. There is nothing to show that the other stockholders ever made any objection to the proceedings, or that they intend to oppose them. The petition in that case was sworn to by R. A. Sadler, and the answer in this case is also sworn to by him. The filing of the petition in the state court must be taken as the act of the corporation. *Exploration Mercantile Company v. Pacific Hardware Company*, 177 Fed. 825, 101 C. C. A. 39. The petition specifically states that the corporation is insolvent.

[2] The allegation in the petition in this case that the corporation had made an assignment, by filing a petition admitting its insolvency and inability to pay its debts, and asking for the appointment of a receiver, is in effect an allegation that the corporation, "being insolvent, applied for a receiver for its property." The proof sustains that allegation.

[3] The chancellor who appointed the receiver testified that the appointment was not made on the ground of insolvency; that at the time of the application he became convinced, from statements made by R. A. Sadler, that the corporation was solvent. He stated, further, that the appointment was made for the purpose of conserving the assets of the estate. He also testified that the paragraph in the petition alleging insolvency was to have been stricken out, but was not. The attorney for the plaintiff in the case testified to the same effect. This testimony of the chancellor and the attorney was objected to, on the ground that it tended to contradict, vary, and explain a judicial record. The testimony was admitted subject to the subsequent ruling of the court as to its admissibility.

It is contended on behalf of the Sadler-Lusk Trading Company that no ground is assigned in the order appointing the receiver, and that for that reason parol testimony is admissible to show the ground on which the order was made. The case of *Schumert v. Security Brewing Company* (D. C.) 199 Fed. 358, is cited in support of that contention. That case arose in Louisiana. A suit had been brought in a state court, alleging that the Security Brewing Company was insolvent, that its board of directors had admitted by resolution that the corporation was unable to pay its obligations, and prayed that a receiver be appointed to administer its assets. The order of the court states that, "the court considering the law and the evidence, and for reasons orally assigned, it is ordered" that receivers be appointed for the corporation "to take charge of its assets and administer its affairs as a going concern." In that case it appears clearly from the order that the state court disregarded the pleadings entirely. In the opinion rendered in the federal court it is stated that:

"The judge of the state court was sworn as a witness, and testified that the parties in interest appeared before him and stated that the corporation was solvent, but, owing to the failure of the Teutonia Bank & Trust Company the day before, the corporation was deprived of its banking facilities and could not meet its obligations as they matured, and that he appointed receivers on that ground, for the purpose of preserving its assets and conducting its business as a going concern, and not because of insolvency."

It thus appears that the receivers were appointed upon oral statements directly opposed to the allegations in the petition and admissions in the answer. The statutes of the state of Arkansas provide, at the instance of creditors or stockholders, for the winding up of insolvent corporations and corporations that have ceased to do business. The following sections of Kirby's Digest are referred to:

Section 950 provides that:

"Any creditor or stockholder of any insolvent corporation may institute proceedings in the chancery court for the winding up of the affairs of such corporations, and upon such application the court shall take charge of all the

assets of such corporation and distribute them equally among the creditors after paying the wages and salaries due laborers and employes."

Section 952 provides:

"When any chancery court shall obtain jurisdiction of any such insolvent corporations under the provisions of this act, it shall direct notice to be given to all the creditors of such corporations to present their claims within 90 days thereafter, for the purpose of sharing in the assets of such corporation."

Section 954 provides that:

"Hereafter courts having equitable jurisdiction may make decrees upon the application of the stockholders or creditors of any corporation, to dissolve and wind up such corporation and to pay its debts and distribute its assets among the holders of the shares of stock thereof, in all cases where it shall be made to appear that such corporation is insolvent, and therefore unable to continue its business, and in all cases where it shall be made to appear that the corporation has ceased to transact business."

It is clear that the petition filed in the state court was drawn under the above sections, with the view of invoking the remedies there provided. The petition alleged insolvency, and prayed that the court "appoint a receiver" and "close up and dissolve the corporation." It will be noted that under section 954, above quoted, decrees to wind up and dissolve corporations may be made in two classes of cases: 1. Where it shall be made to appear that the corporation is insolvent and therefore unable to continue its business. 2. In all cases where it shall be made to appear that the corporation has ceased to transact business.

The petition did not allege that the corporation had ceased to do business. The order made did not indicate a disregard of the allegations of the petition. On the contrary, it stated that the appointment was made "upon consideration of the foregoing petition." It also directed that the receiver should "at once notify all creditors as required by law." Notification of creditors is provided for by section 952, above quoted. Taking the petition and order together, no explanation is required. The petition asks for a winding up and dissolution on the ground of insolvency, and the order states that it was made "upon consideration" of the petition. The order does not purport to be made for "reasons orally assigned." The order, considered in connection with the petition, is clear and consistent, and appears to be made pursuant to the statute.

In that state of case, is oral testimony admissible to contradict, vary, or explain the order? I think not. 17 Cyc. 572. In the case of *Gates v. Bennett*, 33 Ark. 489, the Supreme Court of Arkansas said:

"But it was not competent for appellants to prove by the attorney who brought the replevin suit, or by the justice who rendered the judgment, or by any witness, that the justice in fact rendered any other or different judgment than that shown to have been rendered by the transcript offered in evidence, or that the justice by mistake entered the judgment in the names and in favor of *Gates Bros.*, when it should have been entered in favor of *David Gates*, as trustee."

"The effect of a judgment is never to be explained by parol," and surely not by declarations of the parties to them in opposition to what is obviously implied by them. *Cragin v. Carleton*, 21 Me. 492. Parol evidence is not admissible to show that the ground on which the judg-

ment was apparently based did not exist. *Sheppard v. Whitfield*, 50 Ga. 311.

"No parol testimony can be received to vary, contradict, explain, or interpret a judgment." *Townsend v. Fontenot*, 42 La. Ann. 890, 8 South. 616.

[4] The testimony of the chancellor and attorney being excluded, the petition and order in the state court show clearly that a receiver was appointed by that court on the ground of insolvency. That being the case, creditors of the Sadler-Lusk Trading Company may insist that the assets of the corporation be administered by the bankrupt court. *Exploration Mercantile Company v. Pacific Hardware Company*, 177 Fed. 825, 101 C. C. A. 39; *In re Electric Supply Company (D. C.)* 175 Fed. 612; *Beatty v. Mining Company*, 150 Fed. 293, 80 C. C. A. 181; *Hooks v. Aldridge*, 145 Fed. 865, 76 C. C. A. 409; *In re Wenatchee Heights Orchard Company (D. C.)* 204 Fed. 674.

"The operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked in the administration of the affairs of insolvent persons and corporations, is therein exclusive." *In re Watts & Sachs*, 190 U. S. 27, 23 Sup. Ct. 724, 47 L. Ed. 933.

[5] Moreover, I am convinced that the concern was insolvent. Under the direction of the receiver, R. A. Sadler made an inventory of the property of the corporation, which shows the following assets:

Stock of goods	\$12,400 00
Notes and accounts	19,400 00
Other personal property	300 00
Real estate	2,380 00
Total	\$34,480 00

The notes and accounts constitute more than one-half of the assets. The larger part of these represent indebtedness of customers carried over for a period of two or three years. They are the ordinary run of notes and accounts made in the course of a general mercantile business. There was testimony to the effect that they were worth 60 to 70 cents on the dollar. This estimate was made to depend on good crops and good collections. There was also testimony to the effect that ordinarily notes and accounts of a mercantile concern in liquidation are worth from 20 cents to 40 cents on the dollar. To give to these notes and accounts a value of 45 cents on the dollar would be allowing for them much more than is generally realized for that class of property. There is nothing to show why these notes and accounts are more collectible than notes and accounts generally. I think a statement of the fair valuation of the property may be made as follows:

Stock of goods	\$ 6,820 00
Notes and accounts	8,730 00
Personal property	300 00
Real estate	2,380 00
Total	\$18,230 00

This statement allows the invoice valuation for the personal property other than stock of goods and for the real estate. R. A. Sadler admits that the best offer he had obtained for the stock of goods was 55 cents on the dollar. He also admits an indebtedness of \$19,000. It thus appears that the property of the corporation at a fair valuation is insufficient in amount to pay its debts.

An order will be entered adjudicating the Sadler-Lusk Trading Company a bankrupt.

UNITED STATES v. BIRDSALL. SAME v. BRENTS. SAME v.
VAN WERT.

(District Court, N. D. Iowa, E. D. August 18, 1913.)

Nos. 4,164-4,167.

BRIBERY (§ 1*)—INDICTMENT—REQUISITES.

An indictment which alleges that the defendant was a special officer for the suppression of the liquor traffic amongst the Indians, that it was among his duties to make recommendations to the Commissioner of Indian Affairs as to applications for executive or judicial clemency on the part of those convicted of selling liquors to Indians, that it was the custom for the courts in passing sentence upon persons convicted in such courts to confer with the United States attorney and with the Commissioner of Indian Affairs, that certain individuals had pleaded guilty to selling liquors to Indians and had been sentenced to fine and imprisonment, that the court had announced that he would not reduce the sentence without a recommendation from the Commissioner of Indian Affairs, and that the defendant accepted a bribe from the attorney of the person so sentenced to induce him to recommend to the Commissioner that the sentence be reduced, does not charge an offense, since there is no law conferring upon the Interior Department or the Bureau of Indian Affairs any duties regarding recommendations to executive or judicial departments concerning clemency toward persons convicted of a crime, and a rule or departmental regulation or an established custom cannot take the place of an act of Congress in declaring an offense.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 2, 3; Dec. Dig. § 1.*]

Indictments against W. N. Birdsall, Thomas E. Brents, and Everett E. Van Wert for bribery. Demurrer to the indictment in each case sustained.

See, also, 195 Fed. 980; Id. 974.

Harry J. Bone, Sp. Asst. U. S. Atty., of Topeka, Kan.

Charles W. Mullan and H. B. Boies, both of Waterloo, Iowa, for defendant Birdsall.

S. C. Huber, of Tama, Iowa, for defendants Brents and Van Wert.

REED, District Judge. At a former term of this court separate indictments were found and returned against the several defendants. Those against Thomas E. Brents and Everett E. Van Wert charged them, respectively, with having accepted a bribe from the defendant Birdsall, in violation of section 117 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1109 [U. S. Comp. St. Supp. 1911, p. 1623]);

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and those against the defendant Birdsall with having given to said Brents and Van Wert, respectively, a bribe in violation of section 39 of the Penal Code. To these indictments each defendant separately demurred, upon the ground that the indictment against him charged no offense. These demurrers were sustained, and the indictments dismissed. *United States v. Van Wert* (D. C.) 195 Fed. 974; *United States v. Brents* and *United States v. Birdsall* (D. C.) 195 Fed. 980. And reference is made to the opinion in those cases for the charge in each of the indictments, the several demurrers thereto, and the grounds of the decision.

After the ruling upon the demurrers to those indictments, the government resubmitted to another grand jury the same matters charged therein, and procured a new indictment against each of the defendants for the same alleged offense charged in the former indictment against him. To the new indictments each defendant respectively demurs upon the same ground that he demurred to the former indictment against him. The new or second indictments against Brents and Van Wert are identical, except in the name of the defendants and the amount of the bribe alleged to have been received by each. Omitting the formal parts, that against Brents charges:

"That on the 30th day of April in the year 1910, and for more than a year next prior thereto, and during all the dates and times hereinafter mentioned and set forth, in said district and within the jurisdiction of said court, Thomas E. Brents was then and there a person acting for and in behalf of the United States in an official capacity, to wit, a special officer for the suppression of the liquor traffic with and among Indians, under and by virtue of the authority of a department of the government, to wit, the Department of the Interior of the United States; the said Thomas E. Brents having been theretofore duly and legally appointed such special officer by the Commissioner of Indian Affairs, under and by virtue of the authority of the Secretary of the Interior.

"That in the performance of his official functions as such special officer, as provided by the rules and regulations and established usages and practices and requirements of the said Department of the Interior, the said Thomas E. Brents was then and there charged with the duty, and called upon and required, among other things, to make recommendations to his said superior officer, the Commissioner of Indian Affairs, either directly or through other subordinates of the said Commissioner of Indian Affairs, concerning all matters connected with the conviction and punishment of persons who should unlawfully sell liquor to Indians, or otherwise violate the laws of the United States in reference to the liquor traffic affecting the Indians, and to inform and advise the said Commissioner of Indian Affairs, either directly or through other subordinates of said Commissioner when called on so to do, in all such matters and in all matters relating thereto, and particularly, when called on so to do, to inform the said Commissioner whether or not the effective suppression of the liquor traffic with and among Indians would be furthered or prejudiced by executive or judicial clemency in any particular case, and in all the said matters and in all matters relating thereto to act without partiality or favor and truthfully, and without violating or betraying the confidence and trust reposed in him, the said Thomas E. Brents.

"That at the April term of said court in the year 1909, in and for said district, the following named persons, to wit [naming them], were each and all indicted for unlawfully selling liquor to Indians, in violation of laws of the United States, and each and all of said persons above named and indicted as aforesaid entered a plea of guilty at the December term in the year 1909 of said court to the offenses charged in said indictment, and each of said persons who were indicted and entered a plea of guilty as aforesaid were sentenced by said court at the April term, in the year 1910, to pay a fine of one hundred dollars and be imprisoned for a period of 60 days.

"That before any of the aforesaid sentences were enforced or executed an application was made to the judge of the said court for a reduction of the sentences, and for a suspension thereof or part thereof, and also it was stated on behalf of the said persons who had pleaded guilty that an effort would be made to obtain a commutation of the said sentences by executive action.

"That then and there the judge of the said court announced that he would not change or reduce or suspend the said sentences, or any part thereof, unless a recommendation to that effect was made to him by the said Commissioner of Indian Affairs; and the United States attorney in the aforesaid district announced that he would not recommend a commutation, or other executive clemency, unless a recommendation to that effect was made to him by the said Commissioner of Indian Affairs.

"That then and there and during all the dates and times herein mentioned it was and long had been the settled usage and practice for the United States judges, in determining upon sentences and upon applications for changes, reductions, or suspensions thereof, to consult the United States Attorney, and either directly or through him as the administrative officer charged with the enforcement of the laws in question, including laws for the suppression of the liquor traffic with and among the Indians, the said Commissioner of Indian Affairs; and likewise it had been and was the settled usage and practice of the President, in the exercise of his power of extending executive clemency, to consult the Attorney General; and likewise it had been and was the settled usage and practice of the Attorney General, for the purpose of advising the President on the said subject, to consult with the United States attorney or other officer by whom the prosecution had been conducted.

"That then and there, and before any of the aforesaid sentences were enforced or executed, said court held the execution thereof in abeyance in order to give the said persons who had pleaded guilty as aforesaid an opportunity to apply to and obtain from the said Commissioner of Indian Affairs said recommendation to the said judge of a reduction or suspension of the said sentences, or a part thereof, and a recommendation from the said United States attorney for a commutation of sentences or other executive clemency.

"That then and there and at all times herein mentioned the Commissioner of Indian Affairs, in the performance of his official duty, as provided by the rules and regulations and established usages and practices and requirements of the said Department of the Interior, and as provided by law, was charged with the duty of assisting in the enforcement of the laws of the United States in reference to the liquor traffic affecting Indians, and particularly with the duty, when requested so to do, of advising and making recommendations to any judge before whom any prosecutions on the said subject may have been tried, and the United States attorney or other officer, by whom the said prosecution had been conducted, concerning the effect upon the enforcement of the said law of any proposed leniency or clemency in connection with the punishment of persons found guilty of offenses thereunder.

"That then and there, and while the said sentences were, as aforesaid, being held in abeyance, one Willis N. Birdsall, who was then and there and theretofore had been attorney for the persons who had pleaded guilty as aforesaid, was desirous of obtaining and intended to seek from the said judge of the said court a reduction or suspension of the said sentences, or a part thereof, and was also desirous of obtaining and intended to seek from the President a commutation or other executive clemency of the said sentences, or a part thereof, and to that end was desirous of obtaining and intended to seek from the Commissioner of Indian Affairs a recommendation to that effect to the said judge, and said United States attorney. That then and there on the 30th day of April, 1910, the said Thomas E. Brents, who was then and there, as he, the said Willis N. Birdsall, then and there well knew, a person acting for and on behalf of the United States in the said official function, as aforesaid, under and by authority of the Department of the Interior of the United States, as aforesaid, did unlawfully, willfully, corruptly, and feloniously accept and receive from the said Willis N. Birdsall the sum of fifty dollars, lawful money of the United States, with the intent to have influenced thereby his decision and action on a question, matter, cause, and proceeding,

then and there expected and intended soon to be pending before him, and then and there expected soon by law to be brought before him in his official capacity and in his place of trust and profit, to wit, that is to say, with intent that, when applications should be made to his said superior officer, the Commissioner of Indian Affairs, for said recommendation or recommendations for leniency or clemency, and when said Commissioner of Indian Affairs should call upon him, the said Thomas E. Brents, either directly or through other subordinates of the said Commissioner, for information, report, advice, and recommendation thereon, particularly as to whether the enforcement of the said laws for the suppression of the liquor traffic with and among Indians would be furthered or prejudiced by said clemency or leniency, he the said Thomas E. Brents should thereupon have his decision and action influenced by the receipt by him of the said sum of fifty dollars, so that he would falsely and without regard of truth, and contrary to his duty as a person acting on behalf of the United States in an official capacity under and by virtue of the Department of the Interior, mislead and misinform said Commissioner of Indian Affairs, either directly or through other subordinates of the said Commissioner, that under the facts and circumstances officially known to him, the said Thomas E. Brents, leniency and clemency ought to be granted to the said persons, or any of them, who had pleaded guilty, as aforesaid, and advise that the said Commissioner should, in the interest of the enforcement of the said laws for the suppression of the liquor traffic with and among Indians, recommend to the said judge, or to the said United States attorney, or to the said Secretary of the Interior, or to the said Attorney General, or to the said President, that leniency and clemency should be granted to said persons who had, as aforesaid, pleaded guilty, or to some of them, so that they should not be placed in prison, but the sentences should be changed and commuted to a fine without imprisonment—contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

"H. J. Bone, Special Assistant to the United States Attorney for the Northern District of Iowa."

This indictment differs from the former indictment against Brents only in stating more in detail the rules and regulations of the Department of the Interior, and the customs, usages, and practices of that department and of the Bureau of Indian Affairs; and counsel for the government contends that it overcomes the objections urged, and sustained, to the former indictments. But the difficulty with this contention is (admitting that the indictment is sufficiently direct and certain in its allegations charging the alleged offense, which may be doubtful) that there is no act of Congress conferring upon the Interior Department, or the Bureau of Indian Affairs, any duty whatever in regard to recommending to the executive or judicial departments of the government whether or not executive or judicial clemency shall be extended to, or withheld from, any person who may be charged with, or convicted of, selling intoxicating liquors to Indians, or of any other offense against the United States. Surely under the guise of a rule or departmental regulation, or an established custom or practice of an executive department, legislation cannot be exercised; and an offense or crime against the United States can only be declared by the legislation of Congress.

This question has been so recently considered and determined by the Supreme Court in the case of *United States v. George*, 228 U. S. 14, 33 Sup. Ct. 412, 57 L. Ed. —, in addition to the cases cited in the prior opinion of this court, that it is deemed unnecessary to consider the matter further.

The demurrer to each of the indictments now under consideration must be sustained, and the bail of each defendant exonerated. It is accordingly so ordered.

In re REMMERDE et ux.

(District Court, N. D. Iowa, W. D. August 18, 1913.)

No. 1,044.

BANKRUPTCY (§ 400*)—JURISDICTION OF BANKRUPTCY COURT—EXEMPTIONS.

A bankruptcy court, having determined the property that is exempt generally to the bankrupt and set it apart to him, has exhausted its jurisdiction over such property; and creditors claiming that for any particular reason, as waiver, it is not exempt from their claims, must resort to a state court for enforcement of payment therefrom.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670-675; Dec. Dig. § 400.*]

Submitted on petitions of John W. Remmerde, bankrupt, and his wife, for review of an order of the Referee setting apart to the bankrupt a homestead, but subjecting the same to the payment of certain of his debts. Order directing sale vacated.

See, also, 206 Fed. 826.

Shull, Sammis & Stilwell, of Sioux City, Iowa, for bankrupt and his wife.

C. A. Babcock, of Sheldon, Iowa, for trustee.

REED, District Judge. John W. Remmerde was adjudged a voluntary bankrupt by this court October 7, 1912. A trustee of his estate was duly appointed, who on December 21, 1912, reported that the bankrupt was not entitled to any homestead exemption out of his estate. The bankrupt on April 23, 1913, filed an application with the referee claiming a homestead in lots 19, 20, and 21, block 88, Ninth addition to the city of Sheldon, and asked that it be set apart as his homestead. Upon this application the referee held that the bankrupt had a homestead right in said premises and ordered that it be set apart to him by the trustee as such, but that it was subject to the payment of his debts, and ordered that the trustee sell the same and retain the proceeds thereof as assets of the bankrupt estate. The bankrupt and his wife petition for a review of this order so far as it subjects the homestead so set apart to the payment of the bankrupt's debts, upon the ground, among others, that as to such part of the order the referee was without jurisdiction or authority to make the same. As the petition of the wife for review of the order of the referee is the same, and is based upon the same ground, as the bankrupt's, the latter petition alone will be considered.

The facts, as stated in the bankrupt's petition asking that a homestead be set apart to him and to which the referee makes reference in his certificate, are substantially as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The bankrupt is a married man, the head of a family, and resides with his family in the city of Sheldon, this state, and is entitled to a homestead exemption under the statute of Iowa. At the time of filing his petition in bankruptcy, and for some time prior thereto, the bankrupt resided with his family on lots 1, 2, 14, and 15 in block 87, in the plat of the Ninth addition to the town or city of Sheldon, and such premises with the dwelling house and appurtenant buildings thereon were owned by him and constituted his residence up to August 10, 1912, at which time he intended to change his homestead to lots 19, 20, and 21 in block 88 of said plat. He owned lots 1 to 15 inclusive of said block 87, which includes the homestead above mentioned; and lots 13 to 21 inclusive in block 88, which includes the lots to which he intended to change his homestead, and lots 13 and 14 in block 84, and perhaps other lots in said plat of the Ninth addition to Sheldon.

August 1, 1911, the bankrupt made a mortgage of \$4,000 to one J. F. Stonecipher upon the premises above described, and on June 10, 1912, a second or subsequent mortgage upon the same premises to John McCandlass for \$1,200. Whether or not the bankrupt's wife joined in these mortgages does not appear.

August 10, 1912, the bankrupt made a contract in writing, in which his wife joined, with one W. Oostenburg, to sell to him lots 1 to 15 inclusive in block 87 (which included his then homestead) and lots 13 and 14, block 84, for the agreed price of \$7,350, upon which Oostenburg then paid \$1,000, and agreed to pay \$1,000 by September 1, 1912, \$1,350 by January 1, 1913, and assume and pay the Stonecipher mortgage for \$4,000, before mentioned. The bankrupt was to give possession of the property to Oostenburg November 1, 1912, and make a deed of the property to him upon Oostenburg making the subsequent payments and otherwise complying with his part of the contract. September 1, 1912, Oostenburg paid to the bankrupt the \$1,000 due that day under the contract.

At the time of making this contract with Oostenburg the bankrupt had in course of erection a dwelling house, which was inclosed and the roof shingled, and a barn, or other appurtenant buildings, upon lots 19, 20, and 21 in block 88 of said plat of Sheldon (which block is adjacent to block 87 on the south, but is separated therefrom by a street), upon which he intended to move as soon as the house was completed and ready for occupancy, and thereafter make said lots and the dwelling and appurtenant buildings thereon his homestead.

Upon receipt of the \$2,000, so paid to him by Oostenburg, the bankrupt paid the same to an attorney of Sheldon, Iowa, to be applied pro rata by said attorney upon claims then held by him and other attorneys against the bankrupt, and the same was so applied.

About October 3, 1912, said attorney advised the bankrupt to file a voluntary petition in bankruptcy, which the bankrupt did on October 5th. Said attorney prepared such petition, in which lots 1, 2, 14, and 15 in block 87 were claimed as the homestead of the bankrupt. That the claim in said petition of lots 1, 2, 14, and 15 in block 87 as the homestead of the bankrupt was made upon the advice of said attorney,

and inadvertently upon the part of the bankrupt, as it was not then and is not now his intention to claim said premises as his homestead; but his intention then was, and still is, to change his homestead to lots 20, 21, and the westerly portion of lot 19 adjacent thereto, and occupy the same as his homestead.

On April 19, 1913, the bankrupt made a quitclaim deed to Oostenburg of the premises described in the contract of August 10, 1912, and pursuant to said contract. That said Oostenburg is ready and willing to perform his part of said contract, and pay the \$1,350 due January 1, 1913, with the interest thereon, and assume payment of the Stonecipher mortgage of \$4,000, as agreed in said contract. That said \$1,350 will satisfy the McCandlass mortgage and relieve the premises from the lien thereof. That the trustee has not sold or otherwise disposed of said lots 19, 20, and 21 in block 88, and that the status of said lots remain as they did when the petition in bankruptcy was filed. That lots 20, 21, and the westerly fractional part of lot 19 adjacent thereto, in block 88, are not as great in value as lots 1, 2, 14, and 15 in block 87.

The foregoing facts are condensed from the petition or application of the bankrupt filed with the referee asking that his homestead under the statutes of Iowa, not to exceed one-half acre in extent, be set apart to him so as to include lots 20, 21, and the westerly part of lot 19 adjacent thereto in block 88 of the Ninth addition to Sheldon.

Other allegations of an evidentiary character are alleged, but they are not deemed important to a determination of the question presented by the petition for review. The facts so alleged are admitted by the trustee in his answer to said petition, with an averment that the bankrupt did not move his family to the new homestead as claimed until May 1, 1913; and this fact is admitted by the bankrupt.

Upon such facts the referee found and certifies as follows:

"I find that none of the facts are in dispute and that they are as stated in the petitions of bankrupt and his wife for homestead rights and exemptions and the answer of trustee admitting said facts, and stating further that bankrupt and his family did not move upon and occupy the premises called in said pleadings the 'New Place' until about May 1, 1913, and I find the only facts material to the decision of the question herein to be as follows:

"First. That prior to August 10, 1912, bankrupt had homestead rights in and to lots 1 and 2 and 14 and 15 in block 87 in the Ninth addition to Sheldon, Iowa; he at said time owning said block.

"Second. That on the said 10th day of August, 1912, bankrupt and his wife contracted in writing to sell and convey all of said block 87 to one Oostenburg, subject to certain incumbrances thereon, when said Oostenburg paid bankrupt \$2,000, being the value of the equity of bankrupt in said block 87, and also lots 13 and 14, block 84, in said addition also included in said contract.

"Third. That by the 1st day of September, 1912, said \$2,000 had been paid to said bankrupt, and said sum was used as stated in the petitions, and bankrupt and wife afterwards deeded said property to said Oostenburg, pursuant to said contract.

"Fourth. That when bankrupt filed his petition in bankruptcy herein, October 3, 1912, and when he was adjudicated a bankrupt herein, October 7, 1912, he also owned all of the north half of block 88 in said addition, and had owned the same since and prior to said August 10, 1912; and when he filed his said petition and schedules and at the time of said adjudication, he and his wife intended to claim and move upon lots 20 and 21 and 19 in

said block 88, as their homestead, said bankrupt having at said time a house and barn partly constructed thereon.

"Fifth. That pursuant to the said intentions of bankrupt and his wife, they and their family moved into said house and upon said lots 20 and 21 and 19, as their home and homestead, May 1, 1913, and still so reside thereon, having previously resided on said lots 1 and 2 and 14 and 15 in said block 87, for the reasons stated in their said petitions.

"Sixth. That the debts owing by the bankrupt at the time he filed his petition in bankruptcy and his adjudication as a bankrupt herein were greatly in excess of the value of all his property, and the claims that have been filed and allowed against his estate are greatly in excess of the value of all the property of said estate.

"Question of Law.

"It being admitted that bankrupt is entitled to one-half acre as a homestead in said lots 20 and 21 and 19, in said block 88, but he contending that he is entitled to the same, free of all his debts at the time he was adjudicated a bankrupt herein, and the trustee contending that said homestead is subject to said debts, the question of law raised is whether said half acre is or is not subject to said debts.

"I find as a matter of law that said half acre is subject to said debts. (At time homestead is acquired it is subject to the debts at that time, against the one acquiring the homestead. The homestead is also subject to the liens thereon. Code, §§ 2975, 2976).

"It is therefore hereby ordered that trustee plat said half acre as bankrupt's homestead, subject, however, to all the debts and claims filed and allowed against said estate, and subject to all liens on said half acre, and proceed to sell the same, subject to said liens, separately from the rest of said block 88, and retain the proceeds thereof as assets of said estate.

"Witness my hand this 20th day of May, A. D. 1913.

"Spencer A. Phelps, Referee in Bankruptcy."

The finding of the referee is that the bankrupt at the time he filed his petition in bankruptcy was entitled to a homestead, not exceeding one-half acre in extent (the limit of a homestead under the Iowa statute if it is within a city or town), in lots 19, 20, and 21 in block 88, Ninth addition to Sheldon, as claimed by him, and directed the trustee to set apart to him such homestead in said lots; but also directed the trustee to sell the same and hold the proceeds as assets of the bankrupt estate, thus subjecting the homestead to the payment of the bankrupt's debts. The trustee does not challenge the order of the referee setting apart the homestead in lots 19, 20, and 21, in block 88. That part of the order is not therefore under review and need not be considered.

It may be said, however, that under the Iowa statute and the decisions of its courts the owner of a homestead in that state may change the same and acquire a new one, equal in value to the old, if he does so in good faith, and the latter will be exempt to him to the same extent that the old one was. Code 1897, § 2981; *In re Johnson* (D. C.) 118 Fed. 312, and the Iowa cases therein cited; *Mann v. Corrington*, 93 Iowa, 108, 61 N. W. 409, 57 Am. St. Rep. 256; *In re Irvin*, 120 Fed. 733, 57 C. C. A. 147.

Was the referee authorized to direct the sale of the homestead thus set apart to the bankrupt and hold the proceeds as a part of the bankrupt estate?

This question is not an open one for this court.

In Lockwood v. Exchange National Bank, 190 U. S. 294, 23 Sup.

Ct. 751, 47 L. Ed. 1061, the Supreme Court held that it was clearly the intention of Congress under the present bankruptcy act, as it was under the act of 1867, that the title to the property of a bankrupt, generally exempt to him by the laws of the state, should remain in him and not pass to the trustee in bankruptcy, even though the bankrupt had in writing waived the exemption in favor of certain of his creditors; and the fact that the act confers upon the court of bankruptcy authority to determine the exemptions and exclude them from the assets of the bankrupt estate affords no ground for holding that the court of bankruptcy may reduce such exempt property to money and distribute the proceeds to those in whose favor the bankrupt may have waived his right of exemption, or who might for other reasons subject the same to the payment of debts. The effect of the holding is that when the court of bankruptcy has determined the property that is exempt generally to the bankrupt, and set it apart to him, it has exhausted its jurisdiction over such property; and if creditors claim a right to the property under a waiver by the bankrupt, or that, as to them, it is not exempt for other reasons from their debts, the holders of such debts must resort to a state court of competent jurisdiction to enforce payment of their debts from such property; and, if necessary, the discharge may be withheld to enable them to do so. See, also, *Ingram v. Wilson*, 125 Fed. 913, 60 C. C. A. 618, and *Chicago, B. & Q. R. Co. v. Hall*, 229 U. S. 511, 33 Sup. Ct. 885, 57 L. Ed. —.

The order of the referee directing the trustee to sell the property set apart to the bankrupt as his homestead and hold the proceeds as assets of the bankrupt estate is therefore unauthorized, and so much of his order under review is vacated, and it will be so certified to the referee. The costs of this proceeding will be taxed against the estate.

It is ordered accordingly.

In re REMMERDE.

(District Court, N. D. Iowa, W. D. August 18, 1913.)

No. 1,044.

1. HUSBAND AND WIFE (§ 131*)—SEPARATE PROPERTY—GIFT.

Though a husband's possession of his wife's separate property be with her consent, and even though there be no express agreement to repay it, there is no presumption of gift by her to him, but in the absence of proof of transmission of title to him by gift or contract he is bound to repay it; the husband's common-law rights in his wife's property being abrogated.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 426, 471-483; Dec. Dig. § 131.*]

2. HUSBAND AND WIFE (§ 133*)—OWNERSHIP OF PROPERTY—GIFT TO WIFE—EVIDENCE.

Evidence, on contest of the claim of bankrupt's wife against his estate, held to show that a gift by her father was to her alone, and not to her and her husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 487-494; Dec. Dig. § 133.*]

3. HUSBAND AND WIFE (§ 144*)—USE OF SEPARATE PROPERTY—LIABILITY OF HUSBAND FOR INTEREST.

Under the rule obtaining in Iowa, a husband using, with his wife's permission, her separate estate, is not chargeable with interest, in the absence of express agreement or a course of dealing between them such as to raise an implied agreement to pay interest.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 35, 545-553; Dec. Dig. § 144.*]

4. LIMITATION OF ACTIONS (§ 145*)—NEW PROMISE—NOTE.

Even though the claim of a wife against her husband on account of her separate property, which she has permitted him to use, be barred by limitations, his subsequent execution of a note to her therefor is a revival of it under Code Iowa 1897, § 3456, declaring a barred cause of action on contract to be revived by a new promise in writing, signed by the party to be charged, to pay the debt.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 584-588, 590-592; Dec. Dig. § 145.*]

5. BANKRUPTCY (§ 314*)—CLAIM OF WIFE—LACHES.

The claim of bankrupt's wife against his estate should not be disallowed for her alleged laches in not sooner enforcing her demand against him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469-473, 478, 483-487, 489, 490; Dec. Dig. § 314.*]

Submitted on petition of Johanna Remmerde, wife of the bankrupt, for review of an order of the Referee reducing the amount of her claim against the bankrupt estate; and the petition of the trustee and certain creditors of the bankrupt for review of the order allowing said claim in any amount. Order vacated, with directions.

See, also, 206 Fed. 822.

T. E. Diamond, of Sheldon, Iowa, for petitioner.

C. A. Babcock, of Sheldon, Iowa, for trustee.

G. A. Gibson, of Sheldon, Iowa, for other creditors.

REED, District Judge. John W. Remmerde, of Sheldon, O'Brien county, was adjudged bankrupt by this court October 7, 1912, upon his own petition filed October 5th preceding. October 19th following, the petitioner, Johanna Remmerde, his wife, filed proof of a claim against his estate based upon his promissory note for \$7,032, made to her April 13, 1912, and due on the 15th of said month, bearing 6 per cent. interest. The trustee and certain of the creditors objected to the allowance of such claim in any sum upon the grounds, in substance, that the note upon which it is based is without consideration, and was made for the purpose of defrauding the creditors of the bankrupt; or if there was any consideration for the note such consideration was barred by the statute of limitations before it was made, and the petitioner estopped by her laches from now proving the claim.

Upon the hearing the referee reduced the amount of the claim to \$2,000, and allowed it in that sum with interest from the date of allowance as an unsecured claim against the estate. The petitioner, Mrs. Remmerde, complains of the order of the referee in reducing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the amount of her claim to \$2,000; and the trustee and other creditors complain of the order in allowing it in any sum whatever.

The note is presumptively valid, and the burden is upon the trustee and objecting creditors to establish their objections to its allowance.

The proofs as to the consideration of the note show without any dispute the following facts: Mrs. Remmerde is one of six children (four daughters and two sons) of Mr. G. H. Schoep, a well to do farmer of Sioux county in this state. She was married to the bankrupt in March, 1899, and it seems was the last of the children to marry. About that time her father, Mr. Schoep, arranged to give each of his six children \$4,000 in lands and other property, and made to Mrs. Remmerde a contract (the terms of which are not definitely shown) for a quarter section of land in Sioux county, and gave to each of his other children a like amount of property, or had given it to them prior to such time. The quarter section so intended for Mrs. Remmerde had been rented to the bankrupt for that year (1899), and its value including such rent was about \$45 per acre. In December, 1901, the father made a deed of the land to the bankrupt (in which the consideration was stated as \$7,200), who was to pay the father the difference between the \$4,000 and the value of the land at \$45 an acre, including the rent before mentioned. About the same time the bankrupt borrowed from an insurance company \$3,200, which he secured by mortgage upon the land so deeded to him, in which mortgage the petitioner joined, and paid the father what he was owing him for the land above the \$4,000 that Mrs. Remmerde, by the gift of her father, had therein. Later the bankrupt sold the land, the petitioner joining in the deal, and invested the proceeds in other property, and such other property or what was left of the proceeds thereof he owned at the time of his bankruptcy. On August 1, 1899, the children of Mr. Schoep signed and delivered to him a writing that reads in this way:

"We the undersigned hereby agree to pay on demand to G. H. Schoep or his wife Mrs. G. H. Schoep the sum of one hundred dollars (\$100.00) payable annually whenever so desired by said party or parties; as an annual rental for a (\$4,000) four thousand dollars gift given to each of the signing parties out of love and affection.

"Signed this first day of August, 1899.

P. L. Schoep.

"N. Wassenaar.

"John G. Schoep.

"J. W. Remmerde.

"Johanna Remmerde.

"B. Rozenboom.

"E. Franken."

P. L. Schoep and John G. Schoep whose names are signed to the papers are sons of G. H. Schoep, the father of Mrs. Remmerde. N. Wassenaar, J. W. Remmerde, the bankrupt, B. Rozenboom, and E. Franken are sons-in-law, and Johanna Remmerde is the petitioner. Who prepared or wrote this paper does not appear. Mr. Schoep (the father) thought it was written by his son-in-law N. Wassenaar, but Mr. Wassenaar says he did not write it, but knew of it and signed it. Mr. Schoep, the father, is a Hollander, and understands and

speaks the English language with difficulty. He testified before the referee in this case through an interpreter, and at the time of so testifying was 74 years old. The petitioner, Mrs. Remmerde, is about 43 years old, was born in Holland, came to this country when 11 years old, attended the English schools but little thereafter, and speaks and understands the English language with difficulty, though she testified without the aid of an interpreter.

At the time the father of Mrs. Remmerde deeded the land to her husband, there was no written promise or agreement that the latter should pay to her the \$4,000 so given to her by the father; but she and the bankrupt both testify that he promised verbally to pay the same to her whenever she wanted it; and he has had the use of such \$4,000 ever since. They also say that she asked him a number of times to repay the amount to her, but it was never convenient for him to do so, and that he has never paid the same or any part thereof to her. In April, 1912, after the bankrupt had become somewhat embarrassed financially, she insisted that he give her security for the \$4,000. They then went to an attorney, and the note of \$7,032, which is the basis of the petitioner's claim, was made by the bankrupt to her as the amount of said \$4,000, with interest thereon at 6 per cent. per annum to that time. A chattel mortgage was made on his stock of furniture (he was then, and at the time of his bankruptcy, engaged in the furniture business) to secure the same, which was placed of record. This caused the bankrupt's other creditors (so he says) "to jump him," and he induced his wife to discharge the mortgage of record; but she retained the note, and upon his bankruptcy presented it as an unsecured claim against his estate. Mrs. Remmerde is ignorant of business affairs, and relied wholly upon her husband to protect her against loss of the amount given to her by her father. The foregoing is a brief summary of the ultimate facts established by the testimony.

[1] It is the contention of the trustee and objecting creditors that, if the \$4,000 claimed by Mrs. Remmerde was a gift of her father to her of that amount, she, by allowing her husband to take the title to the land in his own name and use and dispose of the same, thereby gave the \$4,000 to him, and that she is now estopped from claiming that the bankrupt owes her this amount. There is no evidence in the record of any gift by Mrs. Remmerde to the bankrupt of the \$4,000 which the proofs show beyond dispute the father gave to her; and her permission that her husband should take the title to the land and use and dispose of the same, and invest the proceeds in other property, is entirely consistent with her claim that the bankrupt promised to repay her the \$4,000 whenever she wanted it. To constitute a valid gift of property to another there must be a clear and unequivocal intention upon the part of the donor to forever part with his title to the property, accompanied by some act upon his part that vests the title in the donee. *Snively v. Henerson* (C. C. A.) 204 Fed. 978. There is an entire absence of any evidence of such an intention upon the part of Mrs. Remmerde to divest herself of the title and right to the \$4,000 so given to her by her father. On the contrary, she testified positively that she did not give the \$4,000 to her husband, but

left it with him in the land upon his promise to repay it to her whenever she wanted it. The husband says the same.

Section 3153 of the Code of Iowa (1897) provides:

"A married woman may own in her own right real and personal property, acquired by descent, gift or purchase, and manage, sell and convey the same, and dispose thereof by will, to the same extent and in the same manner the husband can property belonging to him."

In the absence of an agreement of the bankrupt to repay to the wife this \$4,000, the presumption would be that when he received the separate property of his wife, with or without her consent, he must be deemed to hold it for her benefit, in the absence of direct evidence that she intended it as a gift to him. *Stickney v. Stickney*, 131 U. S. 227, 9 Sup. Ct. 677, 33 L. Ed. 136. In that case the husband had received possession of the property of his wife, real and personal, coming to her from her father's estate, which he had used and invested in his own name. It was contended that in permitting him to do so she intended a gift to him. Mr. Justice Field, speaking for the court of such contention, said:

"Any presumption of that kind, if it would otherwise arise in the case, was entirely rebutted by her repeated and express directions to invest the moneys for her benefit in her own name. But we are of opinion that, in the absence of her testimony, there would be no presumption, since the passage of the Married Woman's Act, that she intended to give to her husband the moneys she placed in his hands, any more than a gift would be inferred from a third person who in like manner deposited money with him. If there be no proof of indebtedness to the party receiving the moneys, the presumption would naturally be that they were placed with him to be held subject to the order of the other party, or to be invested for the latter's benefit. We think that whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him."

Quoting approvingly from *Grabill v. Moyer*, 45 Pa. 530, 533, he continues:

"After it has been shown, as it was in this case, that the property accrued to the wife by descent from her father's and brother's estates, the presumption necessarily is that it continued hers. In such a case, it lies upon one who asserts it to be the property of the husband to prove a transmission of the title, either by gift or contract for value, for the law does not transmit it without the act of the parties. If mere possession were sufficient evidence of a gift, the act of 1848 would be useless to the wife. Nothing is more easy than for the husband to obtain possession, even against the consent of the wife. And where he obtains it with her consent, it can be at most but slight evidence of a gift."

See, also, *Garner v. Second National Bank*, 151 U. S. 420-423, 14 Sup. Ct. 390, 38 L. Ed. 218; *Clark, Assignee, v. Hezekiah* (D. C.) 24 Fed. 663; *In re Neiman* (D. C.) 109 Fed. 113; *In re Carpenter* (D. C.) 179 Fed. 743, 744; *Logan v. Hall*, 19 Iowa, 491-493; *Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235; *City Bank v. Wright*, 68 Iowa, 132, 26 N. W. 35; *Payne v. Wilson*, 76 Iowa, 377, 41 N. W. 45; *Roberts v. Brothers*, 119 Iowa, 309, 93 N. W. 289.

In the absence of an express agreement, therefore, on the part of Mr. Remmerde, that he would repay to Mrs. Remmerde the \$4,000

received by him from her father, he will, in those jurisdictions where the common-law rule as to the right of the husband to the separate property of the wife is abrogated, as it is in Iowa, be required to do so.

[2] It is also the contention of the trustee and objecting creditors that the \$4,000 claimed by Mrs. Remmerde as having been received from her father was the joint gift of her father to her and her husband; that such is the effect of the writing of August 1, 1899; and that she is therefore only entitled at best to prove her claim for one-half the \$4,000 against the bankrupt estate. This is the view taken by the referee of the matter, for in his certificate he says:

"Upon the evidence submitted upon this claim, and upon hearing counsel thereon, I find that an interest in real estate and furniture amounting to approximately four thousand dollars (\$4,000.00) was given jointly to Johanna Remmerde, claimant herein, and her husband, John W. Remmerde, bankrupt herein, by way of a credit upon the purchase price of a quarter section of land in Sioux county, Iowa (describing it); in consideration of which credit bankrupt and wife became obligated to pay interest in the sum of \$100.00 per annum on demand to G. H. Schoep or Mrs. G. H. Schoep, the parents of claimant herein, in August, 1899.

"I further find that there was no agreement between claimant and bankrupt that the husband (bankrupt herein) should pay the wife (claimant herein) interest for the use of her share of the property given them by claimant's father, or that the facts and circumstances of the case warrant an implication of an agreement to pay interest."

The finding of the referee that the gift by the father of Mrs. Remmerde was a joint one to her and her husband is entirely without support in the evidence.

Mr. Schoep, the father of Mrs. Remmerde, testified as follows:

Q. I will ask you as to whether you ever turned over any property, any money, or anything of value, to your daughter, Mrs. Johanna Remmerde? A. Yes.

Q. And about when was that as best as you can recollect? A. I think it is like the paper says there (referring to the writing of August 1, 1899) at the same time.

Q. I will ask you how much that was that you turned over to your daughter, at that time? A. \$4,000.

Q. I will ask you to tell the court how and in what manner you turned over this \$4,000 to your daughter? A. In land, houses, and furniture.

Q. Now, was this \$4,000 given by you to your daughter, you say in land transferred wherein you transferred land by you to her? A. It was a land contract.

Q. When the contract ripened into a deed, to whom was the deed made out to for this particular land, to Mr. Remmerde, or to Mrs. Remmerde? A. I don't remember.

Q. If the deed shows that the land was conveyed to J. W. Remmerde, then you would say that the recitals in the deed are correct? A. I believe it was, I can't remember very much about it. I know the contract for the land was made out in my daughter's name. * * *

Q. And I will ask you whether you gave this \$4,000 to Mrs. Remmerde because she was your daughter? A. Of course, I shouldn't have given it to Remmerde.

Q. Do you mean by Remmerde, Mr. Remmerde or Mrs. Remmerde, when you say 'to Remmerde'? A. Not to Mr. Remmerde, but to Mrs. Remmerde.

Q. What did you give—did you give it to her as a sort of a marriage por-

tion, or a sort of a dower? A. No, I gave it to all my children, not as a marriage portion, but I gave it to all my children. * * *

Q. Did you give Mr. Remmerde \$4,000 too, or just to your daughter? A. To my daughter. * * *

Q. Explain to the court how it happens that Mr. Remmerde signed this paper, as well as Johanna Remmerde, your daughter. A. The reason why is because they were just about a year married, and I seen that he was not a very good financier, or rather a spendthrift, and for that reason I had them both sign that paper.

Q. Now, what was the object of J. W. Remmerde signing that paper, why did he sign that paper? What was he to be bound to by his signing it? A. The reason was so that he would be obligated to me to pay the \$100 in case I demanded it. * * *

N. Wassenaar testified:

Q. Are you a married man? A. Yes.

Q. What relation is your wife to G. H. Schoep? A. His daughter.

Q. How long have you been married? A. Going on 17 years.

Q. Have you ever seen this document before? (The writing of August 1, 1899, shown the witness.) A. Yes.

Q. About how long ago did you first see it? A. About the time of its date, I think that is right. * * *

Q. I will ask you how it happened—relate the entire transaction to the court, * * * how it happened that you signed your name to that document, and for what purpose? A. Well, the old gentleman was dividing an equal amount among his children, that he was intending to give his children each an equal division of some of his property, and in case that he should ever need support from outside of what he had owned, that we was to give him \$100 a year, that was the understanding, so that in case he should never have to suffer, or never have to go back.

Q. You said he was to give his children an equal division of certain portion of his property; how much was he to give each of the children? A. \$4,000.

Q. As a matter of fact, do you know of your personal knowledge that he did give this much property, of your personal knowledge? A. My wife—that is the only one I have personal knowledge of. But the others, of course, I understand that he did give it. I do not say that he handed it over to them.

Q. Did he give you yourself \$4,000, or to your wife, or both or each of you? A. He gave it to my wife; so far as that is concerned, we started in business with it.

Q. Have you any knowledge of G. H. Schoep ever giving any \$4,000 or other property to his daughter Johanna Remmerde? A. Well, as far as I am personally concerned, as I have said before, I have not seen the money, but there is no question but what they all received an equal amount, and Mrs. Remmerde as well. The equal amount was \$4,000.

Q. Did you and Mr. Schoep ever have any conversation on this matter of him giving his daughters \$4,000? A. Yes, more than once—talked of it different times.

Q. Did you ever have a conversation of like kind with Mr. J. W. Remmerde, the husband of Johanna? A. Yes.

Q. What did Mr. Remmerde say to you in those conversations? A. Oh, we talked at different times, you know, and especially in the last few years when his finances didn't seem to work as good as they did, and I talked with him in regard to his finances, and he made the statement, more than once, that he could pay Johanna her money any time she wanted it—there was plenty for it.

Q. Was anything ever said at any time about interest on this money, during the conversations that you have had, that you can remember of? A. Well, I wouldn't say that; no.

Q. Was ever during any of those conversations anything said that he was to pay interest? A. No.

Cross-Examination.

By Mr. Babcock:

Q. Mr. Wassenaar, you will notice that this paper reads that \$100 is to be given "as an annual rental for \$4,000.00 gift to each of the signing parties out of love and affection." And now the signing parties are P. L. Schoep, yourself, John G. Schoep, J. W. Remmerde, Johanna Remmerde, B. Rozenboom, and E. Franken. The contract says that the gift was to them. What do you say as to that question? A. Well, that might—I don't think that the contract was exactly adhered to at the time so precisely—the contract was signed in good faith with the old gentleman.

Q. I suppose when you signed it was explained to you that this \$100, as—or didn't you read it carefully? A. Why we were perfectly willing to do that, in good faith. As I understand, when it comes right down to the letter, it probably ought to be a little different; of course, that paper was not drawn by an attorney and signed, or presented by an attorney.

Q. How was this money paid to your wife? A. We got an interest in a store, a general store, to the extent of \$4,000, less the furniture which was given to us at the time of our marriage. That is, the furniture was counted out as a part of the \$4,000.

Q. And except as to the amount of the payment of the \$4,000 to your wife, you personally know nothing as to how or when the others got it? A. That I saw the transaction handed over, no.

Q. Did you get the \$4,000 you spoke of before this paper was signed, or afterwards? A. It might have been a little before; it might be about the same time; I wouldn't say definitely, because we were invoicing at that time.

Q. So you don't know why Remmerde signed the paper, and the husband of none of the other girls signed it? A. Yes, I think I do.

Q. No, I don't mean that, just strike that, I meant that partly and partly this: Johanna Remmerde is the only one of the girls that signed this paper—only one of the children of the girls that signed the paper? A. Yes.

Q. If this \$4,000 was given to the children, and the children only, do you know why the other children who weren't girls didn't sign the paper? A. As I stated before, Mr. G. H. Schoep was satisfied with our signatures on that paper, and didn't require the signature of the girls.

By Mr. Diamond:

Q. You say the only person that signed as husband and wife was Mr. Remmerde and Mrs. Remmerde; explain how it happened that in that case it was both the child and the husband that signed the paper, and that was not true in any other case. A. Why he said to me for the reason that Mr. G. H. Schoep was not satisfied with his signature at all, and I remember of his saying definitely, as far as that is concerned, that he wouldn't give it to Will—J. W. Remmerde.

Q. He wouldn't give what? A. He wouldn't give that \$4,000 to J. W., but would give it to her.

Q. And no doubt, to be sure of the \$100, he wasn't satisfied with J. W. Remmerde's signature alone, but also wanted his own child to sign it? A. I think that was it.

Q. A while ago you said, when Mr. Babcock was examining you, that the contract was not being precisely adhered to. Explain to the court exactly what you mean. A. Well, that we didn't exactly understand the contract probably, when we signed, that it would be just exactly the way who were to receive, who were the ones that received that money.

Q. What was the actual fact? Who did receive the money? A. Why, the children themselves, not the sons-in-law, or the daughters-in-law."

There can be no doubt under all the testimony that it was to Mrs. Remmerde alone that the father gave the \$4,000; an amount only equal to that which he gave to each of his other sons and daughters. Nor is the writing of August 1, 1899, inconsistent with this view of the testimony. That writing does not recite a present gift of \$4,000 to each of the signing parties, but only that the father, Mr. Schoep,

has given to each of them \$4,000 out of love and affection, and for which they agree to pay to him or his wife annually \$100. Literally the writing speaks of a gift of \$4,000 to *each* of the signing parties, and that they jointly are to pay \$100 to the father or his wife on demand. So construed it would appear that Mr. Remmerde as well as his wife had been given \$4,000, and that the signers together were to pay only \$100 to the old people. Obviously the writing does not accurately express to whom the father had given \$4,000, nor what each was to pay to him or his wife. The reason that Mrs. Remmerde signed the paper may be, as Mr. Wassenaar says, that the father was not satisfied with the signature alone of the bankrupt, and wanted the signature of his daughter to the payment of the \$100 she and her husband were to pay; or it may be that inasmuch as the bankrupt was to pay for the land \$3,200 above the \$4,000, that he gave to his daughter, had something to do with the signature of both Mrs. Remmerde and her husband. However this may be, there is no dispute under the testimony that Mrs. Remmerde by the gift of her father received an interest equal to \$4,000 in the land deeded to the bankrupt.

The conclusion therefore is that the referee erred in finding that the gift was one of \$4,000 by the father to Mrs. Remmerde and her husband jointly.

[3] As to the obligation of the husband to pay interest for the use of the wife's money or property, the equitable rule, which obtains in Iowa, is thus stated in *Logan v. Hall*, 19 Iowa, 491, 500:

"Whenever the wife has a separate estate (including money) which she permits her husband to use, and there be no stipulation that interest shall be paid by him for the use of it, the law will presume, in the absence of any circumstances showing a contrary intention or understanding, that the husband should not account for or pay interest on the funds; but if, from the mode of dealing, there be any circumstances from which it may reasonably be inferred that the intention of the parties was to charge interest, then the husband is rightfully and properly chargeable therewith,' as where he borrowed his wife's moneys and lent them to a mercantile firm of which he was a member."

The testimony fails to show an express agreement or promise upon the part of the bankrupt to pay interest upon this \$4,000 to his wife prior to the making of the note of April 12th to her therefor. It is true that Mrs. Remmerde says in substance that she was to have interest on the \$4,000 from her husband, and he says substantially the same. But these are rather the statements of their conclusions respectively of what she was to receive, rather than of an express agreement or promise by the bankrupt to pay interest for the use of the money. The referee found as a fact that there was no such agreement prior to the making of the note, and that the course of dealing between Mrs. Remmerde and the bankrupt was not such as to raise an implied agreement to pay interest, and that none should therefore be allowed. The evidence is not such as to warrant interfering with this finding; in fact, it has some support in the testimony of Mr. Wassenaar. Interest should not, therefore, be allowed upon the claim prior to the note of April 12, 1912. To do so would be inequitable to the other creditors.

[4, 5] The objecting creditors further contend that the claim of Mrs. Remmerde was barred by the statute of limitations, and by her laches, before the note was made. This contention cannot be upheld. The Code of Iowa (1897) § 3456, provides:

"Causes of action founded on contract (barred by section 3457) are revived by an admission in writing, signed by the party to be charged, that the debt is unpaid, or by a like new promise to pay the same."

Conceding without deciding that the claim of Mrs. Remmerde was barred by the statute of limitations prior to the making of the note, that note was a revival of the debt. As to the laches of Mrs. Remmerde in not sooner enforcing her demands against her husband and in permitting him to use the money as he did, it is sufficient to say that it is commonly known that husband and wife do not ordinarily deal with each other as strangers do. See *City Bank v. Wright*, 68 Iowa, 132, 26 N. W. 35; and *Robert v. Brothers*, 119 Iowa, 309, 93 N. W. 289, above. The claim should not therefore be disallowed because of the alleged laches of Mrs. Remmerde.

The order of the referee reducing the amount of Mrs. Remmerde's claim to \$2,000 is set aside and vacated, and the matter referred back to him with directions to allow such claim in the sum of \$4,000, with 6 per cent. interest thereon from the date of the note, viz., April 12, 1912, to the filing of the petition in bankruptcy. The trustee and objecting creditors will pay the costs incurred in the matter of this claim.

It is ordered accordingly.

In re FALKENBERG et al.

(District Court, D. New Mexico. June 13, 1913.)

No. 113.

1. BANKRUPTCY (§ 484*)—RECEIVERS—FEES.

Under Bankr. Act July 1, 1898, c. 541, § 48, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3439), as amended by Act June 25, 1910, c. 412, § 9, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1501), authorizing double commissions to a bankrupt's receiver where he continues to conduct the bankrupt's business as authorized by section 2 (5), where a receiver continued the bankrupt's business and collected and turned over to himself as trustee \$1,739.92, together with certain stock, fixtures, and uncollected book accounts, he was only entitled to an allowance for his services of \$148.56 on the settlement of his accounts as receiver, since any fees accruing by reason of the administration of the stock, fixtures, and uncollected accounts turned over to the trustee could not be allowed until the trustee had realized on the property, when a further allowance might be made pursuant to a supplemental account.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 895, 896; Dec. Dig. § 484.*]

2. BANKRUPTCY (§ 484*)—RECEIVERS—FEES—ALLOWANCE—NOTICE TO CREDITORS.

An allowance of fees to a receiver in bankruptcy cannot be made until notice of the application therefor, specifying the amount asked, has

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

been given to creditors in the manner prescribed by Bankr. Act July 1, 1898, c. 541, § 58, 30 Stat. 561 (U. S. Comp. St. Supp. 1901, p. 3444).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 895, 896; Dec. Dig. § 484.*]

3. BANKRUPTCY (§ 482*)—RECEIVERS—ATTORNEYS—FEES.

The number of attorneys employed by a bankrupt's receiver is not an element to be considered in allowing fees, but the allowance should be made as though but one attorney had been employed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. § 482.*]

4. BANKRUPTCY (§ 482*)—RECEIVERS—ATTORNEYS—COMPENSATION.

Where attorneys for a bankrupt's receiver were also attorneys for the moving creditors and for the trustee, they were not entitled to charge the receiver for services performed in obtaining his appointment, or for other matters preliminary thereto, which services were rendered, not to the receiver, but in the interest of the moving creditors, but only for services rendered to the receiver as such.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. § 482.*]

In the matter of Arthur F. Falkenberg and Sam S. Bacharach, partners doing business as The Emporium. On application by receiver in bankruptcy for the allowance of receiver's and attorney's fees on final report. Granted in part.

H. L. Boon, of Tucumcari, N. M., for referee.

Harry H. McElroy, of Tucumcari, N. M., for receiver.

POPE, District Judge. The final report of the receiver herein has been presented to the court for its approval. The report has heretofore been approved by the referee, but subject to approval of this court. There is a supplemental report of the referee, which is also for consideration in connection with the original report. The question involved turns principally upon the propriety of the claim for fees by the receiver, both on his own account and on account of the amount allowed attorneys who have assisted him. The fee claimed by the receiver for himself is \$200, and for his attorneys \$150.

Before considering these, however, one or two matters of detail connected with the reports are to be noticed. The first part of the original report of the receiver shows that he received in cash as such receiver, and prior to the appointment of a trustee, the sum of \$1,739.92. The latter part of his report shows "total chargeables" of \$1,713.92, a difference of \$26, perhaps due to a clerical oversight in one statement or the other. This should be corrected before the report is finally approved by the referee. The supplemental report states that the receiver turned over to the trustee certain stock, fixtures, and uncollected book accounts, but fails to state that the balance of cash in the hands of the receiver was turned over to the trustee. This should likewise be corrected before any final approval of the report is made by the trustee, in order that there may be a showing by the receiver of the payment of this amount to the trustee.

[1] Coming to the fee claimed by the receiver of \$200, the Bank-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ruptcy Act, as amended by the act of 1910, provides in its section 2 (5) that courts of bankruptcy may—

"authorize the business of bankrupts to be conducted for limited periods by receivers, * * * and allow such officers additional compensation for such services, as provided in section 48 of this act."

Section 48, as amended by the act of 1910, allows as compensation to receivers a maximum—

"upon the moneys disbursed or turned over to any person, * * * and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustee, * * * not to exceed six per cent. on the first five hundred dollars or less, four per cent. on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per cent. on moneys in excess of fifteen hundred and less than ten thousand dollars, and one per cent. on moneys in excess of ten thousand dollars."

There is also a provision in section 48 of the Bankruptcy Act, as amended by the act of 1910, that where the business is conducted by the receivers, as provided in clause 5 of section 2 of the Bankruptcy Act, above quoted, the court may allow such officers as much as double commissions upon the basis above indicated. The purpose of the amendment of 1910 is disclosed by the report of the Senate committee on judiciary of the Sixty-First Congress set forth as a footnote on page 46 of Collier on Bankruptcy (9th Ed.). It follows from this provision of law that as much as 12 per cent. on the first \$500 or less, and 8 per cent. on moneys in excess of \$500 and less than \$1,500, may be allowed receivers who carry on the business. Comparing the rule prescribed by statute with the amount claimed and allowed by the referee, the latter is found excessive, even upon the maximum basis. Twelve per cent. on the first \$500 is \$60; 8 per cent. on the next \$1,000 is \$80. The amount above \$1,500, as is above pointed out, is divergently stated in the report to be \$239.92 and \$213.92. The indications from the report are that the latter amount is correct. Four per cent. on this is \$8.56, thus making a total of \$148.56 as the amount coming to the receiver upon an allowance of the maximum permitted by law, so far as the estate has been administered up to this time. It is true that there may be a further amount coming to the receiver, based upon what, following his administration, may be "realized by the trustee from property turned over in kind by him to the trustee"; but this amount does not appear from the reports, and there is no basis for stating it. This latter must therefore, if allowed at all, be covered by a supplemental account after the trustee shall have realized upon the property turned over to him in kind.

[2] Considering the fact that the receiver is also trustee, and that he will be thus entitled to compensation as trustee, I am of opinion that the above sum of \$148.56 is sufficient as his compensation up to the date of the transfer to the trustee. Even this amount, however, cannot be allowed upon the present report, for the reason that the provisions of the act of 1910 have not been complied with as to giving notice to creditors. That act provides that in settling the compensation of receivers—

"before the allowance of compensation notice of application therefor, *specifying the amount asked*, shall be given to creditors in the manner indicated in section 58 of this act."

The only notice given creditors in this matter is that the receiver's report would be for approval by the referee upon a named date. In the notice given creditors there was no specification of the amount asked by the receiver. The notice, therefore, is insufficient, and before compensation may be allowed the receiver a new notice will have to be given.

[3] As to the amount claimed for the attorneys of \$150, the court is of opinion that \$100 is sufficient. Allowances in bankruptcy are made sparingly and with great caution. In *re Duran Mercantile Co.* (D. C.) 199 Fed. 961. The Bankruptcy Act does not contemplate that the number of attorneys employed shall enter into the allowance of attorney's fee, but that allowances shall be made as though one attorney was employed.

[4] It is also to be borne in mind that the attorneys for the receiver were also attorneys for the moving creditors and are attorneys for the trustee. In each of these latter capacities there will doubtless be a claim for compensation. The aggregate of these upon the basis herein claimed for the receiver would be much more than the estate should be called upon to pay. In addition, much of the service herein claimed against the receiver was rendered, not to him, but to the moving creditors. As pointed out in *Re Oppenheimer* (D. C.) 146 Fed. 140, services performed in obtaining the receiver's appointment, or other matters purely preliminary to such appointment, were rendered, not to the receiver, but in the interest of the moving creditors; and this is a matter for settlement as against the estate in the hands of the trustee, when the question of an allowance to the moving creditors is sought under section 62 of the Bankruptcy Act. The attorney's fee for services rendered the receiver is accordingly reduced to \$100.

The papers in the cause will be returned to the referee for further proceedings in accordance with this opinion.

UNITED STATES v. GREAT NORTHERN RY. CO.

(District Court, D. Idaho, N. D. July 9, 1913.)

No. 442.

MASTER AND SERVANT (§ 17*)—HOURS OF SERVICE ACT—CONSTRUCTION.

A fireman on a locomotive engaged in hauling trains on an interstate railroad is an employé "actually engaged in or connected with the movement of" such trains, and within the provisions of Hours of Service Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (U. S. Comp. St. Supp. 1911, p. 1321), and to require him to remain on duty for a longer period than 16 consecutive hours is a violation of the statute, although such duty for a part of the time has no connection with the running of trains, and regardless of whether such other work precedes or follows his service as fireman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. § 17.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by the United States against the Great Northern Railway Company. Judgment for plaintiff.

C. H. Lingenfelter, U. S. Atty., of Boise, Idaho.

Chas. S. Albert, of Spokane, Wash., Herman H. Taylor, of Sandpoint, Idaho, and Thos. Balmer, of Seattle, Wash., for defendant.

DIETRICH, District Judge. The action is brought to recover the penalty prescribed in what is popularly known as the "Hours of Service Act" (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1911, p. 1321]). The act is entitled "An act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon." The term "employes" is therein defined as meaning "persons actually engaged in or connected with the movement of any train"; and common carriers are thereby prohibited from requiring or permitting any employe to remain on duty for a longer period than 16 consecutive hours. The government charges that in the year 1912 the defendant permitted one of its locomotive firemen, Ed. Burgen, to remain on duty continuously from 6 o'clock a. m. of July 10th to 6 o'clock a. m. of July 11th, upon a train running from Hillyard, in the state of Washington, to La Clede, in the state of Idaho.

From the written stipulation of facts upon which the cause has been submitted, it appears that the defendant is a common carrier engaged in interstate commerce by railroad in and through the states of Washington, Idaho, and Montana. Upon July 10, 1912, it directed Burgen, one of its locomotive firemen, to fire its locomotive engine which was to pull, and did pull, a freight train carrying commodities moving in interstate commerce, from Hillyard to La Clede, over what is known as the Spokane division of the defendant's railway system. He began firing and the train left the station of Hillyard at 6 o'clock a. m. on July 10th, and he continued to discharge his duties as fireman while the train was moving to La Clede, at which point it arrived at 9:59 o'clock p. m. of the same day, a period of 15 hours and 59 minutes. Upon the arrival of the train at La Clede it was run into the siding or side track leading out of and into the main line of the defendant's main track, and thereupon it occupied only the side track, leaving the main line clear for the unobstructed movement of trains approaching and passing through La Clede station. The switches at each end of the side track were thereupon locked, and thereafter remained locked in such position that the train could not leave the side track, and no other train could pass from the main line to and upon the side track. The brakes were set so that neither the train nor the engine could move without first releasing the brakes. After the train was thus "tied up," as the process is called, at 10:30 o'clock p. m. on July 10th, it remained stationary on the siding, and no member of its crew, including Burgen, received or was obliged or permitted to receive any order with reference to the future movement of the train or engine. Burgen, however, was permitted and required to remain upon the engine continuously thereafter, until 6 o'clock the next morning, during which time he was on duty as an engine watchman, charged

with the performance of no other duty or work than that of engine watchman. These duties consisted of watching the quantity of water in the boiler of the engine and in replenishing the same so that the engine would always have an adequate supply of water whereby steam could be efficiently and promptly generated, so that when the engine was again to be moved it could be moved under its own steam, and without the delay incident to waiting until steam could be generated afresh, and in watching the fire in the fire box, and replenishing the same with fuel, so that there would always be a sufficient fire to generate steam. At 6 o'clock in the morning of July 11th Burgen was relieved by another fireman, and thereupon he retired to the train for rest, and did not again go on duty or perform duties of any kind until after he had five days of rest.

From this abstract of the facts, as stipulated, it appears that Burgen was actually engaged as fireman a little less than 16 hours, but as fireman and engine watchman he was on duty continuously for 24 hours, and the question for determination therefore is whether, under the circumstances, his service as engine watchman brings the case within the statute. Conceding, as urged, but not deciding, that Burgen's service as engine watchman was not directly or indirectly connected with the movement of the train, he was primarily a locomotive fireman, and, as such, an "employé," as defined by the act, and was therefore subject to its operation. The defendant takes the position that by temporarily turning aside from his regular duty the employé becomes, and for the time being remains, exempt; but to this view I am unable to assent. While the statute is susceptible to such a construction, its prohibition is not, in terms at least, limited to service having to do directly or indirectly with the movement of trains. The language of the second section is:

"It shall be unlawful * * * to permit any employé subject to this act to be or remain on duty for a longer period than 16 consecutive hours."

There is here no express limitation of the operation of the act to a specific duty or class of duties; the limitation is rather to a class of employés, namely, those "actually engaged in or connected with the movement" of trains. The act must therefore be construed, and being remedial in its nature it must receive such construction as will give to its general purpose reasonable effect. *United States v. Kansas City S. Ry. Co.* (D. C.) 189 Fed. 471; *United States v. Missouri Pacific Ry. Co.*, 206 Fed. 847 (decided by District Court for District of Kansas March 22, 1913).

Now the defendant's position is that the time Burgen was engaged in watching the engine is not to be counted, because, during such period, he was performing a duty having no connection with the movement of any train. Plainly in that view the test, and the only test, is the relation of the specific service to the movement of trains. Logically, therefore, it is wholly immaterial whether the service as watchman follows or precedes the service as fireman, or intervenes. It has no more connection with the movement of trains in the one case than in the other, and if want of such connection operates to exclude it

from consideration it is to be excluded the same in one case as in another. But clearly the purpose of the act could in part be very easily frustrated if an employé could be lawfully kept on watch for eight hours, and then immediately be required to fire an engine in transit for 15 hours and 59 minutes; or if he could be required to fire for 8 hours, then watch for 8 hours, and then fire again for 8 hours, all consecutively. It is not to be assumed that such a contingency, which is entirely possible under the construction urged by the defendant, was contemplated in the passage of the act. True, the violation of the spirit of the statute is more apparent in such a case, where the service as watchman precedes the service as fireman, than where, as here, it follows such service; but the difference is one of degree only, and the courts cannot with nicety distinguish between service which materially impairs and that which impairs only to an inappreciable extent the efficiency of a trainman. That 24 hours of continuous service, without sleep, is unnatural, cannot be gainsaid, and that if persisted in for any considerable length of time, even with liberal intervals of rest, it might injuriously affect the trainman's efficiency, is not unreasonable to believe. I cannot avoid the conclusion that it was the intent and purpose of Congress that men charged with the responsibility of safely moving trains in interstate commerce should not be required or permitted to work continuously for more than 16 hours at any one time. It has been suggested that the carrier has no power to compel its employes to rest, and when given the opportunity for rest they may use the time in laboring upon their own account or for some other employer, but such a contingency is remote in the extreme; at least it is one with which we are not presently concerned. Without further discussion, my conclusion is that, under a proper construction of the act, locomotive firemen, engineers, conductors, and other members of train crews, being "employes" as that term is defined, cannot be permitted to be on duty for more than 16 consecutive hours, regardless of the question whether such duty consists in whole or only in part of work directly connected with the movement of trains. In this view, and upon the facts stipulated, it must be held that the defendant is guilty.

As to the penalty, I entertain no doubt that the defendant acted in good faith, upon the belief that it was not violating the law, and it is therefore thought that a fine of \$100 will satisfy the ends of justice. Judgment will be entered for that amount.

EVANS v. SIOUX CITY SERVICE CO. et al.

(District Court, N. D. Iowa, W. D. August 18, 1913.)

No. 29, Law.

1. REMOVAL OF CAUSES (§ 107*)—PROCEEDINGS FOR REMAND—BURDEN OF PROOF.

Where a foreign corporation removed an action for personal injuries to the federal court, alleging that the plaintiff fraudulently joined resident individuals for the purpose of preventing the removal, and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintiff, in a motion to remand, denied the allegations of fraud, the burden of proving fraudulent joinder is upon the foreign corporation.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225-232, 234; Dec. Dig. § 107.*]

2. REMOVAL OF CAUSES (§ 107*)—PROCEEDINGS FOR REMAND—ISSUES.

Where a motion to remand, which includes a denial by the plaintiff of the defendant foreign corporation's allegation that a resident was fraudulently joined as defendant to prevent a removal to the federal court, is submitted on the pleadings, the only question presented is whether the plaintiff's petition in the action states a joint cause of action against both defendants.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225-232, 234; Dec. Dig. § 107.*]

3. REMOVAL OF CAUSES (§ 36*)—GROUNDS—FRAUDULENT JOINDER OF PARTIES.

The fact that a person, injured by a street car, had dismissed a former action against the company, a foreign corporation, and its motorman, upon failing to obtain service upon the motorman, and thereafter instituted an action against the company and its motorman and conductor, does not prove that the plaintiff fraudulently joined the conductor and motorman in order to prevent a removal of the case to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

4. REMOVAL OF CAUSES (§ 47*)—INJURIES TO PERSON ON TRACK—VIOLATION OF ORDINANCE—JOINT LIABILITY.

A petition for personal injuries, which alleged that a foreign corporation and its resident conductor negligently operated a street car, which was not equipped with a fender, as required by ordinance, alleges joint negligence on the part of the conductor and the company, even though the former was under no duty to equip the car with a fender.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 92; Dec. Dig. § 47.*]

At Law. Action by Lavina B. Evans, administratrix, against the Sioux City Service Company and others. On motion of the plaintiff to remand the cause to the state court. Motion granted.

E. M. Corbett and Edwin J. Stason, both of Sioux City, Iowa, for plaintiff.

J. L. Kennedy and J. P. Shoup, both of Sioux City, Iowa, for defendants.

REED, District Judge. This action was commenced in the state court by the plaintiff, as administratrix of the estate of Lewis Frank Evans, to recover damages of the defendants for their alleged joint negligence in causing the death of plaintiff's intestate. The Sioux City Service Company, a New Jersey corporation, in due time removed the cause to this court, upon the ground of a separable controversy between it and the plaintiff, and the diverse citizenship of said parties, and that the defendant Thompson, a citizen of Iowa, of which state the plaintiff is also a citizen, was fraudulently joined as a defendant with it to prevent it from removing the cause to this court. The plaintiff moves to remand.

The original petition of the plaintiff alleges that the defendant Hay was motorman, and defendant Thompson the conductor in charge, of a street car in Sioux City, Iowa, operated by the defendant Sioux

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

City Service Company upon its tracks in that city, and that Thompson as such conductor, and said Sioux City Service Company jointly operated said car at a negligently high and dangerous rate of speed, without giving any warning of the approach of said car, and by such joint negligence and wrongful acts caused the death of plaintiff's intestate as he was about to board the car as a passenger. No notice or summons has been served upon the defendant Hay, and he has not appeared to the action. He will not, therefore, be considered as a party to the action.

The original petition plainly enough alleges the joint and concurring negligence of the Sioux City Service Company and Thompson as the conductor in charge of the car which caused the death of plaintiff's intestate. By an amendment to the petition the plaintiff added to the paragraph so charging such joint negligence the following:

"And in negligently, carelessly, and illegally operating the said car without maintaining on the front end thereof a properly constructed fender, one so constructed and attached as * * * to fully protect persons from injury who are on or near the street railway tracks, over which defendants were operating said car, and in violation of an ordinance of the city of Sioux City requiring fenders for such cars."

This averment so added to the original paragraph of the petition charges both Thompson and the Sioux City Service Company jointly with negligence in operating the car at a high and dangerous rate of speed, and without a fender, as required by the Sioux City ordinance. The ordinance is not attached as a part of the plaintiff petition.

The petition for removal, filed after the amendment to the petition was made, alleges specifically and with much detail that the alleged joint cause of action against defendant Thompson is false and fictitious, known by the plaintiff to be so, and that it was made without any intention of proving the same, and for the express purpose of preventing the corporate defendant from removing the cause to this court. These allegations of the petition for removal are denied by the plaintiff, and the joint negligence of both the defendant Thompson and the corporate defendant, as alleged in the original petition and amendment thereto, are reiterated, and alleged to have been made in good faith. No proof was taken or submitted by the removing defendant in support of its allegations of the fraudulent joinder with it of the defendant Thompson, except that attached to the petition for removal is a copy of a former petition filed by the plaintiff in the state court against the removing defendant and the defendant Hay as its motorman, in which it is alleged that both said defendants were jointly negligent in operating the car, which caused the death of plaintiff's intestate, and the record of the state court showing the dismissal of such petition by the plaintiff upon the filing by the corporate defendant of a petition to remove the cause to the federal court. The motion to remand this cause is submitted upon the petition of the plaintiff in this suit, the petition for removal by the corporate defendant, with the copy of the petition and record of the former suit in the state court attached, and the present motion to remand.

[1, 2] It was incumbent upon the corporate defendant to establish

in this court its allegations of the fraudulent joinder of the defendant Thompson with it for the purpose of preventing the removal, upon the denial by plaintiff of the allegations of the petition for removal charging such fraudulent joinder. *McGuire v. Great Northern Ry. Co.* (C. C.) 153 Fed. 434. And the submission of the motion to remand upon the pleadings, including such denial by the plaintiff, presents only a question of law arising upon the face of the record as to whether or not the petition of the plaintiff as amended states a joint cause of action against both the corporate defendant and the defendant Thompson. That it does so is not doubted.

[3] Nor does the fact that plaintiff dismissed her former petition against the corporate defendant and its motorman, Hay (who was named as a defendant in that suit, but was not served with notice thereof), when a petition for removal of that suit was filed, establish fraudulent conduct upon her part in making the defendant Thompson a joint party defendant to this suit. It was her legal right to bring suit in the state court against all or any of the defendants who were jointly liable to her for causing the death of her intestate (*Powers v. C. & O. Ry. Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673), and her motive in exercising that right cannot be impugned or rightly held to be fraudulent upon her part (*C. & O. Ry. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; *Illinois Central R. R. Co. v. Sheegog*, 215 U. S. 308, 30 Sup. Ct. 101, 54 L. Ed. 208).

[4] It is said in behalf of the removing defendant that the allegation of the amendment to the petition "that the car was being operated without a proper fender" fails to show any duty resting upon the conductor, Thompson, to equip such car with a fender, or that his failure to do so was negligence upon his part; that that was the duty of the Service Company alone, and its failure to do so its negligence alone. But the allegation of the plaintiff's petition is that both defendants operated the car without such fender, regardless of whose duty it was to equip the car therewith. Whether or not the plaintiff can establish such allegation alone as a ground of joint negligence against both defendants will not be determined upon the motion to remand. She has the right to make the charge in connection with the other allegations of joint negligence, and prove it if she can; and the charge is so made in connection with the other allegations of the joint neglect of both defendants that it cannot be separated and alone rightly held to show a separable controversy between the plaintiff and the removing defendant. See *Southern Ry. Co. v. Carson*, 194 U. S. 136, 24 Sup. Ct. 609, 48 L. Ed. 907.

The motion to remand must therefore be sustained, and the cause remanded to the state court. It is so ordered.

In re WATERS-COLVER CO.

(District Court, E. D. New York. July 14, 1913.)

BANKRUPTCY (§ 188*)—PROPERTY PASSING TO TRUSTEE—RETENTION OF LIEN BY SELLER—CONDITIONAL SALE.

Where a creditor furnished boilers to the bankrupt, with the understanding that they were to be used in a vessel being built by the bankrupt under contract for the United States, the creditor could not retain title to, nor a lien upon, the boilers, nor did it have any equitable right in, or lien upon, the contract or its proceeds, as against the trustee or other creditors, in view of Rev. St. § 3477 (U. S. Comp. St. 1901, p. 2320), which makes void an assignment of any interest in government contracts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286–289, 291–295; Dec. Dig. § 188.*]

In the matter of the Waters-Colver Company, bankrupt. On report of commissioner on petition of the Badenhausen Company. Report confirmed, and petition denied.

Hunt, Hill & Betts, of New York City (William H. Peck, of New York City, of counsel), for petitioners.

Alexander & Ash, of New York City (Mark Ash, of counsel), for trustee.

CHATFIELD, District Judge. The facts are stated in the commissioner's report and need not be repeated. The record shows that the Badenhausen Company wished to have the Waters-Colver Company use the Badenhausen boilers in a government contract for the tug Vigilant. They asked the Waters-Colver people to obtain authority therefor. The contract was signed with that end in view, and other arrangements were made with the government showing that all parties contemplated that title in the boilers would pass to the government.

Such a situation would defeat reservation of title to the boilers themselves, and the special commissioner has found that the parties did not in fact intend the transfer to be a conditional sale. The clause reserving title was in the body of the contract, which differs from the facts in the case of *In re George O. Hassam & Son* (D. C.) 153, Fed. 932; but the commissioner's finding makes the situation like the one passed upon in that case. This finding should be upheld unless plainly contrary to the evidence (*In re Stout* [D. C.] 109 Fed. 794; *In re Schwartz* [D. C.] 179 Fed. 767); but, aside from the question of intent, the same result must be reached.

Further, any attempt to work out an equitable lien or assignment of an interest in a government contract is impossible. Section 3477, R. S. (U. S. Comp. St. 1901, p. 2320); *National Bank of Commerce v. Downie*, 218 U. S. 345, 31 Sup. Ct. 89, 54 L. Ed. 1065, 20 Ann. Cas. 1116; *Smedley v. Speckman*, 157 Fed. 815, 85 C. C. A. 179. Nor can there be an equitable lien against the trustee or against creditors, where the legal title has passed, and where to defeat the legal title would be to carry out a fraud in law, even if the parties had no intent to defraud. As a matter of fact, the government officers gave no

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

thought to any idea of this sort, and their acquiescence would not have bound the United States, in the face of positive law.

The Badenhause Company assigned their claim against the Waters-Colver Company to a trust company, and also, a short time after the petition in bankruptcy against the Waters-Colver Company, filed the so-called conditional bill of sale under the laws of the state of New York. The assignee would succeed to the rights of the Badenhause Company against the bankrupt; but an assignment of this sort would not add any rights against the bankrupt's claim of its contract with the United States, nor has the filing of the bill of sale changed the situation, for there are no subsequent mortgages or purchasers for value since the date of filing. Personal Property Law N. Y. (Laws 1909, c. 45 [Consol. Laws 1909, c. 41]) art. 4, § 62.

If filed before use of the boilers on the government contract, the title would still have passed, and the government would not have been bound to recognize the vendor as a party to its contract with the vendee. This would be in effect an assignment of a part of the vendee's claim against the United States. It is plainly shown that all the parties expected title to the boilers to pass to the United States, but Badenhause seems to have had the idea that his title to the boilers would be immediately transferred to the \$3,500 item of the contract, and that such a claim would be good against creditors of the Waters-Colver Company. Hence his attempt to assign the proceeds to the trust company.

Conditional sales are valid against the vendee, and against creditors generally, where no fraud is shown. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; *Wm. W. Bierce, Ltd., v. Hutchins*, 205 U. S. 340, 27 Sup. Ct. 524, 51 L. Ed. 828; *Bryant, Trustee of Newton & Co., Bankrupts, v. Swofford Bros. Dry Goods Co.*, 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997; *Dunlop v. Mercer*, 156 Fed. 545, 86 C. C. A. 435; *In re Garcewich*, 115 Fed. 87, 53 C. C. A. 510. These cases hold that a conditional sale will be tested by the law of the state thereon.

But, as in the case of a chattel mortgage, a reservation of title cannot be coupled with a plain intent to transfer that title. If intent to substitute the proceeds for the chattels be expressed, or be evident from the instrument involved, then the validity of such an intent must be tested by the law of the place where the contract is made.

A trustee in bankruptcy now has the rights of any creditor, as well as those of the bankrupt himself, and the doctrine of *York Mfg. Co. v. Cassell*, *supra* (1905), has thus been amplified. The amendment of the law has entirely validated the statements of the court in the *Garcewich Case*, *supra*, at the bottom of page 89, even if there were questions about the point previously. Act July 1, 1898, c. 541, § 47, cl. 2, subd. "a," 30 Stat. 557 (U. S. Comp. St. 1901, p. 3439), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500).

The trustee's rights under this section attached to all property "coming into the custody of the bankruptcy court." This included the claim against the United States (or the money received therefrom).

A creditor holding "a lien by legal or equitable proceedings," on May 24, 1911, would have been able to treat the then unfiled bill of conditional sale as absolutely void. The trustee, therefore, received property which a creditor, with a valid pledge of the bankrupt's assets, would have held against a conditional bill of sale, void (so far as this lien was concerned) for lack of filing.

But the same result is reached if we consider the direct proposition (as held by the commissioner) that a conditional sale of the chattels, where transfer of title of the chattels is contemplated at the time of reservation of title in the vendor, is a fraud and invalid, whether the instrument be filed or not. Such is the decision of the Garcewich Case, and such is the law of New York. *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285; *In re Garcewich*, supra; *Millicie v. Pearson*, 110 App. Div. 770, 97 N. Y. Supp. 431; *Southard v. Benner*, 72 N. Y. 424; *In re Carpenter* (D. C.) 125 Fed. 831; *In re Liberty Silk Co.* (D. C.) 152 Fed. 844; *Pontiac Buggy Co. v. Skinner* (D. C.) 158 Fed. 858; *In re George O. Hassam & Son*, supra.

It was held in *Dunlop v. Mercer*, supra, that prior to the amendment of 1910 the laws of Minnesota and other states (*In re Gray* [D. C.] 170 Fed. 638; *Bryant v. Swofford*, supra; *York v. Cassell*, supra; *Harkness v. Russell*, supra) were to the opposite effect; but the decisions of New York and this circuit are binding here, and a fraudulent attempt to retain title, which would not be binding against creditors, cannot be validated because of lack of understanding that an interest in a government claim cannot be assigned.

The report of the commissioner will be confirmed, and the petition of the *Badenhausen Company* denied.

UNITED STATES v. MISSOURI PAC. RY. CO.

(District Court, D. Kansas, First Division. March 24, 1913.)

No. 1,256.

RAILROADS (§ 230*)—REGULATIONS—HOURS OF SERVICE ACT—WATCHMAN OF ENGINE—MOVEMENT OF TRAIN—"EMPLOYÉS."

Within Act March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1911, p. 1321), regulating the hours of service of employés of railroads in interstate commerce, "employés" being defined as "persons actually engaged in or connected with the movement of any train," a locomotive fireman, while acting as watchman of his engine when it and its train is being drawn by another locomotive, his duties at such time being to keep up a certain amount of fire and see that the water does not run too low and that a certain amount of steam pressure is preserved, is actually engaged in connection with the movement of the train, so that time so consumed by him is within his hours of service.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 744; Dec. Dig. § 230.*

For other definitions, see Words and Phrases, vol. 3, pp. 2369-2377; vol. 8, p. 7649.]

Action by the United States of America against the Missouri Pacific Railway Company. Judgment for plaintiff.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

H. J. Bone, A. M. Harvey, and C. D. Briggs, all of Topeka, Kan., for the United States.

Waggener & Challiss, of Atchison, Kan., for defendant.

POLLOCK, District Judge. This action, in three counts, was brought by the government to recover penalties provided for violations of Act of Congress March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1911, p. 1321), commonly designated as the Hours of Service Act.

The facts, as stipulated by the parties in the several counts of the petition, are, briefly summarized, as follows:

Count 1. The defendant permitted its locomotive fireman, Roy Scott, to go on duty on October 18, 1911, at 6 a. m. The run of this engine was from Pueblo, Colo., to the station of Horace, this state. That at 10 p. m. on the night of that day the engine, not having completed its run, and having reached the station of Keyser, this state, the fireman signed the "rest register" but was by defendant company thereafter permitted to remain on his engine as watchman in charge until the engine was drawn by another engine to the end of the run, Horace station, which was reached at 11:30 p. m. that night; the hours of continuous service of Scott on that day being, as locomotive fireman from 6 a. m. to 10 p. m., as watchman in charge of the engine from 10 p. m. to 11:30 p. m., total, 17½ hours.

Count 2. That on the following day said Scott as locomotive fireman was required to go out on his run from Horace, this state, to Pueblo, Colo., at the hour of 8 o'clock a. m. without having had the 12 hours of rest from his former day's service as required by the statute, if the time he was engaged as watchman on the previous day should be computed as hours of service within the purview of the act.

Count 3. The defendant on October 20, 1911, permitted its locomotive fireman O. M. Provorse, on a run from Pueblo, Colo., to Horace, this state, to remain on duty as fireman preparatory to going out on his run, from 5:30 a. m. to 6:30 a. m., and to serve as fireman of the locomotive on his run from 6:30 a. m. to 9:30 p. m., and as watchman in charge of his engine while it was drawn by another engine from Sheridan Lake, Colo., to the end of the run at Horace, Kan., which station was reached at the hour of 3:50 a. m. on the morning of October 21st, thus permitting and requiring its said locomotive fireman Provorse to be on duty preparatory to going out on his run one hour, to be actually engaged as locomotive fireman on his run fifteen hours, and to act as watchman of his engine while being drawn to the station of destination six hours, or, a continuous service of twenty-two hours, if the space of six hours in which he watched his engine while it was being drawn shall be computed.

From the statement made it is obvious the question presented is: Shall the time spent by the fireman as watchman in charge of his engine being drawn by another engine to the terminal station be computed in the hours of service as contemplated by the statute?

As stated in the stipulation of the parties, the duties of the fireman so engaged as watchman in charge of his engine are to keep a certain amount of fire in the furnace, to see the water does not run too low

in the boiler, and that a certain amount of steam pressure is preserved. Aside from such duties, the engine employed in drawing the train is in charge of another crew as is the movement of the train itself.

The term "employés," as employed in and defined by the act itself, is "persons actually engaged in or connected with the movement of any train." While it is quite clear a watchman so in charge of an engine has no control over the train movement, hence is not actually engaged in such movement, it is not so clear he is in no manner connected with the movement of the train.

While the question presented is, so far as I find, of first impression, yet, considering the remedial nature and humane purpose of the act, the character of the duties imposed upon such watchman, as stipulated by the parties, and all the facts and circumstances presented by the record to which consideration should be given, I am forced to the conclusion the time so spent by a locomotive fireman in watching his engine must be computed as hours of service within the purview of the act, and for the following, among other reasons which might be given:

The humane feature of the statute being considered, it must be thought the Congress intended, at or before the expiration of the 16-hour period of service provided therein, an employé engaged in the movement of the train would, from exhaustion of body and mind, be in need of relaxation and rest, freed from all responsibility and care for the safety of himself and others. That the cab of a moving engine in which such watchman is required to ride is not such place as in the absence of any duty to be performed is conducive to that rest and relaxation required by the statute is a matter of common experience and knowledge. However, when to this self-evident fact, as in this case, there is superadded the duties imposed on one so situate, as by the parties stipulated, the question of relaxation, rest, and sleep required by the statute must be almost if not altogether, impossible.

Again, aside from the humane purpose of the act, regarded from the standpoint of the welfare of the employé himself, and looking alone to the safety of the employé and others, it is evident the nature of the duties required of such watchman, if from loss of vigilance through exhaustion or sleep, he should permit the water in the boiler to be entirely consumed, the danger from wreck of the train or other disaster by explosion involving himself and others is apparent.

All things considered, I am of the opinion it must be held such watchman is in a manner actually engaged in connection with the movement of the train, and to such extent as brings the time so consumed within the hours of service as contemplated by the act. If such construction of the statute is correct and it shall impose a burden too severe on railroad companies, the remedy lies with the lawmaking power, not the courts.

It follows, on the agreed facts, judgment on all counts must enter for the plaintiff. However, as the defense is meritorious, and the question presented thereby one of first impression, the amount of the penalty assessed on each count will be the sum of \$100.

Let judgment enter for \$100, and costs, on each count of the petition.

In re HALL et al.

(District Court, N. D. Iowa, C. D. August 18, 1913.)

No. 915.

1. CORPORATIONS (§ 90*)—STOCK SUBSCRIPTIONS—ENFORCEMENT—NECESSITY OF TENDER.

Where a stock subscription contract provided for payment of one-third of the amount at the time of the subscription and the balance in two equal payments, to be made in three and six months from such date, and further provided that when the total amount of the subscription should be paid the company would deliver the stock, the company's agreement to issue certificates for the stock was not a condition subsequent, but one to be performed simultaneously with the final payment by the subscriber; and hence, where such certificates were never delivered or tendered, the amounts agreed to be paid could not be recovered by the corporation or its assignee.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 245, 383-419; Dec. Dig. § 90.*]

2. CORPORATIONS (§ 90*)—STOCK SUBSCRIPTIONS—ENFORCEMENT—NECESSITY OF TENDER.

Where under a stock subscription contract the corporation could not recover amounts agreed to be paid, without delivering or tendering certificates for the stock, one who, upon the corporation's becoming bankrupt, purchased the subscription contract, stood in no better position than the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 245, 383-419; Dec. Dig. § 90.*]

In the matter of George B. Hall and another, bankrupts. Claim of the Lumbermen's Cement & Brick Company, presumably a corporation. An order was entered by the referee rejecting the claim, and the claimant petitions for a review. Order approved.

J. L. Bonar, of Algona, Iowa, for petitioner.

E. V. Swetting, of Algona, Iowa, for trustee.

REED, District Judge. April 27, 1909, the bankrupt, George B. Hall, subscribed in writing for \$500 of the preferred and common stock of the Lumbermen's Portland Cement Company, a Kansas corporation, which contract reads as follows:

"Original Subscription to Stock of Lumbermen's Portland Cement Company.

* * * * *

"Payment on this contract to be made only by draft or check payable to the order of the company.

"I hereby subscribe and agree to take five shares of the 7 per cent. interest-bearing preferred stock of the Lumbermen's Portland Cement Company, said shares being of the par value of one hundred (\$100.00) dollars each, for which I agree to pay *five hundred* (\$500) dollars, as follows: One-third at the time of making my subscription; the balance in two equal payments of three and six months from date.

"The company will issue its receipt for each payment when made, and, when the total amount of my subscription for stock shall have been paid, deliver said stock, together with a like amount of common stock of the Lumbermen's Portland Cement Company as a bonus. Stock certificates will bear date corresponding to date of second payment on this contract.

"Name: *George B. Hall.*

"P. O. Address: *Wesley, Iowa.*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"In consideration of above subscription, the Lumbermen's Portland Cement Company agrees to return to the purchaser in cement or brick, at the ruling market price thereof, at the time of ordering the same, the amount of the above investment as a bonus, such return to be made within a period of four years from date of completion and beginning of operation of its plant, in proportion of one-fourth of the amount each year, and not to exceed one-fourth of each year's allotment to be returned during any three-months period of each year.

"It is further agreed that the Lumbermen's Portland Cement Company will deliver the entire first year's proportion of cement or brick, due under this contract, during the year nineteen hundred and nine (1909).

"Lumbermen's Portland Cement Co.,

"Dated April 27, '09.

By W. G. Higley."

The words in italic are written with a pen; the rest of the instrument is printed.

Hall paid the first installment of his subscription, viz., \$166.67, at the time he signed the instrument. Some time after, but just when does not appear, the Lumbermen's Portland Cement Company was adjudged bankrupt, by what court does not appear, and at a sale of its assets pursuant to an order of the bankruptcy court the contract above set forth was sold to the petitioner, the Lumbermen's Cement & Brick Company, and in due time it filed proof of a claim for \$333.-33 against the bankrupt estate of George B. Hall, based upon said instrument, and asked that it be allowed as a claim against said estate. The trustee of the estate objected to its allowance upon the grounds, in substance, that the Lumbermen's Portland Cement Company had not complied with its part of the contract, in that it had not issued to Hall the certificates of stock as provided in the writing, nor tendered such certificates to him, or to the trustee in bankruptcy of his estate; that the Portland Company is now bankrupt, and cannot perform its part of the contract, and had refused to furnish to Hall any cement or brick, as it had agreed to do upon the written request or demand of Hall that it do so.

The referee sustained the objections of the trustee and entered an order refusing to allow the claim. The Lumbermen's Cement & Brick Company petition for a review of this order. Counsel for the petitioner contends that the agreements of the Lumbermen's Portland Cement Company above set forth were "conditions subsequent," and constituted no defense to the subscription contract of the bankrupt; that its agreement to return to Hall cement or brick equal to the amount of the stock subscription is void.

[1] We need not consider the second or latter contention of the petitioner above stated; for the agreement of the Lumbermen's Portland Cement Company to issue to Hall, upon final payment of his subscription, certificates for the preferred and common stock of its company, was to be performed by the company simultaneously with the payment by the bankrupt of the total amount of his subscription. This was not a "condition subsequent," but an undertaking by the Portland Cement Company to issue the certificates simultaneously with the final payment by the bankrupt of his subscription for the stock. The undertakings of the parties were mutual, and were to be performed at the same time. *Courtright v. Deeds*, 37 Iowa, 503; *Coop-*

er v. McKee, 49 Iowa, 286; Nelson v. Wilson, 75 Iowa, 710, 38 N. W. 134. The certificates of stock were never delivered or tendered by the Portland Company to the bankrupt before his bankruptcy; nor have they been delivered or tendered to his trustee since the bankruptcy.

[2] The petitioner, as assignee of the Lumbermen's Portland Cement Company, or as the purchaser of the subscription contract of the bankrupt as a part of its assets, stands in no better position under said contract than the Lumbermen's Portland Cement Company stood.

The order of the referee is approved.

In re HOLLO.

(District Court, N. D. Ohio, E. D. June 2, 1913.)

No. 909.

1. ALIENS (§ 69*)—NATURALIZATION—CERTIFICATE OF ARRIVAL.

Under Act June 29, 1906, c. 3592, § 1, 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 124), providing that it shall be the duty of the Bureau of Immigration and Naturalization to provide for use at the various immigration stations throughout the United States books of record, wherein the commissioners of immigration shall cause a registry to be made, in the case of each alien arriving in the United States, of his name, age, etc., date of arrival, and, if entered through a port, the name of the vessel in which he comes, and that it shall be the duty of such commissioners to cause to be granted to such alien a certificate of such registry, with the particulars thereof, and section 4, providing that, at the time of filing the petition for admission to citizenship, there shall be filed with the clerk of the court a certificate from the Department of Commerce and Labor, stating the date, place, and manner of the petitioner's arrival in the United States, where an alien deserted a ship on which he was employed at New York harbor, and entered the country without inspection, a certificate offered by him on an application for naturalization, which was not based upon his registry at the time of entry, but on information acquired at a hearing subsequent thereto at an immigration station at another port, and which was granted solely for the purpose of allowing him to file a petition, in order that the court might determine whether the certificate of arrival required by section 4 must be made up from the registration described in section 1, could not be accepted as complying with section 4, and before the applicant could be admitted to citizenship he must conform to the requirements of the law, and be properly inspected and manifested by the proper immigration officers.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 227; Dec. Dig. § 69.*]

2. ALIENS (§ 68*)—NATURALIZATION—PROCEEDINGS.

Citizenship is a privilege, and the laws prescribing the procedure necessary to perfect this status should be strictly followed.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-145; Dec. Dig. § 68.*]

Application by Edward Hollo for naturalization. Petition dismissed.

H. Hughes Johnson, of Cleveland, Ohio, for applicant.

U. G. Denman, U. S. Dist. Atty., and Cary Alburn, Asst. U. S. Atty., both of Cleveland, Ohio, for the United States.

DAY, District Judge. [1] Edward Hollo, the applicant for naturalization, was born in Hungary, March 17, 1885, and entered the United States on or about the 6th day of October, 1906, being then an alien and a subject of the king of Hungary. On December 10, 1912, he filed his petition for naturalization in this court, and attached to said petition what purported to be a certificate of landing in the following form:

"Certificate of Arrival—For Naturalization Purposes. (For use of aliens arriving in United States after June 29, 1906. To be issued immediately prior to petitioning for naturalization.)

"Department of Commerce and Labor.

"1404 Immigration Service. Serial No. 721,481.

"Filed December 10, 1912.

"B. C. Miller, Clerk, U. S. District Ct., N. D. O.

"Port of Cleveland, Ohio.

"The immigration records at this port show the following as to the alien named below:

"Edward Hollo.

"Date of Arrival: Oct. 6, 1906.

"Name of vessel: Kaiserin Augusta Victoria.

"Line: Ham.-Amer.

"Correspondence with Com'r of Immigration New York shows alien deserted ship at New York on Oct. 6, 1906, under name of Alex Gingery, native of Italy.

J. A. Fluckey,

"[Title] Inspector in Charge."

Indorsement:

"The above-named alien entered the United States without inspection. This certificate is *not* based upon registry of the alien at the time of entry, but from information acquired at a hearing subsequent thereto at the Cleveland immigration station.

"It is granted solely for the purpose of allowing the alien to file a petition, so that the court in which such petition is filed may judicially determine whether the certificate of arrival required by section four must be made up from the registration prescribed in section one of the naturalization act. This point should be brought to the attention of the court in every case in which it is used."

At the final hearing of his petition it appeared in evidence that the applicant deserted the Hungarian army and came to the United States under the name of Alexander Ginzeri, a native of Italy; that he used the passport of said Ginzeri, was employed in the kitchen on the steamship, came as a member of the crew, then he deserted the ship at New York Harbor, and entered this country without inspection.

Section 1 of the Naturalization Act of June 29, 1906 (34 Stat. 596, c. 3592 [U. S. Comp. St. Supp. 1911, p. 124]), provides in part as follows:

"That it shall be the duty of the said bureau to provide, for use at the various immigration stations throughout the United States, books of record, wherein the commissioners of immigration shall cause a registry to be made in the case of each alien arriving in the United States from and after the passage of this act of the name, age, occupation, personal description (including height, complexion, color of hair and eyes), the place of birth, the last residence, the intended place of residence in the United States, and the date of arrival of said alien, and, if entered through a port, the name of the vessel in which he comes. And it shall be the duty of said commission-

ers of immigration to cause to be granted to such alien a certificate of such registry, with the particulars thereof."

And section 4 of the same act (U. S. Comp. St. Supp. 1911, p. 530) provides in part:

"At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Commerce and Labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the United States," etc.

It was undoubtedly the purpose of Congress in enacting this legislation to afford a reliable method of ascertaining the exact date of arrival in this country of aliens.

[2] Citizenship is a privilege, and the laws prescribing the procedure necessary to perfect this status should be strictly followed. The fact of arrival is a most important one, and Congress evidently thought so when it passed the act in question. The certificate offered by the applicant is simply a record of a statement made by him. It is not verified, and it is at the most a formal record of what he said to the immigration authorities.

Public policy would require that this applicant should comply with all the provisions of the naturalization laws before he should be entitled to citizenship. He has not furnished the certificate required. This may be a hardship in this individual case, but the law was passed to provide for the naturalization of the many aliens coming to this country yearly, and its purpose would not be subverted, were any other interpretation given it than the one I have indicated.

The applicant should conform to the requirements of the law, be properly inspected and manifested by the proper immigration officers, and then refile his petition for naturalization.

The present petition is dismissed without prejudice.

STEPHENS v. CHICAGO, M. & P. S. RY. CO.

(District Court, D. Idaho, N. D. July 10, 1913.)

No. 547.

REMOVAL OF CAUSES (§ 17*)—ACTION UNDER EMPLOYER'S LIABILITY ACT—
WAIVER OF OBJECTION.

The provision of Employer's Liability Act April 22, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act April 5, 1910, c. 143, § 1, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1324), that an action brought thereunder in a state court of competent jurisdiction shall not be removed, confers a personal privilege on the plaintiff which he may waive, and does waive, where he fails to object to a removal when made and thereafter invokes the affirmative action of the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 10; Dec. Dig. § 17.*]

At Law. Action by J. W. Stephens against the Chicago, Milwaukee & Puget Sound Railway Company. On motion to remand to state court. Motion denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Elder & Elder, of Cœur d'Alene, Idaho, for plaintiff.
Geo. W. Korte, of Seattle, Wash., and J. L. McClear, of Cœur d'Alene, Idaho, for defendant.

DIETRICH, District Judge. This action, which involves a claim for personal injuries received by the plaintiff while he was in the employ of the defendant as car inspector and repairer, was commenced in the state district court, and thereafter, upon the defendant's petition, was brought here on removal. The transcript of the record was filed with the clerk upon June 29, 1912. Thereafter, upon stipulation of the parties, the plaintiff procured leave to amend, and accordingly he filed an amended complaint on August 28, 1912. Subsequently the defendant filed demurrer and motion to strike out certain portions of the amended complaint, which motion and demurrer were allowed in part. Thereafter, namely, upon May 31, 1913, the defendant filed its answer, and upon the application of the plaintiff the cause was set down for trial. Later, upon June 9th, the defendant moved for a continuance of the cause on account of the absence of material witnesses, and while this motion was still pending the plaintiff moved that the cause be remanded to the state court, upon the ground that the causes of action pleaded are, as claimed, based upon the Employer's Liability Act of Congress approved April 22, 1908, c. 149, 35 Stat. 149 (U. S. Comp. St. Supp. 1911, p. 1322), as amended by the Act of April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1324). Up to this time—that is, up to June 9, 1913—the plaintiff had never suggested want of jurisdiction or made any objection to the jurisdiction of this court, and, upon the other hand, had invoked the exercise of such jurisdiction to the extent already explained.

I am inclined to the view that under the rule as announced by the Supreme Court of the United States in *St. Louis, San Francisco & Texas Ry. Co. v. Maud Seale et al.*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. —, and *Martin Pedersen v. Delaware, Lackawanna & Southeastern R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. —, both decided May 26, 1913 (see advance sheets), each of the two causes of action as set forth in the original complaint must be deemed to be based upon the Employer's Liability Act, and that the case was not originally removable to this court. The motion to remand must therefore be allowed, unless it be held that the plaintiff in such an action can waive the right to object to removal; under the facts there can be no question of such waiver, provided the power to waive exists. The Liability Act, as amended April 5, 1910, provides that:

"The jurisdiction of the courts of the United States under this act shall be concurrent with the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction, shall be removed to any court of the United States."

Inasmuch as the requisite diversity of citizenship and the value of the matter in dispute are present, it will be seen that the subject-matter of the action is within the general jurisdiction of this court, and that it was optional with the plaintiff whether he would commence the action in the state court or bring it here. It is not a case, therefore,

where the court is without jurisdiction of the subject-matter, and while it is provided in the statute that no such case, when "brought in any state court of competent jurisdiction, shall be removed to any court of the United States," the provision does not indicate an unwillingness on the part of Congress that federal courts exercise such jurisdiction, for it is by express language conferred upon both federal and state courts concurrently, and the plaintiff could as well have brought the action here as in the state court. It is apparent that the prohibition against removal is for the benefit, and is a personal privilege, of the plaintiff, and, if he could have originally brought the suit in this court, there is no reason why he could not waive his privilege, and, after the commencement of the action in the state court, consent to the removal thereof to this court. I perceive no substantial distinction in principle between such a provision and section 51 of the "Judicial Code" (Act March 3, 1911, c. 231, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 150]), which declares that:

"No civil suit shall be brought in any district court against any person in any other district than that whereof he is an inhabitant."

One appears to be quite as mandatory as the other. And yet it is well settled that the right thus conferred of having the suit brought in the district of his residence is a personal privilege which the defendant may waive. *Kreigh v. Westinghouse & Co.*, 214 U. S. 252, 29 Sup. Ct. 619, 53 L. Ed. 984; *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 52 L. Ed. 904, 14 Ann. Cas. 1164. That the plaintiff, in an action under the Employer's Liability Act, may waive the right to have it remanded by failing seasonably to object to its removal, is held in *Thomas v. Chicago & N. W. Ry. Co.* (D. C.) 202 Fed. 766. See, also, *Detroit Trust Co. v. Bank*, 196 Fed. 29, 115 C. C. A. 663.

It appearing therefore that the objection is one which the plaintiff may waive, and that here the plaintiff has, both by acquiescence and by invoking the interposition of this court, consented to its jurisdiction, the motion to remand will be denied.

In re HALE.

(District Court, D. New Mexico. May 5, 1913.)

No. 39.

1. BANKRUPTCY (§ 408*)—DISCHARGE—FALSE OATH.

Bankr. Act July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427) § 14b, precludes a discharge in case the bankrupt has committed an offense punishable by imprisonment as therein provided, and section 29b (2) provides for the punishment of a bankrupt by imprisonment when he has made a false oath or account in, or in relation to, any proceeding in bankruptcy. *Held*, that a false oath made by a bankrupt, to prevent a discharge, must have been knowingly and fraudulently made, and will be so considered when he states matters which he does not believe to be true, willfully and contrary to his oath.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.*]

2. BANKRUPTCY (§ 408*)—DISCHARGE—FALSE OATH.

An objection was filed to a bankrupt's discharge on the ground that he had made a false oath that he had no real estate, when in fact he held the legal title to certain real estate according to the records. The land in question was bought with funds derived from property the legal title to which was vested in the bankrupt's wife during her lifetime, and was located in Missouri and Texas, under the laws of which the wife's property on her death descended to the children, subject to a life estate in the husband, at least to the extent of one-third of the property. *Held*, that the bankrupt was charged with knowledge of his interest in the property, and that his oath that he owned no interest therein was willfully false and sufficient to prevent a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Josiah Hale. Application for discharge denied.

Spiess, Davis & Ilfeld, of East Las Vegas, N. M., for bankrupt.
Jones & Rogers, of East Las Vegas, N. M., for objecting creditor.

POPE, District Judge. This cause is pending before the court upon objections to the discharge of the bankrupt. These objections proceed upon three grounds. Objection numbered 3, in the present state of the record, is without evidence to support it; and as to objection numbered 1, counsel for objecting creditor has, with commendable frankness, expressed his doubt, which we find well founded, as to whether it is possessed of merit. This leaves the case pending upon objection numbered 2, which is that the bankrupt made a false oath in swearing in his schedules that he had no property or assets. Stating the matter more specifically, the alleged false oath consists in the oath of the bankrupt that he had no real estate, and that the interest in certain real estate in Mora county, as to which, according to the records, bankrupt held the legal title, was really in the bankrupt as trustee for his children, and that, as to such, bankrupt "claims no right, title, or interest therein or thereto, excepting as such trustee."

[1] The question is whether this was a false oath such as, under Bankr. Act, § 29b, in connection with section 14b (1), precludes his discharge. The last section provides that, in effect, there should be no discharge where the bankrupt has "committed an offense punishable by imprisonment as therein provided," and section 29b (2) provides for the punishment of the bankrupt by imprisonment where he has made "a false oath or account in, or in relation to, any proceeding in bankruptcy." Of course, the intent is a material element in such a matter. The false oath must have been knowingly and fraudulently made, and an oath may be considered to have been so made when made by a person who states matters which he does not believe to be true, willfully and contrary to his oath. *Wechsler v. United States* (C. C. A. 2d Cir.) 158 Fed. 579, 86 C. C. A. 37. Was the oath of the bankrupt here made that he had no real estate a false oath within the definition just given?

[2] It is shown that the real estate in question was bought with funds derived from property the legal title to which was vested in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the bankrupt's wife during her lifetime. This property was located in the states of Missouri and Texas. Under the laws of these states, so far as we can ascertain them, the property of the wife upon her death descended to the children, subject to a life estate in the husband, at least to the extent of one-third of the real estate. Notwithstanding this state of the law, the bankrupt swore that he had no interest in this real estate. He is presumed to have known the law, and there is no explanation afforded by his testimony as to why, contrary to the legal status of the matter, he made oath that he had no interest in this real property. Had he testified to advice of counsel upon the subject, or any other reasons leading to the belief that his oath upon this point was the result of mistake or improper advice, the case would have been brought within the rule laid down by this court in its opinion in other cases. In the absence of such explanation, it must be presumed that the affiant knowingly took oath that he had no interest in the real estate when charged by law with knowledge of such interest.

There are other reasons leading to the view that bankrupt believed he had an interest, but failed to disclose it. His own earnings, according to the record, largely contributed to the purchase of the property held by his wife at the time of her death. He seems to have pursued the course of delivering to her any surplus of his salary for investment, and her holdings, the proceeds of which went into this Mora county property, were the result of his own earnings. Not only legally, but as a matter of equity, he was interested in the property held by his wife, and it must be assumed that he had this in mind. In addition, during a long course of years he administered the property held by descent from his wife, in many instances held it out as his own, and otherwise demonstrating a claim of more than a naked legal title thereto. True, he claims that he was during all this period acting merely as trustee for his children; but such an attitude to the matter impresses me as unnatural, and as not in accordance with what he believed to be the facts. I am constrained to the view that he had an interest in this Mora county real estate, that he believed at all times that he had such interest, and that his oath to the effect that he had no such interest was made knowingly, and with the purpose of withholding from his creditors the knowledge of his affairs to which they were entitled under the Bankruptcy Act. In *re Breiner* (D. C.) 129 Fed. 155, is illustrative of the legal principles upon which this conclusion is reached.

The discharge prayed for will accordingly be denied.

PERKINS v. DORMAN.

(District Court, D. New Mexico. July 31, 1913.)

No. 106.

BANKRUPTCY (§ 76*)—INVOLUNTARY PROCEEDINGS—RELATIVE OF BANKRUPT.

Bankr. Act July 1, 1898, c. 541, § 59b, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3445), provides that one creditor, having a provable claim of \$500, may file an involuntary petition in bankruptcy, where the creditors are less

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

than 12. Section 59d provides that, where the answer alleges and it is proved that there are more than 12 creditors, the proceeding will be dismissed unless 2 other creditors join as petitioners. Section 59e provides that, in determining whether there are more than 12 creditors, employes and relatives within the third degree of the bankrupt, not joining as petitioners, shall not be counted. *Held*, that section 59e was intended to guard against fictitious creditors preventing bankruptcy, and that relatives were not prevented from bringing bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 50, 56, 97, 99, 100; Dec. Dig. § 76.*]

Petition in bankruptcy by William Rhoades Perkins against Harry Howard Dorman. On motion to dismiss the petition. Denied.

Wilson, Bowman & Dunlavy, of Santa Fé, N. M., and Cramer & Headley, of Cincinnati, Ohio, for petitioner.

Renehan & Wright, of Santa Fé, N. M., for respondent.

POPE, District Judge. This is an involuntary proceeding in bankruptcy, brought by a single petitioner, alleging a claim of more than \$500, and that the total number of the creditors of the alleged bankrupt is less than 12. It is stipulated that the petitioner is related to the defendant within the third degree of affinity by reason of defendant having married his sister. The case is now presented upon a motion to dismiss, upon the ground that an involuntary petition may not be prosecuted by such a relative as the sole petitioner.

This contention is urged upon the terms of section 59e of the Bankruptcy Act, which is as follows:

"In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted."

The argument is that as, in computing the number of creditors for the purpose of determining how many must bring the petition, relatives within the third degree who have not joined in the petition may not be counted, therefore such a relative may not, by himself, bring such a petition. This insistence in our opinion is untenable in a proper view of section 59. The latter section, in its subsection "b," provides that "three or more creditors *who have provable claims* against any person" aggregating \$500 or more, or, if all of the creditors be less than 12 in number, then "one of such creditors" whose claim equals \$500, may file an involuntary petition. Thus possession of a provable claim is the general test of the right to file. Since the claim here asserted is upon promissory notes, and since no reason is suggested why such do not constitute valid obligations between brothers-in-law, the petitioner here is the holder of a provable claim, and thus within the general terms of the statute, and, unless there be something further in the statute operating against him, is entitled to prosecute this proceeding.

Do the further provisions of section 59 have any such effect? Subsection "d" provides that in a proceeding by less than 3 creditors, coupled with the necessary allegation that there are altogether less than 12,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the answer may set up that there are more than 12 creditors, and, this being proved, the proceeding will be dismissed, unless a sufficient number to make at least 3 petitioners join in the proceeding. Subsection "c" provides that in computing the total number of creditors, for the purpose of determining whether the proceeding shall be thus dismissed because of less than the necessary three, employes at the time of filing the petition and relatives within the third degree shall not be counted unless they have joined in the petition. The purpose of this section is plain. Employes and near relatives are presumably under the influence of, or at least in sympathy with, the alleged bankrupt. If these may be counted as creditors to defeat a proceeding by less than 3 creditors, the temptation will often exist to use them fictitiously for such purpose, and thus to defeat the ends of the act. Congress, by the provision above quoted, says that this may not be done, and plainly indicates that if it is sought to oust the jurisdiction of a bankruptcy court, by proof that a sufficient number of creditors out of the total list of creditors have not moved, the latter list must be made up of those who are clearly creditors, not those who, by reason of their relationship to the defendant, may in all probability be only colorably such. The intent is to remove the temptation and danger of using employes and relatives by way of defense.

But where the relative appears, not in aid of a defense and as a weapon to defeat, but as an adverse mover and as a beneficiary of the law, the reason for the rule entirely fails, and with it the rule. The difference in the relative's status when used to frustrate the act and when proceeding under it is illustrated by the prohibition contained in subsection "e". The terms of that section, to the effect that he may not be counted, apply only when he has *not* joined in the petition. When he has joined, he may be counted; for then there exists no reason to fear that his relationship is operating to effect a fraud. Equally, indeed more strongly, is this the case where, as here, he brings the petition himself; indeed, brings it as the sole petitioner. This seems never to have been questioned in the courts. In *re Novak* (D. C.) 101 Fed. 800, decides, it is true, that a wife may bring the proceeding; but the case does not discuss, nor indeed apparently consider, section 59, and may, perhaps, have proceeded upon the theory that husband and wife are not related by affinity (*State v. Wall*, 41 Fla. 463, 26 'South. 1020, 49 L. R. A. 548, 79 Am. St. Rep. 195, 205), and that section 59 was thus not involved. No other decision, even apparently dealing with the matter, has been found by counsel, and this for the reason, doubtless, that it has never heretofore been deemed one for controversy. The bankruptcy text-writers—Remington, § 215; Collier, page 779—express the view that members of the petitioner's family may be petitioning creditors. So, in our judgment, does the spirit and letter of the statute.

The motion to dismiss will accordingly be denied.

THE ASHBOURNE.

(District Court, E. D. New York. July 21, 1913.)

1. TOWAGE (§ 15*)—SUIT FOR INJURY TO TOW—BURDEN OF PROOF.

In a suit against a tug for negligent towage, in permitting the tow to strike an obstruction in the bottom of a slip, the burden of proving that the obstruction was a temporary one, not known to navigators, rests on the tug.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 30-38; Dec. Dig. § 15.*]

2. TOWAGE (§ 11*)—INJURY TO TOW FROM STRANDING—LIABILITY OF TUG.

A tug *held* liable for an injury to a tow from striking upon rocks in the bottom of a slip, where the master knew that the slip was shallow near the center, and might have avoided it by careful navigation.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

In Admiralty. Suit by Alfred G. Trudell against the steam tug Ashbourne; the Philadelphia & Reading Railway Company claimant. Decree for libellant.

James J. Macklin, of New York City, for libellant.

Armstrong & Brown, of New York City, for claimant.

CHATFIELD, District Judge. The tug Ashbourne, the property of the Philadelphia & Reading Railway Company, at about 10:30 p. m., upon the 11th of May, 1911, took a coal boat, the John Mason, belonging to the libellant, with a cargo of coal, to a slip between Pier No. 4 of the Standard Oil Company and a pier of the Tidewater Oil Company, at Bayonne, N. J. The Mason was under charter for the purpose of carrying coal, and on this particular trip the coal on board was to be delivered to a steamer called the Cheyenne. Two lighters at the head of the slip forward of the Cheyenne made it necessary to moor the coal barge outside of these lighters, as the captain of the barge did not then wish to be taken alongside the Cheyenne.

A list was noticed as soon as the barge was moored, which increased as the tide went down, and the barge was found to be "fast." The captain, finding 7 feet of water around the bow and 13 to 17 inches of water inside, was compelled to pump the boat. The next morning she was hauled off by the tug, and subsequent inspection and repairs proved that on the port side aft of amidships 10 of the bottom plank were injured, 4 of them being shoved up inside of the bilge keelson. The libellant alleges that the injury was caused by an obstruction, presumably a rock, well known to mariners using these waters, and therefore to be avoided by any tug undertaking to tow a boat into this slip.

The Mason was loaded with 605 tons of coal, and drew about 9 feet of water. She is 106 feet long, 25 feet wide, and 11 feet sides. A survey of the slip shows a deep berth alongside of the Standard Oil pier, having an average width of about 60 to 75 feet, at the point where the Cheyenne was lying. A shallow area, varying from 13 feet to 5 feet, extends over the middle portion of the slip at the shore end, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in this, some 200 feet from the Standard Oil pier, the presence of boulders and large stones is indicated. Subsequent dredging is said to have been resorted to for the removal of these boulders, and one of them, of considerable size, is indicated upon the chart. The presence of the Cheyenne and the lighters in the slip make it apparent that the Mason rested upon the bottom at some point in the comparatively shallow area within the 13 feet contour.

[1] The claimant has endeavored to prove that some temporary obstruction, whose presence could not be the basis of a charge of negligent towing, might have caused the accident; but no persuasive proof of such a cause is shown. The burden of proving such an obstruction is upon the tug. *The Resolute* (D. C.) 149 Fed. 1005, Id., 160 Fed. 659, 88 C. C. A. 17; *The Mabel S.* (D. C.) 113 Fed. 971.

The claimant's real defense, however, is that, if the Mason went aground at some shallow point in the slip, where a boat of her draft could not safely be navigated, that the Standard Oil Company, which maintains the slip, and which had no marking or buoy to indicate the shoal, would be responsible, as the boat was placed in a berth furnished by them, under conditions known to them, and where they would be liable for placing her in an unsafe position.

After it became apparent that this was the real defense in the case, an adjournment was had until it could be seen whether the obstruction did exist, and whether the Standard Oil Company could be brought in as a party, if the presence of any such obstruction was entirely denied by them. Subsequently a further hearing was had, and the testimony indicates, as has been said, that obstructions did exist. The middle portion of the slip, at its inshore end, was not safe for use by a boat drawing 9 feet of water, unless at high tide.

[2] The real question, therefore, is whether the Ashbourne was negligent in towing the Mason into a slip where dangerous conditions were well known, or should have been known, and where the obligation undertaken was to place the barge alongside the Cheyenne in a safe manner, so as to avoid the obstruction just outside of the ship's berth. If this was the claimant's contract, and the danger were known, then the Ashbourne did not tow the Mason properly, and is responsible for her injury. On the other hand, if the claimant had no actual knowledge of the condition of the slip and the depth of water therein, if the dangers were neither apparent nor matters of common and charted knowledge to navigators, and if the tug was merely taking a barge into a berth furnished by the Standard Oil Company, with the result that the injuries were occasioned by the condition of the berth, then all questions of liability would have to be settled between the owner of the barge and those who maintained the berth, and the right to recovery would depend upon proof that an unsafe berth was furnished.

The testimony shows that the captain of the tug knew that a safe berth lay along the pier and that he could pass alongside the Cheyenne with his tow. He knew that there was an obstruction some distance out, and that the slip was shallower in all parts, except where the Cheyenne was lying. He knew that the barge drew enough water so that it had to be kept in the deep water, and he put the boat alongside the

lighter at the request of the barge captain, and not by direction of the Standard Oil Company. It would seem that the responsibility for getting the boat in safely under such circumstances was on the tug, and that her injury was caused by lack of care on the part of the tug as to conditions which the tug captain knew of and had to be careful about.

The presence of a casual obstruction is not shown. The proof shows an injury by grounding in shoal water on a stone or hard bottom such as existed there.

The libellant may have a decree.

ESQUIBEL v. ATCHISON, T. & S. F. RY. CO.

(District Court, D. New Mexico. May 16, 1913.)

No. 205.

COSTS (§ 128*)—SUITS IN FORMA PAUPERIS—INTEREST OF ATTORNEY.

Plaintiff cannot take advantage of Act June 20, 1892, c. 209, 27 Stat. 252 (U. S. Comp. St. 1901, p. 706), permitting the prosecution of suits in forma pauperis, without prepayment of or the giving of security for costs, upon the making of affidavit of inability to do so because of poverty, where her attorneys are prosecuting the case on a contingent fee basis and are admittedly able to give security for the costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 497, 499, 503, 511; Dec. Dig. § 128.*]

Action by Eulalia T. Esquibel, as administratrix, against the Atchison, Topeka & Santa Fé Railway Company. On motion to require plaintiff to give security for costs. Motion granted.

Elmer E. Studley, of Raton, N. M., for plaintiff.

R. E. Twitchell, of East Las Vegas, N. M., for defendant.

POPE, District Judge. Motion has been made herein for security for costs from the plaintiff. An affidavit has been filed on her behalf, setting up poverty, and thus the right to sue without security for costs under the provisions of Act June 20, 1892, 27 Stats. c. 209, page 252 (U. S. Comp. St. 1901, p. 706). As against this latter an affidavit has been filed on behalf of the defendant, setting up that the attorneys in the case are prosecuting the case upon a contingent fee, and are thus interested in the result of the litigation. This is admitted by plaintiff's counsel upon the hearing of the motion for security for costs. The question raised is whether under such circumstances the showing for leave to sue in forma pauperis must include a showing that the attorney, who has an interest in the result of the case, as well as the plaintiff and the other beneficiaries (she suing as administratrix), is unable to give security for costs.

The federal authorities which have construed the law on the subject above cited are unanimous in the holding that the showing, to be complete, must be to the effect, not only that the plaintiff herself is unable

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to furnish security, but that all persons interested in the result of the suit must likewise be shown to be thus unable to furnish security. *Boyle v. Great Northern R. Co.* (C. C.) 63 Fed. 539; *The Bella* (D. C.) 91 Fed. 540; *Reed v. Pennsylvania Co.*, 111 Fed. 714, 49 C. C. A. 572 (opinion by Circuit Judge Lurton); *Feil v. Wabash R. Co.* (C. C.) 119 Fed. 490; *Phillips v. Louisville & N. R. Co.* (C. C.) 153 Fed. 795.

This construction of the statute seems to be proper, in order that its purposes may be effectuated, and the motion for security for costs in this case will accordingly be sustained; it being admitted on the hearing that the attorneys interested are able to give security for costs. The amount of cost bond is fixed in the sum of \$250, to be approved by the clerk.

THE DAYLIGHT.

(District Court, E. D. New York. July 23, 1913.)

ADMIRALTY (§ 50*)—PARTIES—SUIT FOR TOWAGE.

In a suit in rem to recover for towage services, claimant is entitled by analogy under admiralty rule 59 to bring in a third party, on allegation that the services were rendered on his credit, and not on the credit of the vessel.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 414-429; Dec. Dig. § 50.*]

In Admiralty. Suit by the Merritt & Chapman Derrick & Wrecking Company against the schooner Daylight. On petition of claimant to bring in new party. Granted.

Williams & Stevenson, of New York City, for libellant.

Alexander & Ash, of New York City, for claimant.

James J. Macklin, of New York City, appearing specially for McWilliams, in opposition to the within motion.

CHATFIELD, District Judge. The libel alleges towing services rendered by order of the captain on the credit of the vessel. The answer and petition to bring in McWilliams allege that the services were not rendered on the vessel's credit, but were at the request and on the credit of McWilliams. The libellant could have sued the vessel in rem, and McWilliams in personam. The liability of McWilliams may be established in the suit, even if the decree does not go against the vessel, and the libellant cannot object to the motion; for, if the defense is good, he would have only a claim in personam against McWilliams. If the defense is not good, then a proper case is shown by analogy under rule 59 to bring in the party really responsible.

Motion granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BARKER et al. v. EASTMAN et al.

(Circuit Court of Appeals, First Circuit. August 22, 1913.)

No. 990.

1. COURTS (§ 492*)—CONFLICTING JURISDICTION—PRIORITY.

The rule applied that the filing in a state court of a bill against a testamentary trustee for an accounting and distribution did not affect the jurisdiction of the United States courts with reference to a bill seeking the same relief, filed previously to that filed in the state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1345; Dec. Dig. § 492.*]

Conflict of jurisdiction with state courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.]

2. COURTS (§ 279*)—UNITED STATES COURTS—JURISDICTION—ALLEGATIONS OF PLEADINGS.

The rule applied that if it does not appear at the outset that a suit is one of which the Circuit Court, at the time its jurisdiction was invoked, could properly take cognizance, a suit must be dismissed, and lack of jurisdiction cannot be supplied by anything set up by way of defense.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 279.*]

3. COURTS (§ 278*)—UNITED STATES COURTS—JURISDICTION—ALLEGATIONS OF PLEADINGS.

While a United States Circuit Court cannot acquire jurisdiction of a suit, unless its jurisdiction is apparent on the face of the bill or declaration, its jurisdiction may be defeated by a subsequent development of facts which did not appear at the outset.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 819; Dec. Dig. § 278.*]

4. COURTS (§ 308*)—UNITED STATES COURTS—JURISDICTION—CITIZENSHIP OF PARTIES.

Where, in a suit by citizens of Massachusetts against a testamentary trustee, who was a citizen of New Hampshire, for an accounting and distribution, another citizen of New Hampshire, interested in the distribution, was made a party defendant and answered, admitting the allegations of the bill and alleging that the time for distribution had not arrived, the United States courts had no jurisdiction, since, whatever the fact with reference to the lawful time for distribution, the right to an accounting, which was the real purpose of the bill, was at all times existent, and that controversy was between citizens of Massachusetts and New Hampshire on one side and another citizen of New Hampshire on the other side.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 855, 856; Dec. Dig. § 308.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullaghan, 27 C. C. A. 298.]

Appeal from the Circuit Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Bill by Will T. Barker and others against Edwin G. Eastman, trustee, and others. From a decree dismissing the bill (192 Fed. 659), the complainants appeal. Affirmed.

Alvah G. Sleeper, of Boston, Mass., for appellants.

Edwin G. Eastman, of Exeter, N. H. (Eastman, Scammon & Gardner, of Exeter, N. H., on the brief), for appellees.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 206 F.—55

Before PUTNAM and DODGE, Circuit Judges, and BROWN, District Judge.

PUTNAM, Circuit Judge. This is a bill in equity, brought by persons entitled under the will of Hiram Barker against the existing sole trustee under that will. It was filed by three citizens of the state of Massachusetts, in behalf of themselves, and also in behalf of Charles B. Barker, another citizen of Massachusetts, if he should choose to join. The only respondent named in the bill was the trustee, Eastman, a citizen of New Hampshire.

Subsequent to the filing of the bill, a motion was made by the complainants to make Ella M. Barker, another citizen of Massachusetts, a party plaintiff. This motion was immediately granted. The bill alleged that under the will the trustee was to pay Clara Barker Berry, the only daughter of the testator, \$2,000 annually during her life, "and a further sum if in the opinion of the trustee it should be necessary"; and it further alleged that "neither the said Clara Barker Berry, nor the said Ella M. Barker, is a necessary party to this bill, as they are not entitled to any distributive share out of the estate." Subsequently, however, the complainants made a motion to make Clara Barker Berry a party respondent, because, as they alleged, she was one of the legatees mentioned in the will concerned, and also "interested in the distribution of the estate." Thereupon an order was entered that she be made a party respondent for the reasons stated in the motion. Clara Barker Berry filed a plea, which she afterwards withdrew, and subsequently an answer, admitting the allegations of the bill, and making no denial of her distributive interest, but alleging that the time for distribution had not arrived. The motion for joining her described her as a citizen of the state of New Hampshire.

The bill was dismissed without prejudice, and the complainants thereupon appealed to us. The appeal is described as by "the above-named plaintiffs," without further designation of who was meant by "the above-named plaintiffs"; but, as the bond on appeal was signed by Will T. Barker, Eda F. Barker, Hiram H. Barker, and Ella M. Barker, it is to be assumed that all the original complainants, as well as Ella M. Barker, are included in the words "the above-named plaintiffs."

Eastman is a testamentary trustee, with reference to whose accounts and other proceedings full provision is made by the statutes of New Hampshire, which statutes give ample remedy in reference thereto. Public Statutes N. H. 1901, c. 198.

The bill is drawn in all respects like the bill sustained in *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260, except that there is no charge of misfeasance against the trustee, as there was in *Payne v. Hook*. Indeed, it is doubtful whether the bill sets out any controversy whatever. It makes no question about the construction of the will, or about the rights of the various persons in interest under it. It fails to make any charge against the trustee, in so far, indeed, that it fails to allege that he has either omitted or delayed or declined to render accounts

according to the statutes of New Hampshire referred to, or has been requested to do so.

[1] The record shows that a bill of a similar purport was filed in the state courts of New Hampshire, but subsequently to the filing of the bill with reference to which this appeal was taken; so that it cannot, as is thoroughly settled, in any way affect jurisdiction with reference to the matter now before us. The same is true with reference to certain other proceedings commenced in the state courts to which we need not refer particularly.

[2] Inasmuch as the claim is made that certain proceedings subsequent to the filing of the bill here gave the Circuit Court jurisdiction, all we need say in reference to that is that the general principle stated in *Railway Company v. Lewis*, 173 U. S. 457, 19 Sup. Ct. 451, 43 L. Ed. 766, is thoroughly settled that, if it does not appear at the outset that a suit is one of which the Circuit Court, at the time its jurisdiction was invoked, could properly take cognizance, the suit must be dismissed; and lack of jurisdiction cannot be supplied by anything set up by way of defense. This is reaffirmed in *Omaha Electric & Power Company v. Omaha*, 230 U. S. 123, 33 Sup. Ct. 974, 57 L. Ed. —. This does not, of course, bar amending a bill or other proceedings in such way as to show jurisdiction, if in fact the court had jurisdiction.

The prayer of the bill is as follows:

"To the end, therefore, that your orators may obtain the relief to which they are justly entitled in the premises, they now pray the court to grant them due process of subpoena directed to said Edwin G. Eastman, defendant hereinbefore named, requiring him to appear herein and answer (but not under oath, the same being expressly waived) the several allegations in this your orators' bill contained, and that an account may be taken of the personal and real estate of the testator now in the hands of the defendant, and that the same may be applied in due course of administration, and that it may be determined what proper, suitable, and sufficient bonds or other security shall be given by the plaintiffs, and each of them, in accordance with the terms of the will, and that it may be ascertained what is the respective share of said estate now belonging to the plaintiffs, and each of them, and that the same may be paid to the plaintiffs, and each of them, and that for those purposes all proper directions may be given, and that the plaintiffs may have such further or other relief in the premises as the nature and circumstances of this case may require, and to your honors shall seem meet."

In *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260, already referred to, there was clearly a controversy between citizens of different states in the sense of the Constitution, because the complainant, of one state, charged the respondent, a citizen of another state, with misconduct in his office; but the bill at bar discloses no controversy of that character. It asks for an accounting, without alleging that any accounting had been refused, or that there was default, omission, or refusal by the trustee with reference to anything whatever. Therefore the question at once arises whether, in view of the later decisions of the Supreme Court limiting or qualifying *Payne v. Hook*, or some expressions therein, as the case or the expressions had been somewhat understood—that is to say, *Buyers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, *Farrell v. O'Brien*, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101, *Ingersoll v. Coram*, 211 U. S. 335, 29 Sup. Ct.

92, 53 L. Ed. 208, *Waterman v. Bank*, 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80, and *McClellan v. Carland*, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. Ed. 762—the bill presents any controversy as between citizens of different states within the meaning of the Constitution. We pass this by, however, because the bringing into the case by the complainants of Clara Barker Berry, a distributee, and therefore a necessary party, in view of the fact that she is a citizen of the same state as the original respondent, the trustee, defeats jurisdiction in any event.

[3, 4] While the rule is clear that, in the aspect we have here, jurisdiction cannot be secured unless apparent on the face of the bill or declaration, yet it is equally true that it may be defeated by a subsequent development of facts, which did not appear at the outset. This is now the position here, made so by the complainants when they brought in Clara Barker Berry. It is true she alleges that the bill misinterprets the decision in *Edgerly v. Barker*, 66 N. H. 434, 31 Atl. 900, 28 L. R. A. 328, but that it is not alleged in such way as to show whether she intends, with reference thereto, to make a controversy between her and the original complainants, or between her and the trustee. If, within the terms of the bill, it did indicate a substantial controversy between her and the complainants, then, so far as this is concerned, the bill might possibly be retained, because, arranging the parties according to the controversies, we might have the complainants on one side, and the trustee and Clara Barker Berry on the other. This, however, would be purely incidental, so far as this litigation is concerned, because, whatever the fact with reference to the lawful time for distributing the estate, the right to an accounting, the obtaining of which is the real purpose of the bill, is at all times existent; and, so far as that is concerned, Clara Barker Berry is arrayed with the nominal complainants. Therefore, as to the only controversy which the record sets out, we find citizens of two states, Massachusetts and New Hampshire, on one side, and the trustee, also a citizen of New Hampshire, on the other. It would be useless to go on with a bill in which the record as made by the complainants now shows must ultimately result in defeating the jurisdiction of the court.

The decree of the Circuit Court is affirmed, and the respondent Eastman recovers the costs of appeal.

CENTRAL VERMONT RY. CO. v. BETHUNE.

(Circuit Court of Appeals, First Circuit. June 20, 1913.)

No. 1,016.

MASTER AND SERVANT (§ 204*)—EMPLOYER'S LIABILITY ACT—ASSUMED RISK.

Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), imposes a liability on interstate carriers for injuries to servants, and section 4 declares that, in any action brought against any common carrier under the act to recover damages for injuries to or death of any of its employes, such employe shall not be held to have assumed the risk

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employes contributed to the injury or death of such employe. *Held*, that such section limited the abrogation of the doctrine of assumed risk in such cases to instances where the violation of an express statutory duty by the carrier was charged, and hence such doctrine was applicable to an action under the statute for the death of a railroad employe engaged in interstate commerce resulting from the alleged negligence of the railroad company in constructing its tracks too close together.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544–546; Dec. Dig. § 201.*]

In Error to the District Court of the United States for the District of New Hampshire.

Action by Hannah Bethune against the Central Vermont Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

George F. Morris, of Lancaster, N. H. (Drew, Shurtleff & Morris and Harry B. Amey, all of Island Pond, Vt., on the brief), for plaintiff in error.

Henry F. Hollis, of Concord, N. H. (Hollis & Murchie, of Concord, N. H., and Raymond Trainor, of White River Junction, Vt., on the brief), for defendant in error.

Before PUTNAM and DODGE, Circuit Judges, and BROWN, District Judge.

PUTNAM, Circuit Judge. This is a suit for damages under the employer's liability statutes of the United States, with a verdict and judgment for the plaintiff, followed by this writ of error by the defendant. By the word "plaintiff" we mean the plaintiff below, and by the word "defendant" we mean the defendant below. Numerous points were raised, but we need consider only two. The allegations of the declaration which we need refer to are as follows:

After alleging sufficient to establish the character of the defendant as an interstate commerce carrier, they proceed:

"That the defendant at said White River Junction, at a point opposite a certain icehouse of a certain corporation styled Swift & Co., wrongfully, unlawfully, and negligently maintained, and suffered to be maintained, as a part of its roadbed, three several lines of railroad track, nearly parallel, and situated so close together and constructed in such a careless and negligent manner as to endanger the lives and limbs of employes who might have occasion to stand or pass between trains of cars situated on said three several lines of railroad track, or to ride or climb upon the cars of said trains passing each other on said tracks; that on the 1st day of September, 1909, plaintiff's intestate was employed by said defendant as a sealer, to take the number of seals and cars passing from said state of Vermont into the states of New Hampshire and Massachusetts and carrying commerce between said White River Junction and Lebanon, in said county of Grafton and state of New Hampshire, and between said White River Junction and Springfield, in the county of Hampden and commonwealth of Massachusetts; that while in the exercise of due care and in the performance of his duties as such sealer, and engaged in interstate commerce, as said intestate was passing or standing between two trains of freight cars situated on two adjoining tracks opposite said icehouse, being two of the three several lines of railroad track afore-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said, one of said freight trains was carelessly, improperly, and negligently started in motion, without warning to said intestate, by said defendant, its officers, agents, and employes, so that said intestate was crushed between the two trains of freight cars aforesaid, by reason of the defective, negligent, and unlawful condition of said roadbed, as aforesaid, and by reason of the careless, improper and negligent starting of said freight train, without warning to said intestate, as aforesaid, and said intestate was thereby so injured, bruised, and maimed that he died."

We will consider mainly the question of the assumption of risk as known at common law, including the subordinate question whether that defense is available under the statutes of the United States on which the suit was based.

The propositions in reference thereto are complicated because the plaintiff rests its case on a multiple, or double, charge of negligence, viz.:

First. The relation of the tracks of the defendant corporation to the trains situated thereon, as we will explain.

Second. The alleged negligence of the yardmaster, to which we will refer.

If the negligence of the yardmaster was found by the jury to have been an element in the plaintiff's case, the question of assumption of risk might not have been important, because there might have been no unusual risk with proper care on the part of the yardmaster; and there is no evidence in the record that the yardmaster was habitually negligent, or, if habitually negligent, that the deceased had knowledge of that fact. But it is not improbable that the jury failed to find that the yardmaster was negligent, so that the entire negligence found by the jury may have been in the construction of the tracks, and in the location of the trains, two matters as to which the deceased was perhaps thoroughly informed, and as to which, at common law, he perhaps assumed the peril incident to the situation.

The rulings of the court, however, took no note of this peculiarity in the plaintiff's case; so that, if they were erroneous in any view of the evidence which the jury might have accepted, there was prejudicial error.

The point on this question of assumption of risk was clearly raised by request for instructions, as follows:

"The jury should take into consideration plaintiff's knowledge of the dangers of the situation derived from his experience, and if you find he was fully informed of the dangers incident to his work your verdict should be for the defendant."

There was an accompanying request which asked the court to instruct the jury that certain conditions, supposed to exist, did not constitute "negligence in law"; but expressed in this form it was fatally bad. As to the request which we have quoted, the court instructed the jury as follows:

"Under the old law, take the first instance, if this place was faulty—in other words, not a reasonably safe place—and if Bethune knew it was dangerous, or understood it was dangerous, he would assume the risk; but that doctrine, or that theory, as has been claimed, has been overthrown by this federal statute which declares in effect that the assumption of risk or contribu-

tory negligence, which is largely the same thing, where a man voluntarily goes into a dangerous place, is not a full defense.

"It seems to have been the policy of Congress, and it is generally accepted, I think, as a sound public policy, that those old ancient rules are too harsh to be administered under present economic conditions, so Congress has seen fit, so far as it may go—and that is only so far as concerns interstate business—to overthrow those rules and say in effect that if there was fault on the part of an employer or any of its agents the fact that the injured party knew of the dangerous situation, and the hazards of it, or knew that he was to work in connection with a coservant for whose fault he was formerly responsible, is not now a full defense.

"I have been requested to say—and I have already said it in effect—that whatever knowledge this injured party had about the dangers of the situation is not to be considered on the question of the defendant's liability."

It is clear, therefore, that, in any view of the record, the position at the trial was plainly understood by both court and counsel, with reference to the question of assumption of risk.

We give the detailed alleged facts of the case from the brief of the plaintiff, because at every point we must on the issues we are considering take the view of the plaintiff as to what the jury might have been justified in finding. As claimed by the plaintiff, they were as follows:

"Donald Bethune was a car sealer in the White River Junction yard. His work consisted in taking the numbers of cars and the numbers of seals on all loaded box cars coming into and going out of White River Junction, as well as calling crews for trains and getting the arriving and leaving time of all passenger cars.

"It was his duty to examine cars coming into the yard, take the numbers and initials and impressions on the seals, and record them in a book in the yard office for future reference. The seal numbers were taken on a small book that he carried around with him and from it copied into the station record.

"He took the record of all cars that passed through White River Junction while he was on duty. He worked from 7 a. m. to 7 p. m. daily, and probably took the numbers of 20 trains during that time. Bethune had done this work for 30 years. Wherever it was most convenient for him, he took the car numbers, and, of course, it was more convenient to get them before the trains were broken up, but in any event he had to complete his job on each train and examine every car. The seals referred to were little pieces of lead, pressed with the number and initials of the road and pierced with wire, with which they were fastened to the car door.

"In the northerly part of the Central Vermont yard at White River Junction, Swift & Co. maintained an icehouse used for the purpose of supplying ice to refrigerator cars which stopped there. Bethune often took the car numbers and seals of trains at this place. In fact, his duties took him to all parts of the yard. The work at the icehouse was done while the cars were being iced, but Bethune worked wherever the train happened to stop, catching the trains wherever he could, it being his business to go to them wherever they were and get their car numbers. He operated about a mile on either side of the White River Junction station. In doing his work Bethune usually commenced at the forward end of a train and worked to the rear of one side, taking the numbers on the other side on his way back.

"When injured, plaintiff's intestate was working on train 404, coming from the north through White River Junction. It was known as a freight extra, carrying perishable stuff that required icing at the icehouse. It was also called the butter train, and came in over the Central Vermont from St. Albans to White River Junction. Immediately upon the arrival of the train Bethune commenced to take the car seals. At the time of the accident he had taken the numbers and seals down on one side and was coming up on the other, taking seals between the two trains.

"As previously said, there was an icehouse belonging to Swift & Co. at the time of the accident at White River Junction. It was used for storing ice, and located in the northerly part of the Central Vermont yard. Between the icehouse and the White River there were three tracks. The one nearest the river was the passenger main line. West of this was the freight line, and immediately west of the freight line was the icehouse track. The icehouse was the usual stopping place for all trains in the summer time that had to be iced. Most of the trains with refrigerator cars going south stopped there.

"In one place between the main freight line and the icehouse siding the space grows narrow. Towards the south end it is a little narrower than at the other end. Above the icehouse there is more room between these two tracks. Just south of the center of the icehouse the tracks come to the very narrowest point. There the roofs of cars project out so that they are closer than the bottoms of the cars.

"Bethune was injured in front of the Swift icehouse at the north end of the yard about midway of the icehouse, perhaps a little to the north of the center, if anything. The butter train was on the main freight line, the middle of the three tracks. A dairy train, No. 759, had pulled in on the icehouse track, coming from the north, from which direction the butter train also came. The butter train had come in on the main freight line going south, and after that the dairy train had pulled in on the icehouse track going south. The butter train had stopped on the main freight line, and five or six cars were cut off, taken south, backed north onto the icehouse siding, and were iced, pulled out, and backed onto the train again and coupled on. The dairy train pulled onto the ice house track right after the five or six cars mentioned had been pulled out, and had come to a rest before these cars were coupled onto the butter train.

"When the butter train started south it was going about twice its length onto what was called the straight track to be inspected; the dairy train remaining stationary. The first Fitzpatrick, a man who was present, knew of the trouble, he heard a cry, and, looking back, saw Bethune between the roofs of both cars. He was being rolled between a car of the butter train and a car of the dairy train, his body about half above the roofs, and, after he had revolved between the cars back to the gap, he was released and dropped. Fitzpatrick thinks he was climbing up over on extra 404 or onto the dairy train, and when he got to the top he naturally swung around, and his body was caught."

This statement of facts alleged by the plaintiff complemented the propositions of the declaration to which we have referred as to a double negligence, namely, that of the manner and maintenance of its tracks by the defendant corporation, and that of the omission of a warning by the yardmaster, Fitzpatrick, in the following language:

"There is nothing complex or concealed about the evidence of negligence upon which this action is based, and for which the defendant is legally responsible. It consisted in the failure of Fitzpatrick, the White River Junction yardmaster, who had charge of and was directing the movements of the butter train, to give the deceased timely warning of his intention to signal the train to start, although knowing of Bethune's presence in a place where he was likely to be injured by such movement, and in the maintenance by the defendant of its tracks in such condition that cars upon them came close together, so close that persons working between them were likely to get squeezed."

We pay little attention to the mere fact of the location of the tracks in the way described, although we do not deny that, under the particular circumstances, the jury might perhaps have found that the construction was negligent, nor especially that, under the particular circumstances, the defendant corporation was negligent in allowing its trains

to be sealed at that precise locality, and in not requiring that the sealing should be done at one of the other neighboring localities described by the plaintiff. Presumably, nevertheless, the mere matter of the location of the tracks would not be held negligent in New England, where the approximation of tracks to each other is very close in so many localities, especially about the terminals and the yards of railroads, so that denunciation of them as unauthorized, or the maintenance of them as negligent, would require reconstruction beyond what could possibly be regarded as reasonable. Under the circumstances of the case, we leave that to further investigation by the court of first instance with a full opportunity therefor. It is enough now to say that, under proper instructions by the court, the jury might have found that, with the knowledge of the premises possessed by the deceased car inspector, he might well be held at common law to have assumed the risk under some circumstances.

Perhaps the leading case, and the one absolutely close to this at bar on this point, is *Tuttle v. Railway*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114, where it was held that the construction of the tracks within a railroad freight station or yard was perilous, arising from the sharpness of the curves, and was yet held to involve a danger assumed by the employés who were familiar therewith. The dangers were presumed, at page 195 of 122 U. S., 7 Sup. Ct. 1166, 30 L. Ed. 1114, to have been known to an experienced brakeman accustomed to the yards in question, where the ruling of the trial court in directing a verdict for the defendant on this account was sustained. It was said, at page 194 of 122 U. S., 7 Sup. Ct. 1166, 30 L. Ed. 1114, that any rule of law restricting a railroad company as to such questions would leave to the varying and uncertain opinions of juries the determination of engineering questions, and that it must be a very extraordinary case where the discretion of such corporations in such matters should be interfered with, and that the brakemen and others employed to work in such situations must decide for themselves whether they will encounter the hazards incidental thereto. To a similar effect were the extracts from *Judge Cooley* approved on page 196. *Tuttle v. Railway*, and its substantial expressions, were reaffirmed and applied with reference to the construction of a water tank as late as *Choctaw R. R. Company v. McDade*, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96, and meanwhile, in *Southern Pacific Co. v. Seley*, 152 U. S. 145, 153, 14 Sup. Ct. 530, 38 L. Ed. 391, and elsewhere.

Tuttle v. Railway, and all the observations contained in it, would apply fully in behalf of the defendant at bar if the entire negligence charged had been with reference to the construction of the tracks, unless there is within the record some exceptional circumstances not called to our attention by either party. Plain it is that at common law the defendant would have been entitled to have had instructions as to the assumption of risk in the line of the cases cited, if that had been the only alleged negligence on the part of the defendant.

However, there are varying phases presented by the case before us, in view of which we are bound to say that it was impossible for the court, having due regard for the law, to take the whole case from

the jury; and no exception based on a claim for a ruling of that kind can be sustained. Aside from that, there are various phases, as follows:

First, if the jury had found that it was the duty of the yardmaster to warn the intestate car inspector, as claimed by the declaration and propositions of the plaintiff, several positions might follow, namely:

As to the neglect of the yardmaster, there is nothing in the record to justify any claim of the assumption of risk which might perhaps exist if the practices of the yardmaster were different from what they ought to have been, had been continuous, and had been known to the intestate, in which case the intestate might have been required to look out for himself; and further it follows that, if it was the duty of the yardmaster to warn the intestate, and the intestate had no reason to understand that he would not warn him, there was no risk to be assumed, because there could have been no special risk under the circumstances. The jury might have found this; and, if the record had shown that it did so find, the verdict might be required to stand. But, as the case went to the jury, this position cannot be reasonably supposed to have existed. On the other hand, the jury might have found, under the instructions of the court, that there was no negligence except in the construction of the tracks. In view of that fact, the defendant at common law would have been entitled to an instruction upon the assumption of risk, as argued for by the defendant; and the instruction given would have been error. Therefore we have only to consider the question whether, under the United States statutes, it is true that the doctrine of assumption of risk does not apply, as held by the court, and as now maintained by the plaintiff. We are of the opinion that it does apply, and that the instruction in question should have been given, if not in the precise form requested, yet in substance.

The statutes as amended are conveniently found in the Employer's Liability Cases, 223 U. S. 6, 7, and 8, 32 Sup. Ct. 169, 56 L. Ed. 327. The only thing therein expressly relating to this topic is section 4, appearing on page 8 of 223 U. S., 32 Sup. Ct. 169, 56 L. Ed. 327, to the effect that no employé shall be held to have assumed the risk in case of violation of "any statute." This section by its letter is clearly limited to a violation of a statute. In the case at bar there was no violation of any statute. There is merely a liability for the recovery of damages under certain circumstances; that is, by reason of certain defects or insufficiencies existing at common law. It is hardly to be presumed that Congress would enact statutory directions about the construction of railroads in New England in the particular involved here, where a compliance with such a statute would be perhaps ruinous. In order that the provision might apply here, instead of using the words "violation of any statute," it should have been broadened out to cover all the obligations of a carrier required either by the common law or by statute; and the construction now claimed by the plaintiff for this provision is too extreme and unnatural to be accepted.

The plaintiff also relies on section 5, referring to "any contract, rule, regulation or device" looking to an exemption of the common carrier, that clearly has relation to some express undertaking or de-

vice of a specific character, aside from mere implication of liabilities and rights growing out of the mere matter of employment. In the attempts made by various courts and text-writers to explain and support the doctrine of assumption of risk, there are many expressions indicating the view that it is implied in the contract of employment; but there is nothing of the kind. It is merely a practical rule of common sense, which leaves to the owners of houses and other establishments, especially to agricultural holders, a necessary privilege of constructing and maintaining their premises according to special circumstances, the stringency of finances and the custom of the country. This proposition was properly summarized in *Pollock on Torts* (Webb's edition, 1894), where, in treating of the maxim of *volenti non fit injuria*, this particular topic was taken up, and the observation made distinctly at page 195 that the rule "is in itself independent of the contract of service or any other contract." A sufficient exposition of it is found in *Tuttle v. Railway*, already referred to, 122 U. S., where it is said, at page 194, that brakemen and others employed must decide for themselves whether they will encounter the hazards incident to the work, and that, "if they decide to do so, they must be content to assume the risk." The same proposition appears in the opinion in *Texas & Pacific Railway Company v. Harvey*, 228 U. S. 319, 33 Sup. Ct. 518, 57 L. Ed. —, passed down April 14, 1913, as follows:

"On the branch of the case dealing with assumption of risk we think the charge of the trial court was as favorable to the railroad company as it could properly have been under the statute. If the doctrine of assumed risk applied to this case, it was because the alleged defect was so palpable and visible that Harvey was presumed to know of it, although there was no direct proof upon that subject, and, by continuing to work, to have taken upon himself the hazard of injury from that source."

That, we think, is all there is of it, and the notion that a practical rule like this must be reduced to the law of contracts is going beyond what is necessary.

Neither are there any authorities which assist the plaintiff on this branch of the case. *Northern Pacific Railway Company v. Maerkl*, 198 Fed. 1, 6, 117 C. C. A. 237, was not dependent upon any such question, as it was a case where there was negligent construction of a car of which the employé could have had no knowledge in advance; and there was mixed negligence on the part of both the owner of the car and the carpenter by whom it was repaired. This question was referred to by the court only incidentally and with no particularity. *Sandidge v. Railway*, 193 Fed. 867, 878, 113 C. C. A. 653, did not involve this question in any positive manner, nor in any way requiring any particular examination; and the practical result was not in contravention of anything we have here. It must have been hastily decided, because an examination of the *McDade Case*, the last case cited, shows that the holding in it was the reverse of the proposition for which it was cited, or certainly of any proposition we reach here. *Railroad Company v. Tucker*, 220 U. S. 608, 31 Sup. Ct. 725, 55 L. Ed. 607, was a rescript, where the situation was considered only with reference to the jurisdiction of one or all of the federal courts, where

there was a motion to dismiss or affirm; and, as is permissible in many cases, although the court might have overruled the motion to dismiss, it did affirm.

On the other hand, in two late decisions of the Supreme Court, it is very evident that the court proceeded on the theory that the doctrine of assumption of risk had not been shaken by the statutes, except under the limitations which we claim. *Gulf Railway v. McGinnis*, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. —, contains the following:

"It has also been assigned as error that the defense of assumed risk was, in legal effect, denied, because the court overruled a motion to instruct a verdict for the defendant. The defense of assumed risk was submitted to the jury under a full and fair general charge. In addition a number of special requests asked by the railroad company in respect of several aspects of the facts were given. The contention is that upon all the evidence in the case there was no sufficient evidence of any negligence for which the company was chargeable in law, and that in such case the death of the decedent must have been due to some assumed risk. We pass this by."

We have examined the Supreme Court record in that case, and we find that this assigned error was passed by because the local court in various forms had instructed the jury on the question of assumption of risk favorably to the defendant in the language of the common law. Of like impression is *Seaboard Air Line Railway v. Moore*, 228 U. S. 433, 434, 435, 33 Sup. Ct. 580, 57 L. Ed. —. What is found in *Employer's Liability Cases*, 223 U. S. 1, 49, 50, 32 Sup. Ct. 169, 175 (56 L. Ed. 327), is even more efficient, as follows:

"The rule that an employé was deemed to assume the risk of injury, even if due to the employer's negligence, where the employé voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employés contributed to the injury."

It is true this does not assume an affirmative, direct form in favor of our proposition, but it hardly could be used unless as much as that was meant. At any rate, this extract and the other references in opinions of the Supreme Court suggesting the assumption of risk as applicable under the statutes in question would not have appeared unless the court intended to maintain the existence or the continuance of the doctrine, because otherwise all these allusions to it would have been cut out by a short method.

The fact is that the reference to violations of statute to which we have alluded is only in line with a series of many decisions, of which *The Pennsylvania*, 19 Wall. 125, 136, 22 L. Ed. 148, is a sample, by virtue of which in collision cases a broad distinction is made against a vessel which is guilty of breach of an express statutory obligation, treating more lightly a vessel that is guilty only of a breach of a common rule of navigation.

The other questions, which may never come up again, we pass by. For the present we leave the case to stand on the fact that the District Court held that the statutes applicable practically set aside the common-law doctrine of the assumption of risk, so far as the questions involved here are concerned, as to which specific directions should have been

given with reference to all the relations of that doctrine to any state of facts which the jury might have been permitted to find.

The judgment of the District Court is reversed, the verdict is set aside, and the case is remanded to that court for further proceedings in accordance with law; and the plaintiff in error recovers its costs of appeal.

SHEA et al. v. LEWIS et al. (two cases).

(Circuit Court of Appeals, Eighth Circuit. May 26, 1913.)

Nos. 3,761 and 125, Original.

1. **BANKRUPTCY (§ 439*)—APPELLATE PROCEEDINGS—MODE OF REVIEW.**

Where a court of bankruptcy has erroneously retained jurisdiction to adjudicate the rights of an adverse claimant, its judgment may be reviewed by a petition to revise.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 439.*]

2. **BANKRUPTCY (§ 288*)—JURISDICTION OF COURT—ADVERSE CLAIMS.**

The jurisdiction of a bankruptcy court to determine in a summary proceeding adverse claims created before the filing of the petition in bankruptcy to liens upon and titles to property claimed by the trustee as that of the bankrupt is conditioned and limited by its actual possession of the property. In other cases it may proceed in a summary way, so far as to determine whether the claim is substantial or merely colorable, and if the former a plenary suit must be brought, unless the claimant consents to a determination on the merits; and a claim may be substantial, even though in fact fraudulent and voidable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

3. **BANKRUPTCY (§ 288*)—JURISDICTION OF COURT—ADVERSE CLAIMS.**

The petition of a trustee for a summary order requiring the wife of the bankrupt to turn over property, both real and personal, alleged to belong to the bankrupt, alleged that it was in the joint possession of the husband and wife. It was conceded that all of the property was purchased by the wife with the proceeds of land which was acquired by the bankrupt under the homestead laws of the United States, and was also claimed by him as a homestead under the state law, and was conveyed to her when not subject to any liens. *Held*, that the case was one where the wife had a substantial adverse claim, which could not be determined without her consent, except in a plenary suit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

4. **BANKRUPTCY (§ 446*)—APPELLATE PROCEEDINGS—PETITION TO REVISE.**

On a petition to revise an order of a District Court in bankruptcy in matter of law, the evidence will only be reviewed to ascertain if the order is wholly unsupported thereby.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 446.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

5. **BANKRUPTCY (§ 136*)—ORDER REQUIRING BANKRUPT TO TURN OVER PROPERTY—SUFFICIENCY OF EVIDENCE.**

An order requiring a bankrupt to turn over money to his trustee, based on the testimony of witnesses that he displayed the money a few days

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

prior to the filing of the petition and claimed it as his, is sufficiently supported where the possession of the money or its disposition is not satisfactorily accounted for.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

Appeal from and Petition to Revise Order of District Court of the United States for the District of Minnesota; Page Morris, Judge.

In the matter of Andrew J. Shea, bankrupt. On appeal and petition to revise by the bankrupt and his wife, Abbie A. Shea, to review orders requiring them each to turn over property. Appeals dismissed. Order against Abbie A. Shea reversed, and order against the bankrupt affirmed.

Appellant and petitioner Andrew J. Shea became the owner of a federal homestead consisting of 130.05 acres of land in St. Louis county, Minn., under patent issued by the United States August 17, 1908. Prior thereto he had been engaged in litigation over this tract with one Walter Douglas. He retained as his attorneys the objecting creditors, Washburn & Wilson, and had become indebted to them for fees and moneys advanced.

Concurrently with the issuance of his patent from the United States, Shea occupied and claimed 80 acres of this same tract as a homestead under the laws of the state of Minnesota. The uncontradicted testimony is that in September, 1908, through the intervention of his brother, Shea conveyed these lands to his wife. The deeds, however, were not recorded, and were lost. April 26, 1909, through the intervention of his son, he again conveyed these lands, comprising his federal and state homesteads, to his wife. This conveyance is of record.

Subsequently Mrs. Shea, by deed, in which her husband joined, conveyed these lands to a corporation known as the Cedar Island Lake Iron Company, receiving therefor ultimately 100,000 shares of the stock of said company and a note for \$30,000. Thereafter \$10,000 was paid to her on this note, and later she recovered judgment against the company for the balance, amounting to \$20,332.83. This judgment still stands in her name, has not been assigned or otherwise disposed of, and no part thereof has been paid. The 100,000 shares of stock in the above-named corporation also stand in her name, and the certificates have been and are in the possession of H. W. Dietrich, of Superior, Wis., as her agent.

Appellants and petitioners claim, and submit evidence tending to prove, that with the money received from the payment on the note of the corporation as aforesaid Mrs. Shea purchased five horses, together with some equipment therefor; also a 10-acre tract of land in St. Louis county, Minn., receiving a deed in her name, which was duly recorded; that some of this money was used for living expenses, and about \$2,000 remained in her possession at the time this litigation arose. Mrs. Shea had also purchased a residence in the city of Duluth, which is now occupied as a homestead. This, however, was paid for with money received from the sale of timber cut from the original homestead lands, and is not now in controversy. The horses and their equipment were kept on this homestead in Duluth.

August 9, 1911, Shea was duly adjudged a voluntary bankrupt by the District Court for the District of Minnesota. August 21, 1911, appellee and respondent Lewis was chosen trustee. All the indebtedness of the bankrupt accrued prior to the issuance of the federal patent. September 9, 1911, on motion of said trustee, the referee made an order requiring said bankrupt and his wife to show cause why they should not be required to turn over, deliver, transfer, convey, and assign to the said trustee the following property: 1. The judgment for \$20,332.83, standing in the name of Abbie A. Shea. 2. The 100,000 shares of stock issued in the name of Abbie A. Shea, and being in the custody for her of H. W. Dietrich of Superior, Wis. 3. The sum of \$2,000 disclosed by Mrs. Shea, upon examination, as being in her possession. 4. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

10 acres of land in St. Louis county, Minn., the conveyance for which was taken and then stood in the name of Mrs. Shea. 5. The five horses charged to be in the possession of the bankrupt and Mrs. Shea on their homestead in Duluth. 6. The sum of \$3,000 shown to have been in the possession of the bankrupt in currency a few days prior to the filing of the petition in bankruptcy. 7. An item of \$700 not here in controversy.

The bankrupt filed answer in opposition to this order, and Mrs. Shea filed a separate answer making specific adverse claim of ownership and possession of all the property above described, alleging the conveyance to her of both federal and state homesteads free and clear of the debts of the bankrupt, that all said property was bought with the proceeds of said lands after said conveyance, while claimant owned the same of her own right, and that all said property then formed a part of her separate estate. She further challenged the jurisdiction of the bankruptcy court to try the issues in this summary way. This objection was overruled, and, upon hearing, the referee ordered the bankrupt and his wife to deliver to said trustee all the property described in said order to show cause, less statutory exemptions, and that claimant Abbie A. Shea make all conveyances and assignments essential thereto. Upon review of this order in the District Court the same was approved and confirmed, except as to the item of \$700. There the objection to the summary jurisdiction of the bankruptcy court was renewed. The bankrupt and his wife bring the case to this court on appeal and petition to revise.

H. W. Dietrich, of West Superior, Wis. (John B. Arnold, of Duluth, Minn., on the brief), for appellants and petitioners.

E. M. Morgan, of Minneapolis, Minn. (Washburn, Bailey & Mitchell and Wilson, Morgan & Morgan, all of Duluth, Minn., on the brief), for appellees and respondents.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge (after stating the facts as above). The errors mainly relied upon as stated in the brief are: First, that the referee was without jurisdiction in summary proceedings to try the right and title of claimant Abbie A. Shea to the real and personal property she is ordered to turn over to the trustee, and in that connection: (a) That under the federal homestead laws there can be no fraudulent conveyance of a federal homestead as to creditors whose claims accrued prior to the issuance of patent, and, as all claims filed are of such character, claimant, by the conveyance of bankrupt's federal homestead, took good title thereto and to the proceeds of any sale thereof, including all the property she is ordered to turn over to the trustee; (b) that under the homestead laws of Minnesota there can be no fraudulent conveyance of a state homestead exemption of 80 acres, and that, by the conveyance of bankrupt's state homestead, claimant Abbie A. Shea acquired a good title, as well as to the proceeds of any sale thereof by her, including all the property she is ordered to turn over to the trustee, except 5,000 shares of stock in Cedar Island Lake Iron Company. Second, that in law there is no evidence to warrant the order directing the bankrupt to pay to the trustee \$3,000, or any other sum.

[1] Out of abundance of caution appellants and petitioners present this case on appeal and by petition to revise. In the view we take, it is unnecessary to determine whether appeal will lie. It is conclusively

established that where, in a case like this, the District Court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review. In *re Gill* and *In re Farmers' & Manufacturers' Bank of Rich Hill*, 190 Fed. 726, 111 C. C. A. 454; In *re McMahon*, 147 Fed. 684, 77 C. C. A. 668; *Mueller v. Nugent*, 184 U. S. 1-15, 22 Sup. Ct. 269, 46 L. Ed. 405; *Schweer v. Brown*, 195 U. S. 171, 25 Sup. Ct. 15, 49 L. Ed. 144; *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051.

We shall consider first the specification of error involving the summary jurisdiction of the District Court.

[2] 1. The rule applicable to situations such as that presented by the case at bar has been authoritatively established by numerous decisions of the Supreme Court and has been exhaustively discussed and specifically stated by this court. In *re Rathman*, 183 Fed. 913, 106 C. C. A. 253, Speaking for this court, Judge Sanborn said:

"The jurisdiction of the bankruptcy court to determine in a summary proceeding adverse claims created before the filing of the petition in bankruptcy to liens upon and titles to property claimed by the trustee as that of the bankrupt is conditioned and limited by its actual possession thereof."

"The test of the summary jurisdiction is that the court of bankruptcy, through the act of its officers, such as referees, receivers, or trustees, has taken possession of the res as the property of the bankrupt."

"The declaration in *Mueller v. Nugent*, 184 U. S. 1-14, 22 Sup. Ct. 269, 275 (46 L. Ed. 405), that the filing of the petition * * * 'is a caveat to all the world and in effect an attachment and injunction,' has been so limited by subsequent decisions of the Supreme Court that it has no application to those holding substantial claims antedating the filing, to liens upon or titles to property claimed as that of the bankrupt. In the absence of proper proceedings to make such claimants parties to the bankruptcy proceeding, they are strangers thereto, and their claims are unaffected thereby."

In such cases a plenary suit must be brought either at law or in equity by the trustee, in which the adverse claim of title can be tried and adjudicated. *Bardes v. Hawarden Bank*, 178 U. S. 524-532, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051; *Murphy v. John Hofman Co.*, 211 U. S. 562-570, 29 Sup. Ct. 154, 53 L. Ed. 327; *Babbitt v. Dutcher*, 216 U. S. 102-113, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; *Johnston v. Spencer*, 195 Fed. 215, 115 C. C. A. 167; *Cooney v. Collins*, 176 Fed. 189, 99 C. C. A. 543; In *re McMahon*, 147 Fed. 684, 685, 77 C. C. A. 668; In *re Michie* (D. C.) 116 Fed. 749.

The bankruptcy court has jurisdiction to draw to itself, and to determine by summary proceedings after reasonable notice to claimants, the merits of controversies between the trustee and such claimants over liens upon and title to property claimed by the trustee as that of the bankrupt which has been lawfully reduced to the actual possession of the trustee or of some other officer of the bankruptcy court as the property of the bankrupt. When those in possession are not adverse claimants, but are only representatives of the bankrupt, without claim of lien upon, or right to, the property in themselves, the bankruptcy court may by summary proceeding take the actual possession of the

property, and then, when it has thus acquired the actual possession, may by summary proceedings determine the validity of claims or liens upon and titles to it. In *re Rathman*, supra, 183 Fed. pages 922-923, 106 C. C. A. 253.

In *Babbitt v. Dutcher*, 216 U. S. 102, 113, 30 Sup. Ct. 372, 377 (54 L. Ed. 402, 17 Ann. Cas. 969), the Supreme Court said:

"There are two classes of cases arising under the act of 1898 and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt, based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy. In the former class of cases a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated."

The bankruptcy court, however, has jurisdiction under an order to show cause to investigate and determine whether or not it had at the time the petition for the order to show cause was filed, or at any other time, actual possession of the property involved in the order, and whether those asserting lien or title have a substantial or only a frivolous and baseless adverse claim. In *re Rathman*, 183 Fed. 913-918, 106 C. C. A. 253; *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413. If it had no such possession, and if the claim asserted is actual and substantial, as distinguished from one merely colorable and fictitious, it may proceed no further, but should decline to adjudicate on the merits without consent. If it errs in its ruling either way, its action is subject to review. *Mueller v. Nugent*, 184 U. S. 1-15, 22 Sup. Ct. 269, 46 L. Ed. 405. Such a claim may be adverse and substantial, even though in fact fraudulent and voidable. *Johnston v. Spencer*, 195 Fed. 215, 115 C. C. A. 167; *Cooney v. Collins*, 176 Fed. 189-192, 99 C. C. A. 543; *Mueller v. Nugent*, 184 U. S. 15, 22 Sup. Ct. 269, 46 L. Ed. 405; In *re Michie* (D. C.) 116 Fed. 749. A case in which the claimant either invokes or accepts the jurisdiction is not here presented.

[3] The assignment of error under consideration involves the judgment of \$20,332.83, standing in the name of the claimant, the 100,000 shares of stock issued to her, the certificates of which were in the possession of her agent in Superior, Wis., the 10 acres of land conveyed to her and standing in her name upon the record, the five horses kept upon the homestead in Duluth, and the \$2,000 alleged to be in her actual possession, all of which was ordered to be turned over, delivered, conveyed, transferred, or assigned to the trustee. It will be observed that none of said property had been reduced to the actual possession of the trustee, or any other officer of the bankruptcy court, as the property of the bankrupt by proceedings summary or otherwise. None of it is alleged to be in the actual exclusive possession of the bankrupt. The trustee could acquire constructive possession only through possession of the bankrupt. It cannot be pretended that

either the judgment, the stock, or the \$2,000 in money was in such possession. The title to the 10 acres of land was in the claimant, and, in the trustee's petition for order to show cause, is at most alleged to be in the joint possession of the bankrupt and the claimant. A joint possession of the horses and equipment is urged, together with the admission that they were kept upon the homestead in the city of Duluth—itself conceded to be exempt. The theory of the trustee is thus stated in the grounds of the application:

"The same are, in fact, in possession or under the control of the said bankrupt, or of the said Abbie A. Shea for him. * * * That in so far as the said property or any part thereof is in the name, or possession, or control, of said Abbie A. Shea, it is only by collusion between her and said bankrupt, pursuant to an attempt on the part of both of them to secrete said property and keep the same from the possession of the trustee and from being converted into money and subjected to the payment of the obligations of the said bankrupt."

In fact the possession of the claimant, whether actual, exclusive, qualified, or joint, is conceded, and the gravamen of the complaint is that the claim is colorable and fictitious, because conceived to be fraudulent and voidable. This was apparently the view taken by the court below, although it found explicitly that Mrs. Shea had no actual adverse claim, and that the bankrupt was, in fact, in possession of all the property described. But one of the main questions raised by the adverse claimant was as to the possession of the property. She denied, under oath, that the bankrupt had any title to or interest in the property in question. The bankrupt not only denied any claim to it, but asserted that of the claimant. Such a claim to the right of possession may be just as absolute and just as essential to the interest of the claimant as the right of property in the thing itself, and is, in fact, a species of property in the thing, as much the subject of litigation as the thing itself. *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481; *Cooney v. Collins*, 176 Fed. 189-193, 99 C. C. A. 543; *Johnston v. Spencer*, 195 Fed. 215-219, 115 C. C. A. 167. By decisions under the prior bankruptcy law it was settled that the bankruptcy court was without jurisdiction to determine adverse claims to property, not in the possession of the assignee in bankruptcy, by summary proceedings. The present act was framed in recognition of the principle of these cases. *First National Bank v. Title & Trust Co.*, 198 U. S. 280-289, 25 Sup. Ct. 693, 49 L. Ed. 1051; *Smith v. Mason*, 14 Wall. 419, 20 L. Ed. 748; *Marshall v. Knox*, 16 Wall. 551-557, 21 L. Ed. 481; *Eyster v. Gaff et al.*, 91 U. S. 521-525, 23 L. Ed. 403. While Act June 25, 1910, 36 Stat. c. 412, p. 840, § 7 (U. S. Comp. St. Supp. 1911, p. 1499), amending section 23, subd. "b," of the act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]), may have enlarged the jurisdiction of the bankruptcy court as such, it did not affect the distinction recognized to exist between summary proceedings and plenary actions.

This leads to a brief inquiry into the basis of Mrs. Shea's claim as disclosed by the record. It is undisputed that the bankrupt did convey to his wife both his federal and state homesteads at a time when they were uncharged with any of the debts proved or provable against the

bankrupt estate. All the property sought to be reclaimed, to which the wife of the bankrupt asserts title, flowed from the disposal of these homesteads after such conveyance to her. Such disposition was made, and subsequently acquired titles taken in her name. True, the Sheas have continued to live together as husband and wife, and it may be conceded that the transfer of the homesteads to her may have been made under the impression that thereby the payment of this indebtedness might be more effectively avoided. Is this, if true, conclusive of the question before us? We have seen that a claim, even though fraudulent, may nevertheless be actual, adverse, and substantial.

Section 2296, R. S. U. S. (U. S. Comp. St. 1901, p. 1398), provides as follows:

"No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuance of the patent therefor."

The Statutes of Minnesota for 1905 provided:

"Sec. 3452. The house owned and occupied by a debtor as his dwelling place, together with the land upon which it is situated to the amount hereinafter limited and defined, shall constitute the homestead of such debtor and his family, and shall be exempt from seizure or sale under legal process on account of any debt not lawfully charged thereon in writing except," etc.

"Sec. 3453. If situated outside the limitations of an incorporated city, village, or borough, such homestead may include any quantity of land not exceeding eighty acres," etc.

"Sec. 3458. The owner may sell and convey the homestead without subjecting it, or the proceeds of such sale for the period of one year after sale, to any judgment or debt from which it was exempt in his hands," etc.

It is the contention of the claimant Abbie A. Shea that the transfer of these homesteads to her was actual and substantial, and could not be fraudulent as to her husband's creditors; that having title thereto, and possession thereof, she had a right to dispose of the land and enjoy the proceeds from its sale free from the antecedent debts of her husband. That such a contention discloses a contested matter of right, involving some fair doubt and reasonable room for controversy, as distinguished from a claim merely colorable or fictitious, has been recognized in many decided cases. *Russell v. Lowth*, 21 Minn. 167, 18 Am. Rep. 389; *Smith & Crittenden v. Steele*, 13 Neb. 1, 12 N. W. 830; *Blair et al. v. Mayer et al.*, 24 S. D. 563, 124 N. W. 721, 140 Am. St. Rep. 797; *Bouscher v. Smith et al.*, 73 Iowa, 610, 35 N. W. 681; *McCorkell v. Herron et al.*, 128 Iowa, 324, 103 N. W. 988, 111 Am. St. Rep. 201; *Van Doren v. Miller et al.*, 14 S. D. 264, 85 N. W. 187; *Brandhoefer v. Bain et al.*, 45 Neb. 781, 64 N. W. 213; 20 Cyc. 381, 385, note 73; *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254; *Stinde v. Behrens*, 81 Mo. 254; *Harris v. Meredith*, 106 Mo. App. 586, 81 S. W. 203; *Morrison v. Abbott et al.*, 27 Minn. 116, 6 N. W. 455; *Baldwin v. Rogers*, 28 Minn. 544, 11 N. W. 77; *Horton v. Kelly et al.*, 40 Minn. 193, 41 N. W. 1031; *Blake v. Boisjoli*, 51 Minn. 296, 53 N. W. 637; *Keith v. Albrecht*, 89 Minn. 247, 94 N. W. 677, 99 Am. St. Rep. 566; *Kershaw v. Willey*, 22 Okl. 677, 98 Pac. 908; *Scheel v. Lackner et al.*, 4 Neb. (Unof.) 221, 93 N. W. 741; *Keyes v. Rines*, 37 Vt. 260, 86 Am. Dec. 707.

These are questions that we do not undertake to decide in this case,

believing them to have been beyond the jurisdiction of the District Court in this proceeding. We hold only, as we did in *Johnston v. Spencer*, that the claimant presents some questions arising from the peculiar facts of the case that require serious consideration; that she asserts a substantial adverse claim to the property in controversy, which entitles her to a trial in due course, rather than in a summary proceeding. *Johnston v. Spencer*, 195 Fed. 215-220, 115 C. C. A. 167.

Our conclusion is that, with respect to the property involved in the consideration of this first specification of error, the bankruptcy court was without jurisdiction of the merits in a summary proceeding, because neither the trustee nor other officers of that court had ever reduced or attempted to reduce this property to possession as assets of the bankrupt; because the property was in the possession of the claimant Abbie A. Shea, within the meaning of the rule requiring title thereto to be adjudicated in a plenary suit in a court of competent jurisdiction; because the claimant Abbie A. Shea duly asserted an adverse claim thereto, as distinguished from one merely colorable and fictitious, even though fraudulent and voidable; because she seasonably challenged the jurisdiction of the District Court to adjudicate the matter upon the merits in this summary proceeding, and that court should, therefore, have declined to accept jurisdiction and to proceed to a determination of the controversy. We adhere to the wholesome rule "which assures a trial of the merits of" such claims "in a plenary suit at law or in equity under the rules of pleading, of practice, and of evidence, that wisdom and experience have found most conducive to the discovery of the truth and the administration of justice." In *re Rathman* (C. C. A.) 183 Fed. 913, 929, 106 C. C. A. 253, 269.

[4] 2. The second specification of error complained of has to do with the \$3,000 in currency alleged to have been in the possession of the bankrupt a few days prior to the filing of the petition in bankruptcy. Counsel concede that the petitioners' remedy as to this item is by petition to revise; that under this procedure this court will review the evidence only to ascertain if the order of the District Court is wholly unsupported thereby, contrary to law, a clear mistake, or generally for any reason for which evidence may be reviewed on writ of error. *First National Bank v. Cole*, 144 Fed. 392, 75 C. C. A. 330. It was clearly within the jurisdiction of the bankruptcy court to determine this matter in a summary proceeding under a show cause order.

[5] While there was a conflict in the testimony, there was substantial evidence to sustain the finding of the referee and court. Three witnesses testified directly that shortly before the petition was filed the bankrupt exhibited a large sum of money—a \$500 bill being observed on the outside of the roll of currency. He boasted that he had \$3,000 and was not yet "broke." This testimony was left, without adequate refutation or satisfactory explanation.

"When property of a bankrupt estate is traced to the possession of one who receives it upon the eve of the bankruptcy of its owner, it is presumed that it remains in his possession or under his control," and "the burden is upon him to satisfactorily so account for it" to the court of bankruptcy. "He cannot escape an order for its surrender by simply denying under oath that he

has it, or that it is the property of the * * * estate." In re Meier, 182 Fed. 799, 105 C. C. A. 231.

This rule applies with especial force to the bankrupt himself. *Boyd v. Glucklich* (C. C. A.) 116 Fed. 131-142, 53 C. C. A. 451.

Since both branches of the case have been considered on the petition to revise, the appeal will be dismissed. With respect to the item of \$3,000 ordered to be delivered by the bankrupt to the trustee, the order of the District Court is approved and confirmed, and the petition to revise is denied. With respect to the other property, to wit, the 10 acres of land, the 100,000 shares of stock, the judgment for \$20,-332.83, the five horses and equipment, and the sum of \$2,000 in cash ordered to be conveyed, transferred, assigned, turned over, and delivered to the trustee by the bankrupt and the claimant Abbie A. Shea, or either of them, the petition to revise is sustained, and the order of the District Court is vacated and set aside, with directions to dismiss the summary proceeding as to these items, without prejudice, however, to the right of the trustee to institute a suit in a court of competent jurisdiction for the recovery of the money and property in question. One-half of the costs of both proceedings in this court shall be taxed to Andrew J. and Abbie A. Shea and one-half to the trustee in bankruptcy.

It is so ordered.

B-R ELECTRIC & TELEPHONE MFG. CO. et al. v. ÆTNA LIFE INS. CO.
et al.

SAME v. SOUTHWESTERN ENGINEERING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. June 24, 1913.)

Nos. 3,876 and 127.

1. BANKRUPTCY (§ 440*)—APPEAL—DECISIONS REVIEWABLE.

Under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), authorizing appeals to the Circuit Court of Appeals from judgments adjudging or refusing to adjudge a defendant bankrupt, granting or denying a discharge, or allowing or rejecting a debt or claim of \$500 or over, no appeal lies from an order refusing to vacate and set aside an adjudication in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 440.*]

2. BANKRUPTCY (§ 444*)—REVISION OF ORDERS BY APPELLATE COURT—SCOPE OF REVIEW.

Under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), providing that the Circuit Court of Appeals shall have jurisdiction in equity to superintend and revise, in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction, on a petition to revise an order refusing to vacate an adjudication in bankruptcy, the appellate court could not consider the evidence in the record, but could only determine, as matter of law, whether on the face of the papers filed the petitioning creditors had a right to come in and defend as against the involuntary petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920-927; Dec. Dig. § 444.*]

Appeal and review in bankruptcy cases, see note In re Eggert, 43 C. C. A. 9.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. BANKRUPTCY (§ 88*)—INVOLUNTARY PROCEEDINGS—RIGHT OF CREDITORS TO DEFEND.

Under Bankr. Act July 1, 1898, c. 541, § 18b, 30 Stat. 551 (U. S. Comp. St. 1901, p. 3429), providing that the bankrupt or any creditor may appear and plead to the petition within five days after the return day, or within such further time as the court may allow, creditors have an absolute right to appear and contest an involuntary petition within five days after the filing thereof, or, where no process is issued, within a reasonable time, and any order of adjudication made within such time is voidable as to them, even though the bankrupt voluntarily appears and consents to the adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 58, 98, 104, 109-112; Dec. Dig. § 88.*]

4. BANKRUPTCY (§ 100*)—INVOLUNTARY PROCEEDINGS—RIGHT OF CREDITORS TO DEFEND.

At the time of filing of involuntary petition in bankruptcy there was also filed a voluntary appearance, a waiver of the issuance and service of subpoena, and a consent that an adjudication might be made, executed in the name of the bankrupt, by its attorney, whereupon an order of adjudication was made. Thereafter by its president it filed an answer denying the allegations of the petition and demanding a jury trial. No process was issued, and, without any unreasonable delay, other creditors filed a petition asking that the adjudication be vacated, in which it was alleged that they were creditors of the alleged bankrupt, that the bankrupt had more than 12 creditors, that the attorney who filed the consent to the adjudication was unauthorized, and that the alleged bankrupt was not insolvent. *Held* that, although the petition to vacate was not technically an answer and the petitioners did not formally ask to defend the involuntary petition, they should have been permitted to come in and defend, and it was improper to force them to try whether the allegations in the petition to vacate were true, instead of hearing and determining the facts set forth in the involuntary petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141-144; Dec. Dig. § 100.*]

Appeal from and Petition to Revise Order of the District Court of the United States for the Eastern District of Oklahoma.

Petition by the B-R Electric & Telephone Manufacturing Company and another to vacate an order adjudicating the Southwestern Engineering Company bankrupt, on the petition of the Ætna Life Insurance Company. To review an order denying the petition, the petitioners appeal, and also petition to revise. Appeal dismissed, and orders vacated on the petition to revise.

Roach & Bradley, of Muskogee, Okl., for appellants and petitioners.

Martin, Bush & Moss, of Tulsa, Okl., for Ætna Life Ins. Co.

A. J. McCarthy, of Oklahoma City, Okl., for Southwestern Engineering Co.

Charles A. Loomis, of Kansas City, Mo., for appellant and petitioner in Nos. 3,877 and 128.

Before SANBORN and CARLAND, Circuit Judges, and WILLARD, District Judge.

CARLAND, Circuit Judge. [1] The above-entitled case has been brought here both by appeal and by petition to revise. The order which is sought to be revised is an order made July 15, 1912, by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

United States District Court for the Eastern District of Oklahoma, refusing to vacate and set aside an adjudication in bankruptcy made by the same court June 13, 1912. A motion has been made to dismiss the appeal, for the reason that the order is not appealable under the provisions of section 25a of the Bankruptcy Act. That section provides for appeals to this court in the following cases: 1. From a judgment adjudging or refusing to adjudge a defendant a bankrupt. 2. From a judgment granting or denying a discharge. 3. From a judgment allowing or rejecting a debt or claim of \$500 or over. We think it is clear that the appeal must be dismissed, as the order appealed from is not one of the judgments mentioned in the law above quoted. In the case of *In re Ives*, 113 Fed. 911, 51 C. C. A. 541, the Circuit Court of Appeals for the Sixth Circuit held that an order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication was not appealable.

[2] We now turn to the petition to revise. Section 24b of the Bankruptcy Act provides that the several Circuit Courts of Appeals shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. It will be seen that the statute limits our jurisdiction to that of superintending and revising in matter of law, etc. The record presented on the petition to review hereinbefore referred to presents the following facts:

On June 13, 1912, the Ætna Life Insurance Company filed in the District Court of the United States for the Eastern District of Oklahoma a petition asking said court to adjudge the Southwestern Engineering Company an involuntary bankrupt. The petition alleged two acts of bankruptcy, as follows: That said Southwestern Engineering Company, on or about the 8th day of June, 1912, paid to the Builders' Material Supply Company, one of its creditors, large sums of money, the exact amount of which your petitioner is unable to state, to apply upon its account, or in payment in full of its account, which payment was made by said Southwestern Engineering Company with intent to prefer said Builders' Material Supply Company, and that said sums were received by said Builders' Material Supply Company with knowledge that the said Southwestern Engineering Company was insolvent and that the same was an unlawful preference. That on the same day said Southwestern Engineering Company paid to the American Water Softener Company, one of its creditors, large sums of money, under the same circumstances and conditions as above set forth with reference to the Builders' Material Supply Company.

At the same time the above petition was filed the Southwestern Engineering Company filed a waiver of the issuance and service of subpoena and entered its voluntary appearance in said cause, consenting that the same might be heard at once and that an adjudication in bankruptcy be immediately made. At the same time said Southwestern Engineering Company also filed an answer to the above petition, admitting the allegations thereof, and consenting that an adjudication in bankruptcy be made at once and without further notice, whereupon an order of adjudication was made. The waiver of issuance of pro-

cess was signed by A. J. McCarthy, attorney for Southwestern Engineering Company, and the answer of said company was also signed in the same manner. On June 22, 1912, the Southwestern Engineering Company, by J. B. Davidson, president, filed an answer to the petition of the Aetna Life Insurance Company wherein it denied the acts of bankruptcy set forth in the petition, denied that it was insolvent, denied that it had less than 12 creditors, and prayed that the issues thus made might be inquired into by a jury.

On July 13, 1912, the B-R Electric & Telephone Manufacturing Company and P. O. Draper filed a petition in the bankruptcy proceeding asking that the order of adjudication made on June 13, 1912, be vacated and set aside. Petitioners alleged that they were creditors of the Southwestern Engineering Company, one in the sum of \$888.50, and the other in the sum of \$280; that said Southwestern Engineering Company had, at the time of the filing of the petition in bankruptcy more than 12 creditors; that A. J. McCarthy, the attorney who filed the first answer and consented to an adjudication on the part of the Southwestern Engineering Company, was not authorized so to do; and that the Southwestern Engineering Company was not insolvent. On the same day the Southwestern Engineering Company, by J. B. Davidson, its president, filed a petition to set aside the order of adjudication hereinbefore mentioned.

No pleadings of any kind were filed in answer to these petitions. The court, however, proceeded, not to hear and determine the facts set forth in the involuntary petition filed by the Aetna Life Insurance Company, but to hear and determine whether the facts set forth in the petitions filed for the purpose of having the order of adjudication vacated and set aside were true. After hearing evidence it made the order of which complaint is made. On the petition to revise we may not consider the evidence in the record, but may determine as matter of law whether on the face of the papers filed the creditors had a right to come in and defend as against the involuntary petition filed by the Aetna Life Insurance Company.

[3] Section 18b of the Bankruptcy Act provides that the bankrupt or any creditor may appear and plead to the petition within five days after the return day, or within such further time as the court may allow. As the creditors of the Southwestern Engineering Company had a right under the law to resist the petition of the Aetna Life Insurance Company, an adjudication, even though the bankrupt voluntarily appeared and consented to it, ought not to have been made until at least five days had elapsed after the filing of the involuntary petition, so that any creditor desiring to come in and defend might have done so. We do not mean to decide that the order of adjudication was void as to the alleged bankrupt, if it voluntarily appeared and consented to it, but only that it is voidable by the petitioning creditors herein. In re Humbert (D. C.) 100 Fed. 439; In re Columbia Real Estate (D. C.) 101 Fed. 965; In re American Brewing Company, 112 Fed. 752, 50 C. C. A. 517; In re Western Investment Co. (D. C.) 170 Fed. 677.

[4] No process having issued when the involuntary petition was filed, nor thereafter, no creditor could be defaulted, if application were seasonably made to come in and defend. The creditors' petition to vacate and set aside the order of adjudication was not technically an answer, nor did such creditors formally ask to defend the involuntary petition; but we think it plainly appeared that it was the purpose of the creditors to contest the involuntary petition. The law gave to the petitioning creditors the absolute right to appear and plead to the involuntary petition. If there had been any process issued on the petition, the time for appearing would have been limited to five days; but, as there was no process issued, the creditors could come in within a reasonable time and plead, and we think in the case at bar the petitioning creditors were not guilty of any unreasonable delay. If a party who files an involuntary petition desires to put in default all those persons who have a right to appear and plead to the petition, he should issue the usual subpoena, and then the law fixes the time within which every one who has a right to plead may appear; otherwise, the adjudication will not be binding on those who do not consent to it if they appear within a reasonable time and ask to plead.

We think on the face of the record the petitioning creditors were entitled to come in and defend as against the petition of the Ætna Life Insurance Company, and should not have been forced to try whether the allegations in their petition were true or not, especially when the Southwestern Engineering Company, through its president, had filed an answer demanding a jury trial. We are therefore of the opinion that the order of July 15, 1912, denying the motion to set aside the judgment of adjudication, should be vacated and set aside, and the petitioning creditors allowed to come in and defend as against the involuntary petition of the Ætna Life Insurance Company, and that the order of adjudication should also be vacated and set aside as to the petitioning creditors. And it is so ordered.

By stipulation of the parties, the same order will be made in No. 3,877 and No. 128 original.

JAMESON v. UNITED STATES FARM LAND CO.

(Circuit Court of Appeals, Eighth Circuit. July 10, 1913.)

No. 3,899.

BROKERS (§ 52*)—COMPENSATION—FAILURE OF NEGOTIATIONS.

Defendant agreed to pay plaintiff a specified commission for procuring S. to undertake the sale of a tract of land on terms to be agreed upon between defendant and S. The same day defendant wrote S., stating that the price to defendant was to be \$35 an acre, that on each \$200,000 received by it in cash S. was to be paid \$40,000, that S. was to be charged interest at 5 per cent. on \$2,000,000, less receipts from sales by him, and that further details might be agreed upon when an agreement was made. S. replied, suggesting certain modifications, by which he was to be paid certain percentages of the commission in cash, dependent on the price for which the land was sold, each sale was to be treated as a separate trans-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

action, settlements to be made monthly, and no interest to be charged. Defendant again wrote S., suggesting that the details might be arranged later, after S. had examined the land, and stating that it would close an agreement with him on the conditions outlined in his letter, subject to some qualifications regarding manner of paying the percentage of cash received and the interest item. *Held*, that these letters constituted no contract between defendant and S., since the modifications suggested by S. constituted a rejection of the original offer, and these modifications were not accepted by defendant, and hence plaintiff was not entitled to the agreed commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 73; Dec. Dig. § 52.*]

In Error to the District Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Action by A. Y. Jameson against the United States Farm Land Company. Judgment for defendant, and plaintiff brings error. Affirmed.

M. H. Boutelle, of Minneapolis, Minn. (A. M. Higgins, of Minneapolis, Minn., on the brief), for plaintiff in error.

Edward T. Young, of St. Paul, Minn. (Thomas D. O'Brien and Royal A. Stone, both of St. Paul, Minn., on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges.

CARLAND, Circuit Judge. This action was brought by Jameson to recover from the Land Company damages for breach of contract. On the trial at the close of the plaintiff's evidence, the action was dismissed on the merits on motion of counsel for defendant. This ruling of the court is assigned as error. It was alleged in the complaint that the Land Company, on or about September 1, 1911, offered and proposed to Jameson that if he would procure one M. W. Savage to undertake the handling and sale of a tract of land known as "Chowchilla Ranch," in California, containing about 108,000 acres, on terms to be agreed upon between the Land Company and M. W. Savage, the Land Company would pay Jameson as and for a commission for negotiating said sales agency contract a sum equal to 5 per cent. of the amount received by the Land Company from sales made by said Savage on said sales agency contract, and in addition thereto a lump sum or bonus of \$25,000; that Jameson accepted this proposition, and subsequently procured said M. W. Savage to undertake the handling and sale of said Chowchilla ranch on terms proposed by the Land Company; that after Jameson had procured Savage to act as sales agent upon terms proposed by the Land Company, the latter wholly refused to perform its contract with Savage, to the damage of Jameson in the sum of \$214,000. The evidence material to the cause of action pleaded appears from the record to be as follows:

Prior to September 21, 1911, Jameson had been authorized by the Land Company to negotiate for a sale of the Chowchilla ranch in con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sideration of a certain commission. On the above date, however, the relations of the parties were entirely changed by the following writing:

"United States Farm Land Co.

"St. Paul, Minn., Sept. 21, 1911.

"Mr. A. Y. Jameson, Minneapolis, Minn.

"Dear Sir: We hereby rescind and withdraw all propositions heretofore made you, as to commission you would receive in event of your making a sale of the Chowchilla ranch in California, and we hereby agree to give you, in event of our making a sale, or sales contract, with M. W. Savage, of Minneapolis, at a price of thirty-five (\$35) dollars per acre, a commission of five (5%) per cent., and a further sum of twenty-five thousand (\$25,000) dollars, conditioned, however, upon the fulfillment of the contract by Mr. Savage; it being hereby agreed that the commission is not earned, due, or payable except upon the fulfillment of the contract by Mr. Savage. When we have received the net sum of three hundred thousand (\$300,000) dollars in cash from Mr. Savage's sales, there is earned, and will be paid to you, the sum of twenty thousand (\$20,000) dollars, and a like sum will be earned and paid when a further sum of three hundred thousand (\$300,000) dollars has been received by us, and so on, until you have received your full commission; we agreeing that when we have received two million (\$2,000,000) dollars in cash that your whole commission will then be earned, due, and will be paid by us, but the same is not earned until payments are received by us as specified herein.

"Very respectfully,

United States Farm Land Co.,

"By G. D. Eygabroad, V. P."

On the same day the Land Company wrote the following letter, which was delivered to Savage:

"United States Farm Land Co.

"St. Paul, Minn., Sept. 21, 1911.

"Mr. M. W. Savage, Minneapolis, Minn.

"Dear Sir: Subject to previous sale, option or conditions that would make it not advisable for us to enter into a sales agreement with you, we will recommend entering into a sales contract with you on the Chowchilla ranch, in the San Joaquin valley of California, on the following terms: Price or consideration to us thirty-five (\$35) dollars per acre, you to sell at least ten thousand (10,000) acres the first three (3) months after entering into the contract with us, and a like amount the succeeding three (3) months. At the end of nine (9) months you are to have sold at least thirty-five thousand (35,000) acres, and at the end of twelve (12) months from the date of the agreement at least fifty thousand (50,000) acres, we to receive all the cash and prepare and issue the contacts of sale to your purchasers. When we receive two hundred thousand (\$200,000) dollars in cash, we are to turn over to you forty thousand (\$40,000) dollars and continue paying to you a like amount on each succeeding two hundred thousand (\$200,000) dollars we receive in cash, and as soon as same is received, provided the same does not exceed the amount of cash that would be due you, based on your profits over and above thirty-five (\$35) dollars per acre and the percentage of cash we receive in proportion to the amount of deferred payments on sales made by you. We will pay the taxes on the unsold portion of the ranch during the term of the agreement to be made, or until we have received our equity in same; your purchasers, of course, to pay taxes from the date of their purchase. Your purchasers to pay six (6%) per cent. interest on deferred payments. We to charge you interest at five (5%) per cent. on two million (\$2,000,000) dollars until such time as we have received two million (\$2,000,000) dollars in cash net from your sales, the cash that we receive from such sales to be credited on the two million (\$2,000,000) dollars and interest stopped on such amount. Further details to be mutually agreed upon at the time the agreement is made.

"Inasmuch as we are absolutely tying this property up with you, and you are taking same entirely out of our hands, we shall require that you satisfy us as to what you will do in the way of advertising and of your ability to make sales and comply with the conditions of the contract. This we believe you can easily do. While we do not desire, at this time, to absolutely option the land to you, before our regular agreement is made, it is our belief that we will be able to contract with you on the terms and conditions stated herein; but should an option or previous sale be made, unbeknown to us, by one of our other offices, or should some condition arise that would make it impossible for us to fulfill our part of the agreement to be made, we would wish to decline to make same; but if you make a trip to California and the proposition is acceptable to you, we believe there will be no trouble whatever in our carrying out our part of the agreement. There will also be incorporated in our agreement, and made a part thereof, that should you fail and not be successful in selling the land, as you anticipate, or as you would agree, and we were unwilling to extend the agreement, that you would pay us forty (\$40) dollars per acre for the land you had sold and we to turn over to you your profits on same in cash and contracts in the same proportion that we received from sales by you.

"Very respectfully,

United States Farm Land Co.,

"By G. D. Eygabroad, V. P."

Also, on the same day, E. B. Savage, representing M. W. Savage, wrote to the Land Company the following letter:

"M. W. Savage Interests, Administrative Offices.

"Minneapolis, Sept. 21, 1911.

"Mr. G. D. Eygabroad, c/o United States Farm Land Co., St. Paul, Minnesota.

"Dear Sir: In coming over on the car I studied your letter of September 21st in regard to giving us a selling contract on the Chowchilla ranch. I furthermore took up some of the details with Mr. M. W. Savage on my return to the office. It seems to us that our ideas coincide in a general way, but we believe that the contract drawn on a basis of a cash commission of 7% and 3½% is more easily understood than the plan which you mentioned, for the simple reason that on the 7 and 3½% basis each sale is treated as an individual transaction, and the amount of commission is fixed in such a manner as to avoid any possible question. The result is practically the same in both cases, as you will discover if you work it out on possible sales.

"Under our arrangement, if we sell the land at less than \$47 an acre, we are entitled to no cash commission until the entire deal is cleaned up; but we do not want you to get the idea that, because of this, we would not make sales under \$47, if it became necessary. We would make these sales, treating them as big deals on which we can afford to wait for our commission, as we would be under no selling cost. Now, if we sell tracts of land for all cash, I think you will agree that we are entitled to at least 50% of our full commission. We believe it is no more than fair to ask for monthly settlements on the basis of sales made during the previous month, because we are going to be under the necessity of tying up a great deal of cash in this deal, and we do not see where there is any material advantage to you in asking us to wait the three months before we get a settlement.

"Now, in regard to making sales. We are willing to sell on your regular terms of one-third cash and the balance in five yearly payments, and believe we can do so. There may be special cases come up where we would want to make, and where you would want us to make, different arrangements rather than turn down the sales. Under these circumstances we will be glad to confer with you, and leave the decision, both as to the terms to be made and the commission we would be entitled to under these terms, up to you.

"In looking over your outline hurriedly this noon I did not stop to question the interest item. On considering the matter further, we have come to the conclusion, inasmuch as you are receiving \$5 more per acre for the land selling it in this way than you were asking for it on a straight sales basis, that you ought to be willing to stand this interest charge, which would amount

in a year, on the basis you have figured it, to about \$100,000. You have had this investment for some time, and have been paying interest charges on it (this is merely my impression from the fact that Mr. Jameson has been working on the sale of the land for almost a year), and the amount you are granting is three months more interest charges, because at the end of three months you will certainly know whether or not it will pay you to continue the sales contract.

"We do not believe that we can afford to pay \$25,000 for each three months trial in selling up to the schedule, in addition to the large amount we would have to put into it as an advertising selling campaign, to say nothing of the general expense, etc. You realize that in making an arrangement of this kind we do not figure on the basis of everything going as we expect. We figure on the worst possible side of the case, and base our judgment on the amount we are willing to lose if we make a flat failure. Both Mr. Savage and myself have full confidence in our ability to sell the land, because if we should fall down it would be the first time we have ever made a failure on a selling proposition. I believe that our organization is peculiarly adapted to this line of work, and I think that if we work together on the basis outlined (copy of which is attached) that it will be greatly to our mutual advantage.

"We have outlined to you what we are willing to gamble on, on our ability to make good, and the question up to you I believe is whether we have impressed you sufficiently, so that you are willing to tie up your property for three months and find out whether or not we can get 'the name on the dotted line.' With kind personal regards, I remain,

"Very truly yours,

E. B. Savage.

"We will attempt to sell the Chowchilla ranch for you on a commission basis, our commission to be all that we get for the land above \$35 per acre. You are to pay us a cash commission of 7% on all sales made by us for you, providing such sales are made on a basis of \$60 per acre or better and one-third of the selling price is paid in cash. If sold at \$47 per acre, we are to receive 3½%. Each sale to be treated as a separate transaction, and all settlements to be made monthly. If sales are made for all cash, then we will be entitled to 50% of our full commission.

"We will sell on your regular terms of one-third cash and balance in five yearly payments. Any change from these terms except cash must be O. K'd by you. When we have turned over to you contracts amounting to \$2,790,000, cash on same amounting to \$790,000 and \$2,000,000 in mortgages, we will divide the mortgage and cash received until you have received payment in full for land at \$35 per acre, and from that date on you turn over to us the proceeds of all future sales. If we fail to sell on schedule outlined, you have the right to revoke our selling contract and pay us the commission due us on a basis of the land netting you \$40 per acre, and you can pay us either in this land at \$35 cash or mortgage."

On September 22, 1911, the Land Company wrote to M. W. Savage the following two letters:

"United States Farm Land Co.

"St. Paul, Minn., Sept. 22, 1911.

"Mr. M. W. Savage, Minneapolis, Minn.

"Dear Sir: Replying to Mr. E. B. Savage's letter of September 21st, handed to us by Mr. Jameson, we feel, considering the fairness that each of us, we believe, intends to extend to the other, that there will be no trouble or difficulty in arranging for the sale of the Chowchilla ranch with you, on a basis of thirty-five (\$35) dollars per acre, provided the property meets with your approval on examination. There are many minor details to be considered, and which it will be necessary to incorporate in our final agreement, that it is not necessary to take up at this time. I know we are willing to be more than fair and liberal with you, and believe you feel the same towards us, and as to the final matter of arranging the details, we frankly say we believe there will not be the least particle of trouble. We could entirely discard

the letter I wrote you yesterday and Mr. Savage's letter of September 21st, and with the verbal understanding we have and the fairness we intend to extend to each other, we certainly can come together, if the examination of the property meets with your approval.

"We do not think it necessary, at this time, to take up further the details referred to in either your letter or our former letter. We shall be glad to have you go and make an examination of the ranch. Before you leave, we desire to see you, and shall be glad to give you any further information we can, and would want to give you a letter of introduction to our California manager, who will at that end of the route give you every assistance possible and all the information you could expect. Trusting we may become associated in this matter, and that it will prove to our mutual benefit, financially and otherwise, we remain,

"Very respectfully,

United States Farm Land Co.,

"By G. D. Eygabroad, V. P."

"United States Farm Land Co.

"St. Paul, Minn., Sept. 22, 1911.

"Mr. M. W. Savage, Minneapolis, Minn.

"Dear Sir: Replying further to letter of Mr. E. B. Savage, dated September 21st, we would advise that he make the trip to California at once, and on his return, if his examination of the property is satisfactory, we will close a sales contract agreement on the conditions outlined in said letter, subject to, perhaps, some qualifications regarding per cent. and the manner of paying the percentage of cash received to you, and the interest item. We believe a better arrangement can be agreed upon as to the payment of commissions to you, which would be just as favorable to you.

"We will positively agree, at this time, to waive the item of interest for at least three (3) months from the date of our final contract with you. Further than that will be a matter of agreement at the time same is entered into. You, of course, understand from my previous letter that all cash and deferred payments that were turned to us from sales would be credited and offset the amount that would be drawing interest.

"As further stated in my former letter, we believe there will be no difficulty whatever in agreeing on all the details in the general agreement. If we had the least doubt of this, we would not consent to your spending your time and money to examine this proposition. These conditions, of course, are all subject to the sale of the property as stated in our recent letter. We, however, expect to be very fair and reasonable with you, even on propositions that might come to us after you start to examine this property, and know we will be more than fair and liberal with you, and feel you will be the same with us.

"Very respectfully,

United States Farm Land Co.,

"By G. D. Eygabroad, V. P."

If there was any contract entered between the Land Company and M. W. Savage for the handling and sale of the Chowchilla ranch, it must be found in the letters above mentioned. We are not only satisfied of this by an examination of the record, but Mr. Jameson and Mr. Savage both testified that there was no contract made after the return of Mr. Savage from California, and that whatever contract there was existed before that journey. Mr. Jameson, when his attention was called by counsel to the foregoing letters and was asked, "It is true, isn't it, that unless there is a contract contained in these instruments to which I have now called your attention, between Mr. Eygabroad and Mr. Savage, then no contract was ever made between them about Chowchilla Ranch?" answered, "That is all the contract there was." Jameson, having on the 21st of September accepted the proposition of the Land Company with its conditions, cannot claim

the benefit of any transaction between himself and the Land Company transpiring before that date to support the contract which he pleaded in his complaint, and to support which he introduced evidence at the trial. It seems to us very clear that the letters herein set forth show that the minds of the parties never met in agreement upon the same subject in the same way. In other words, there was no acceptance on the part of either party of the proposition offered by the other. As mentioned by the trial court, there was no agreement arrived at by the parties in regard to the item of interest at 5 per cent. for one year on \$2,000,000.

The case of *M. & St. L. Ry. Co. v. Columbus Rolling Mill Co.*, 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376, is instructive. In that case the Supreme Court declared the law as follows:

"A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance."

The letter of E. B. Savage, under the rule quoted, would constitute a rejection of the letter of the same date written by the Land Company, and the other two letters written by the Land Company on September 22d did not assent to the proposed modifications of the original offer contained in the letter of E. B. Savage, but suggested still other modifications. As in our opinion there was no contract ever entered into between the Land Company and Savage, it becomes unnecessary to discuss the matter of damages or the authority of the officers who signed the letters of the Land Company.

We have examined the other assignments of error, relating to the exclusion of evidence, and we find no error in the rulings of the court; moreover, we cannot see how, if the rulings had been in favor of the plaintiff, the result of the trial could have been different than it was. We have carefully considered the exhaustive brief filed by counsel for plaintiff in error, but it seems to us that the plain facts appearing in the letters quoted prevent a lengthy discussion in the decision of the case.

Judgment affirmed.

THOMASON et al. v. WELLMAN & RHOADES.

(Circuit Court of Appeals, Eighth Circuit. June 30, 1913.)

No. 3,918.

INDIANS (§ 15*)—ALLOTMENT—CONVEYANCE BEFORE ISSUANCE OF CERTIFICATE AND PATENT.

A member of the Chickasaw Tribe having "selected" and designated land as her surplus allotment, by formal application at the land office, as provided by the Choctaw and Chickasaw Supplemental Agreement (Act July 1, 1902, c. 1362, par. 6, 32 Stat. 641), thereby doing all that the law required of her to entitle her to a patent, she then had an equitable interest in the land, which she could at once convey; such conveyance be-

coming entirely valid and effective, on an allotment certificate issuing to her after expiration, without contest, of the nine months within which, under paragraph 71, her right could be contested, and a patent thereafter issuing to her, effective by relation as of the date of her selection.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.*]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by Wellman & Rhoades, a partnership composed of C. L. Wellman and E. S. Rhoades, against W. L. Thomason and others. From a decree for complainants, defendants appeal. Affirmed.

J. E. Dolman, of St. Joseph, Mo., and L. S. Dolman, of Ardmore, Okl., for appellants.

W. I. Gilbert and E. H. Bond, both of Oklahoma City, Okl., for appellees.

Before SANBORN and CARLAND, Circuit Judges, and WILLARD, District Judge.

CARLAND, Circuit Judge. This is an appeal from a decree quieting the title to certain real estate in appellees. The case was heard on bill and answer. The real estate in controversy consists of certain lots in Head addition, Duncan, Okl. Both parties claim title from common grantors, namely, Sallie Duncan and William Duncan, her husband. Sallie Duncan is a white woman, intermarried with William Duncan, a member and citizen of the Chickasaw Nation. These grantors conveyed the land by warranty deed to J. G. Miller on September 21, 1904, and by subsequent conveyance the title became vested in the appellees, if the deed from the Duncans is valid. July 13, 1909, Sallie Duncan and William Duncan conveyed the land by quitclaim deed to D. M. Dillingham, through whom the appellant W. I. Thomason claims title. No question is made concerning the proper record of any conveyance. On September 19, 1904, Sallie Duncan, above named, being by virtue of her marriage a member of the Chickasaw Tribe of Indians, and in possession of a tract of land which included within its boundaries the lots in question, duly selected and designated the same as her surplus allotment, and a certificate of allotment, after the expiration of the time in which the right of said allottee could be contested had expired, was issued to her by the Dawes Commission as of September 19, 1904, as provided by law. On the 2d and 10th days of February, 1906, a patent for the land above mentioned was issued to Sallie Duncan by Green McCurtain, principal chief of the Choctaw Nation, and Douglas H. Johnson, Governor of the Chickasaw Nation, which patent was duly approved by the Secretary of the Interior. It is claimed by the appellants that the selection of the allotment by Sallie Duncan gave her no interest in the land selected which she could convey prior to the issuance and delivery of the allotment certificate. It is not claimed that there existed any restriction which would prevent Sallie Duncan from conveying the land on September 21, 1904, but that she had no interest therein that she could convey. It is admitted

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that Sallie Duncan was entitled to select the land which she designated as her surplus allotment, and it must also be conceded that she did all that the law required of her to entitle her to receive a patent for the land. It is also admitted that, if the formal selection and designation of her surplus allotment at the local land office amounted to an allotment, the deed of September 21, 1904, is valid. *Mullen v. U. S.*, 224 U. S. 457, 32 Sup. Ct. 494, 56 L. Ed. 834.

Paragraph 6 of the Choctaw and Chickasaw Supplemental Agreement (32 Stat. 641) reads as follows:

"The word 'selected' and its various modifications, as applied to allotments and homesteads, shall be held to mean the formal application at the land office to be established by the Commission to the Five Civilized Tribes for the Choctaw and Chickasaw Nations for particular tracts of land."

Paragraph 71 of the same agreement reads as follows:

"After the expiration of nine months after the date of the original selection of an allotment, by or for any citizen or freedmen of the Choctaw or Chickasaw Tribes, as provided in this agreement, no contest shall be instituted against such selection."

The allotment certificate was the evidence that a selection had been made, but its issuance did not constitute the selection itself. That was done by the formal selection of the surplus allotment on September 19, 1904, at the local land office. Sallie Duncan did all that the law required of her to entitle her to a patent for the land, and the fact that her formal application was subject to contest during a period of nine months in no way affected her equitable interest in the land selected. She subsequently received the allotment certificate, and later a patent for the land; there having been no contest of her selection. The patent issued to her for the land, by relation, became effective as of the date of her selection, namely, September 19, 1904.

As there was in fact no contest made during the period of nine months allowed by law against the selection of Sallie Duncan, it must be held that by her formal selection on September 19, 1904, her right to a patent for the land became vested, and that she had an equitable interest in the land which she could properly convey to Miller, and having subsequently received a patent for the land her conveyance to Miller became entirely valid. "The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with that duty." "When the right to a patent once became vested in a settler under the law, it was equivalent, so far as the government was concerned, to a patent actually issued." *Barney v. Dolph*, 97 U. S. 652, 24 L. Ed. 1063; *Simmons v. Wagner*, 101 U. S. 260, 25 L. Ed. 910; *Stark v. Starr*, 6 Wall. 402, 18 L. Ed. 925; *Ballinger v. Frost*, 216 U. S. 240, 30 Sup. Ct. 338, 54 L. Ed. 464; *Wallace v. Adams*, 143 Fed. 721, 74 C. C. A. 540; s. c., 204 U. S. 415, 27 Sup. Ct. 363, 51 L. Ed. 547.

There was no error in the judgment of the lower court in quieting the title to the land in question in appellees.

The decree is therefore affirmed.

THE PRINZ EITEL FRIEDRICH.

(Circuit Court of Appeals, Second Circuit. May 12, 1913.)

Nos. 221, 222.

COLLISION (§ 95*)—STEAMSHIP AND MEETING TOW—FAULT.

A decree affirmed which, based on conflicting testimony of witnesses, most of whom were heard before the court, *held* a steamship solely in fault for a collision with a lighter in tow of a meeting tug in the Hudson river in the early morning.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*

Collision with or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

Appeals from the District Court of the United States for the Southern District of New York.

Suits in admiralty for collision by Carl Franck and others and by the Empire Lighterage & Wrecking Company, owners of the lighter *Eagle* and her cargo, against the steamship *Prinz Eitel Friedrich*; Hamburg-American Line, claimant. Decrees for libelants, and claimant appeals. Affirmed.

On appeal from decree of the District Court for the Southern District of New York. The first decree was entered July 12, 1912, holding the steamship *Prinz Eitel Friedrich*, of the Hamburg-American Line, liable in the sum of \$16,203.03 damages, interest and costs, sustained by the appellees Carl Franck et al., owners of the cargo on the lighter *Eagle*, by reason of a collision with the steamship. The lighter was at the time in tow of the tug *Bluestone Co.* The second decree was entered September 9, 1912, in favor of the Empire Lighterage & Wrecking Co., owner of the *Eagle*, against the steamship for damages, interest and costs in the sum of \$3,489.38. The claimant, the Hamburg-American Line, has appealed in both cases.

Harold G. Cortis, of New York City, for appellant.

Foley & Martin, of New York City (John F. Foley and Frank A. Spencer, Jr., both of New York City, of counsel), for Empire Lighterage & Wrecking Co.

Lawrence Kneeland, of New York City, for appellees Franck and others.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. This controversy involves several complicated questions of fact, in the decision of which the District Judge had, what we have not had, the great advantage of seeing and hearing seven of the ten witnesses examined. The appearance and conduct of a witness on the stand may be such as wholly to discredit his testimony, and yet when read from the printed record, it may give no indication of being fabricated or distorted. Recognizing this fact, we have, with few exceptions, followed the rule to adopt the findings of the trial judge upon the facts, where the witnesses were examined orally before him.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The collision occurred in the North River about the center, but probably nearer the New York than the New Jersey side. The time was about 7 o'clock a. m. January 5, 1911, and the place somewhere between Pier 4 and Barclay street. The weather was clear except for a slight haze. All vessels had the proper lights set and burning.

The steamship Eitel Friedrich was proceeding from Pier 15, East River (about at Wall street), around the Battery to Pier 65, North River. She was attended by three steam tugs which were to assist her in docking and was under her own steam. She was making 6 knots an hour. The lighter with which the steamship collided was in tow of the tug Bluestone Co. on two hawsers 15 fathoms long made fast to the port and starboard corners of the lighter. She was square ended, 90 feet long and 31 feet wide. She had no rudder or motive power. Her cargo, consisting of chicory root and paper, was stored below and on deck. The speed of the tug was 4 to 5 miles an hour. Her destination was the Long Island Railroad dock, East River. The tug and tow had come from Hoboken, and at the time of the collision were proceeding down the North River about as far distant from the New York shore as was the Eitel Friedrich going up. The vessels were then meeting head on or nearly so and the rule required that they should give a single blast and pass port to port. Judge Holt found that it was most improbable that the Bluestone Co. should have given a two-blast signal in such circumstances and we think he was correct in so finding. All the circumstances required that she should go to the right. It was for her advantage to do so, as she had the tide with her and would have lost much of this advantage had she gone close to the New York piers. She had a large clumsy lighter on a hawser. The lighter had no rudder and might sheer in crossing the tide. Then, too, the tugs attending the steamship were navigating between her and the New York piers and we think it most improbable that the tug should have given a two-blast signal and have attempted to haul her unwieldy tow across the steamship's course and thus complicate her navigation with the tugs which were proceeding up the river between the steamship and the New York shore.

The judge found that the tug gave but one blast and we think that this finding is supported not only by the testimony but by the probabilities of the situation and we see no reason why this finding of fact should be disturbed.

The decree is affirmed.

MARGARETE STEIFF v. BING.

(Circuit Court of Appeals, Second Circuit. June 14, 1913.)

No. 279.

1. COURTS (§ 322*)—CITIZEN OF STATE—ALLEGATIONS OF BILL.

Description of defendant in the bill as "a citizen of the United States and a resident * * * of the * * * state of New York" is a sufficient statement of his being a citizen of that state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876-881, 887; Dec. Dig. § 322.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 95*)—UNFAIR COMPETITION—IMITATION.

The bill charging that defendant shows prospective customers toys made by complainant as samples of what defendant's principals manufacture, and it being shown that complainant's toys are copied by defendant's principals in unnecessary features, the natural explanation of which is an attempt to impress the public that they are buying complainant's toys, injunction pendente lite will be granted.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*]

Unfair competition in use of trade-mark or trade-name, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by Margarete Steiff, a German corporation, against John Bing. From an order granting a preliminary injunction, defendant appeals. Affirmed.

Following is the opinion of Ward, Circuit Judge, in the District Court:

[1] The description of the defendant in the bill is singular, viz.: "A citizen of the United States and a resident and inhabitant of the borough of Manhattan, city, county, and state of New York." It has been held not enough to describe a party as a citizen of the United States; the proper course being to say of what state he is a citizen. *Picquet v. Swan*, 5 Mason, 35, Fed. Cas. No. 11,134; *Wilson v. City Bank*, 3 Sumn. 422, Fed. Cas. No. 17,797; *Merserole v. Paper Collar Co.*, 6 Blatchf. 356, Fed. Cas. No. 9,488. The fourteenth amendment to the Constitution provides: "Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Argu-mentatively, therefore, the statement that the defendant is a citizen of the United States is a statement that he was either born or naturalized in the United States, and, as he resides in the state of New York, that he is a citizen of that state. If he is not a citizen of some state, the court is without jurisdiction.

[2] The bill charges that the defendant shows jobbers who are intending customers toy animals made by the complainant as samples of what his German principals manufacture. It is shown that certain of the complainant's toys are copied by the defendant's principals most accurately and in special features which are unnecessary, such as, for example, the peculiar pattern of the wheels, the inaccurate position of the elephant's tusks, and the peculiar marking and attitude of the complainant's horse. Why does the defendant use the complainant's toys as samples to sell from, and not the Bing toys, and why do his principals manufacture toys in accurate imitation of the complain-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ant's? The natural explanation is, in order to at least let the public buy the Bing toys under the impression that they are the complainant's. We have gone very far in this circuit in the way of enjoining unnecessary imitation of features which are nonfunctional. See *Rushmore v. Manhattan Works*, 163 Fed. 939, 90 C. C. A. 299, 19 L. R. A. (N. S.) 269; *Rushmore v. Badger Co.*, 198 Fed. 379, 117 C. C. A. 255.

The complainant may have a very narrow injunction pendente lite.

Jacob Newman and A. Benedict, both of New York City (Leon N. Futter, of Brooklyn, N. Y. of counsel), for appellant.

A. von Briesen and Hans von Briesen, both of New York City, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Order affirmed with costs, on the opinion of the court below.

THE WM. E. GLADWISH.

THE NEWBURGH.

(Circuit Court of Appeals, Second Circuit. June 27, 1913.)

No. 259.

COLLISION (§ 93*)—STEAM VESSELS CROSSING—STARBOARD HAND RULE.

A tug passing up the Hudson river *held* in fault for a collision with a ferryboat crossing on such a course as to make the tug the favored vessel under the starboard hand rule, on the ground that after giving the crossing signal she changed her course, in violation of article 21 of the Inland Rules (30 Stat. 96 [U. S. Comp. St. 1901, p. 2883]).

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 194, 195; Dec. Dig. § 93.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty for collision by the West Shore Railroad Company, owner of the ferryboat Newburgh, against the steam tug William E. Gladwish, Elmer A. Keeler, claimant, with cross-libel. Decree for libelant, and claimant appeals. Affirmed.

D. L. Berier and James J. Macklin, both of New York City, for appellant.

Barry, Wainwright, Thacher & Symmers, of New York City (A. G. Thacher, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. Libel and cross-libel for collision. March 7, 1911 at 6:20 p. m. the ferryboat Newburgh left her slip at Weehawken, N. J., bound for Forty-Second street, N. Y. The tide was running strong ebb. At the same time the tug W. E. Gladwish was coming up the New York side of the river on a course, as her witnesses say, 300 to 400 feet off the pier line. When about 1,000 feet off the end of Pier 83 at the foot of West Forty-Third street, the ferry-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

boat blew a signal of two whistles to the tug, then about off Thirty-Ninth street, which the witnesses from the tug say was not heard. The tug then blew a signal of one blast and ported. When the ferryboat received this signal she stopped, and on getting a second signal of one blast and seeing the change of course, backed full speed astern and blew an alarm. The tug continued with unabated speed under her port helm until when just below Forty-Third street she starboarded so as to clear Pier 83 and crossed the bow of the ferryboat at a point about 100 feet from the end of that pier, breaking the ferryboat's forward rudder with her port quarter and sustaining some damage herself.

The situation was clearly one of the starboard hand rule. The ferryboat was bound to keep out of the way and the tug to hold her course and speed. Articles 19 and 21 of the Inland Rules. It was quite natural for the ferryboat to ask permission to cross the tug's bow. On a strong ebb tide she would have difficulty in making her slip while the tug could very easily slow or stop. But upon receiving the second signal of one blast and seeing the tug sheering to starboard, the only way for the ferryboat to keep clear was by backing at full speed, as she did. The tug by porting violated article 21 at her peril. If instead of porting, and so bringing herself some 200 to 300 feet nearer the pier line, she had held her course as the law required, we think she would have passed clear under the ferryboat's stern, even if the ferryboat had stopped and backed just as she did. Of course, if, under such circumstances, the ferryboat had kept her speed, there could have been no collision.

The decree is affirmed, with interest and costs.

DAVID et al. v. HARRIS.

(Circuit Court of Appeals, Second Circuit. May 12, 1913.)

No. 217.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SWEATER.

The Weinschenk patent, No. 925,146, for improvements in sweaters, consisting of the attachment to a low-necked sweater of two infolding lapels and a collar, which can be turned up to convert it into a high-necked sweater, discloses patentable invention, and is entitled to a reasonable range of equivalents; also *held* infringed.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by Emanuel David and Samuel Weinschenk, copartners under the firm name and style of Hy-Lo Knitting Company, against Morris Harris. Decree for defendant, and complainants appeal. Reversed.

On appeal from a decree of the District Court for the Southern District of New York dismissing the bill which was based on letters patent No. 925,146 granted June 15, 1909, for improvements in sweaters.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Briesen & Knauth and Eugene Eble, all of New York City, for appellants.

Otto A. Samuels, of New York City, and J. William Ellis, of Buffalo, N. Y., for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The principal defense is that the defendant does not infringe the claims when they are limited as required by the prior art.

The patent covers an ingenious garment which combines two features of the prior art which were previously embodied in separate garments. It can be used as a low-necked sweater in mild, pleasant weather and as a high-necked sweater in cold and stormy weather. Or the wearer, after using the low-necked garment while exercising, can turn up the collar to avoid catching cold. This result is accomplished by placing upon the collarless low-necked sweater two lapels, and an invertible collar secured and concealed within the garment when it is used as a low-necked sweater, but so arranged that it can be turned up and used as a high collar in connection with the lapels.

The patented feature is an exceedingly simple device, but it involves considerable ingenuity and is evidently popular with the trade and with buyers. It is not found in the prior art. Somewhat similar attempts were made in coats and shirts, but we cannot find that the idea had occurred to any one, prior to Weinschenk, to convert a sweater into a garment capable of two such uses accomplished by such easy transformation.

The fact that the defendant is making his sweaters under a subsequent patent to Rautenberg makes the defense of lack of novelty and invention come with rather poor grace from one who is asserting that even after the complainants' patent there was still room for invention.

The defendant's sweater, when in actual use, is, in all essentials, the same as complainants', the only difference being that in the former the so-called lapels are attached to the concealed collar, and not to the front of the sweater where they are turned over to give the low neck effect as in Fig. 1 of the complainants' patent.

We think that the patent is entitled to a reasonable range of equivalents and that the parts marked YY in red, on the Rautenberg drawing (Fig. 5) are the equivalents of the parts similarly marked on the patent in suit. This is practically admitted by the defendant's expert, Mr. Dorsey, who says:

"These extensions (YY) do perform the function explicitly ascribed to the lapels of the patent in suit."

All that is necessary to make the two structures identical in function is to remove the lapels from the sweater and sew them upon the disappearing collar.

The questions whether the patented sweater involves invention and whether the claims are infringed are not entirely free from doubt upon the proof, but we are inclined to answer them in favor of the complainants, first, because of the presumption arising from the grant of

the patent; second, because the prior art shows many attempts to accomplish the same result without success; and third, because it seems quite inconsistent for one who is operating under the Rautenberg patent to deny patentability to the Weinschenk sweater. Regarding infringement, the only difference between the two structures has been pointed out, and, if the complainants are entitled to invoke the doctrine of equivalents at all, the claims of their patent must cover the slight change in the location of the lapels introduced by the defendant.

The complainants called no expert witness and their course in this respect is to be commended. The improvement of the patent is within such narrow limits and is so plain and simple that an examination of the garments made under the various patents in evidence furnishes all the proof required as to the nature and scope of the invention.

The decree is reversed with costs.

LUTEN v. TOWN OF LEE et al.

(District Court, D. Massachusetts. July 29, 1913.)

No. 225 (C. C. 801).

PATENTS (§ 260*)—INFRINGEMENT—WHAT CONSTITUTES.

The fact that a town adopted plans for bridges which embodied a construction covered by patents, and advertised and accepted bids thereon, does not render either the town or bidder liable for infringement, where, on learning of the patentee's claim, the plans were changed, and the patented construction was not used.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 359; Dec. Dig. § 260.*]

In Equity. Suit by Daniel B. Luten against the Town of Lee and Frank R. Harding. On final hearing. Decree for defendants.

Jones, Addington, Ames & Seibold and F. H. Drury, all of Chicago, Ill., for complainant.

Herbert C. Joyner and Mooers & Whiting, all of Boston, Mass., for defendants.

DODGE, Circuit Judge. The bill charges the defendants with joint contributory infringement of United States patents 853,202 and 853,203, issued to the plaintiff May 7, 1907. The first patent is for an arch structure; the second, for an arch. The infringement by the defendant town consisted, according to the bill, in knowingly and willfully causing plans and specifications embodying the patented inventions to be prepared for two concrete arch structures to be erected in said town. The infringement by the other defendant, Frank R. Harding, consisted, according to the bill, in knowingly and willfully contracting to erect the two concrete arch structures on plans and specifications furnished by the defendant town and embodying the patented inventions. The bill seeks an injunction and an accounting.

The defendants have not questioned the validity of the patents sued on, but each denies any infringement of them by him.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It is not disputed that the defendant town, by vote at its annual meeting in April, 1910, appropriated \$3,400 to defray the expense of building two new bridges on one of its public roads. It does not appear that the vote provided for any particular kind of bridge. The selectmen of the town, having charge of the construction and repair of its highways and bridges, thereupon decided to build the two bridges of concrete, and they employed Heaphy, a resident of the town, to draw plans for such bridges. He did so, and the selectmen then advertised for bids to build the bridges according to Heaphy's plans. Three bids were received. The defendant Harding was one of the three bidders, and his bid was the lowest of the three. It is not disputed that bridges built according to Heaphy's plans would have embodied the patented inventions. But the selectmen, having learned, after the bids were in, for the first time, that the fact was so, and that the plaintiff would claim a royalty of 10 per cent. if the bridges were built as planned by Heaphy, discarded the plans altogether, and let Harding build two flat concrete bridges for the town, which did not embody the patented inventions, instead of those planned as above.

Even if it be conceded that Heaphy's embodiment of the patented inventions in his plans would have been contributory infringement, and chargeable to the town, if the bridges had been built as planned, I am unable, upon the case as it stands, to regard it as an infringement of any kind. The patented inventions were never used. Embodying them in the plans was, at most, evidence of an intent to use them, and in this aspect is further referred to below. I hold that no actual infringement on the part of the town is shown.

As to the defendant Harding, he is not shown to have done anything more than submit the lowest of the three bids for the construction planned by Heaphy. I regard the evidence as insufficient to show that any contract was ever entered into between him and the town for that construction; but, if such a contract was ever made, it was abandoned by mutual consent before anything was done under it by either party, and I should be unable to hold that by reason of it either party, or both together, could be held guilty of infringement, contributory or otherwise.

While paragraph 7a, added to the bill by amendment after it was filed, but before it was answered, alleges that the defendants have become infringers, paragraph 6 alleges that the plaintiff fears that, when the structures planned are erected, they will contain his patented inventions, but does not know to what extent these have been used by the town at the time of filing his bill; and in paragraph 7 he alleges the same fear, but says he does not know to what extent his inventions have been used by Harding, at the time of filing the bill. He prays discovery as to both these matters.

It appears from the evidence in the case that the bids above mentioned were advertised for in July, 1910, that the bids were received about August 1, 1910, and that on August 13th there was an interview at Lee between the plaintiff and the selectmen, at which he threatened them with a suit for infringement if they used Heaphy's plans without paying him royalty, and finally with a suit in any event. The

noninfringing bridges actually built were constructed in September, 1910. An express notice in writing, sent by the selectmen to the National Bridge Company, whereof the plaintiff was president, upon some date not definitely fixed by the evidence, but not long after the interview of August 13, 1910, was testified to. Whether this express notice actually reached the plaintiff or not before he filed his bill in this case on October 24, 1910, the selectmen had told him on August 13th that they would make no contract on the Heaphy plans until the patent question was settled, and had also told him that they could build a flat bridge without infringing his patents, to which suggestion he had assented. In view of these circumstances, and of the fact that, although the plaintiff lives in Indianapolis, his sole representative in New England (Denman), present with him at the interview of August 13th, lived no further from Lee than Springfield, Mass., I am unable to believe that the plaintiff had any real and substantial reason on October 24, 1910, for fearing or apprehending that the town or Hard-ing were to infringe his patents. Any intention to do so, evidenced by the town's adoption of the plans or the bids made thereon, was abandoned when they undertook to build the flat bridges, and the plaintiff does not show, either that he was ignorant that such intention had been abandoned, or that he could not reasonably have been expected to know it before October 24th. Concealment of what the town was doing can hardly be supposed possible. I am unable to believe that an injunction, for which only the plaintiff now asks, would be justifiable under the circumstances.

There may be a decree dismissing the bill, with costs.

In re COULTER.

(District Court, W. D. Pennsylvania. March, 1913.)

BANKRUPTCY (§ 363*)—DIVIDENDS—DECLARATION—CLAIMS PROVED AFTER DECLARATION.

Though Bankr. Act July 1, 1898, c. 541, § 57d, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3444), providing that claims shall not be proved against an estate subsequent to a year after the adjudication, by implication allows proof of a claim within a year, yet section 65b, as amended by Act Feb. 5, 1903, c. 487, § 15, 32 Stat. 800 (U. S. Comp. St. Supp. 1911, p. 1508), providing, in case of a certain state of the funds, for declaration of the first dividend within 30 days after the adjudication, and for subsequent declarations of dividends, "provided that the final dividend shall not be declared within three months after the first dividend shall be declared," by implication allows the final dividend to be declared at any time after four months from the adjudication, with the effect that one thereafter, though within the year, proving his claim, is barred from participation in the distribution: section 65c providing that the rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by proof and allowance of claims subsequent to such payment or declaration.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 550-554; Dec. Dig. § 363.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of one Coulter, a bankrupt. On review of order of referee refusing petition of creditors. Affirmed.

George L. Roberts, of Pittsburgh, Pa., and White, Johnson & Cannon, of Cleveland, Ohio, for petitioning creditors.

Roberts & Mason, of Erie, Pa., for trustee.

YOUNG, District Judge. In this case the bankrupt was adjudged a bankrupt July 4, 1912, on his own petition. On August 19, 1912, the first dividend of 30 per cent. was declared. On December 12, 1912, final hearing was held, and a dividend of 30 per cent. was declared on such claims as had been allowed subsequent to the first dividend of that amount, and a final dividend of 29.4 per cent. was declared on all claims. Before this dividend was paid, to wit, on December 19, 1912, the W. Bingham Company filed proof of their claim for \$877.32, and on January 16, 1913, the Oil Well Supply Company filed proof of its claim for \$59.87. On January 20, 1913, these two creditors petitioned the referee to set aside the decree of distribution made on December 12, 1912, and to order a new distribution allowing petitioners' claims to participate, and this the referee refused on January 25, 1913, and exceptions were filed by the petitioners and the cause was certified to this court on February 4, 1913.

Section 57n of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3444]) provides that:

"Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication."

This by implication permits the creditor to prove his claim within one year; but section 65b, as amended by Act Feb. 5, 1903, c. 487, § 15, 32 Stat. 800 (U. S. Comp. St. Supp. 1911, p. 1508) provides that:

"The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: Provided, that the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: and provided, further, that the final dividend shall not be declared within three months after the first dividend shall be declared."

This, in our opinion, by necessary implication authorizes the final closing of the estate and the declaration of the final dividend at any time after four months from the adjudication. It becomes our duty to reconcile, if possible, these apparently contradictory requirements of the act. How shall the right of the creditor to prove his claim within one year be reconciled with the deprivation of that right which necessarily follows from the distribution of the fund in less than a year, namely, after four months? We have no doubt the final dividend may be declared within four months after adjudication, and if

the creditor has not proved his claim before the declaration of that dividend, he cannot participate, as it is provided by section 65c that:

"The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declaration of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends."

Here it is clearly expressed in the act that the creditor who postpones proving his claim takes the risk of losing it by the declaration of a dividend. If he has not proved it before the dividend is declared, he may still prove it within a year; but he can take nothing by it, because his taking his share of the distribution would affect the rights of the creditors in whose favor the dividends have been declared, and this the act in clear terms prohibits.

The language of section 57n is not that he has a year within which to prove his claim, but that claims shall not be proved against a bankrupt estate subsequent to one year. It cuts up his claim by the roots, and after a year deprives him of his remedy, but within the year permits the proving of the claim, allows the remedy, but deprives him of a share in the estate, if that participation affects a creditor in whose favor the dividend has been declared. Under section 65c the creditor has a vested right in the dividend as soon as declared, which cannot be affected. The court cannot interfere with this clear statutory right. It is given by the act in precise terms, and it cannot be legislated out by judicial decision.

We are therefore of the opinion that the action of the referee in refusing to set aside the declaration of the final dividend and permit the petitioners to participate in that distribution was proper, and we must therefore affirm his finding in that respect. And now, March 19, 1913, the order of the referee in bankruptcy in refusing the petition of the W. Bingham Company and the Oil Well Supply Company to set aside the order of distribution of December 12, 1912, and to permit said creditors to participate in the distribution, is affirmed.

POPE v. CANTWELL.

SAME v. CANTWELL et al.

(District Court, D. Massachusetts. July 12, 1913.)

Nos. 312, 313.

1. FRAUDULENT CONVEYANCES (§ 104*)—ELEMENTS OF FRAUD AS TO CREDITORS—INTENT.

The voluntary transfer of any interest in property by a husband to his wife when he is actually insolvent is fraudulent and void as to his creditors under the law of Massachusetts, although not made with intent to escape the payment of any particular debt or debts.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 337-344; Dec. Dig. § 104.*]

2. BANKRUPTCY (§ 303*)—ACTION BY TRUSTEE TO RECOVER PROPERTY FROM BANKRUPT'S WIFE—BURDEN OF PROOF.

Where a general course of business was shown on the part of a bankrupt, who was a builder, extending over several years and while he was insolvent, to build upon property acquired in the name of his wife and then sell the same, the proceeds being reinvested in the same manner, the burden rests upon the wife, in a suit by his trustee to recover property so standing in her name at the time of the bankruptcy, and in the improvement of which some of his indebtedness scheduled was incurred, to show how much, if any, interest in the property belonged to her.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

3. BANKRUPTCY (§ 303*)—ACTION BY TRUSTEE TO RECOVER PROPERTY—VOIDABLE TRANSFER.

Evidence considered, in a suit by a trustee in bankruptcy to recover property, and *held* to show that a brother of the bankrupt's wife, who purchased the property, then standing in her name, a few days prior to the filing of the voluntary petition in bankruptcy, was chargeable with notice that the conveyance was made in contemplation of bankruptcy, and for the purpose of placing the property beyond the reach of the bankrupt's creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

In Equity. Suits by Benjamin Pope, trustee in bankruptcy of Patrick J. Cantwell, against Sarah M. Cantwell, and against Sarah M. Cantwell and Bennett A. Ford. Decrees for complainant.

In Case No. 312:

Nason & Proctor, of Boston, Mass., for complainant.

Lee M. Friedman and Henry I. Morrison, both of Boston, Mass., for respondent.

In Case No. 313:

Nason & Proctor, of Boston, Mass., for complainant.

E. Philip Finn, of Boston, Mass., for respondent Ford.

Henry I. Morrison, of Boston, Mass., for respondent Cantwell.

DODGE, Circuit Judge. Patrick J. Cantwell, of Brookline, a builder, was adjudged bankrupt in this court on his own petition November 28, 1911. His schedules showed liabilities of more than \$10,000 against assets of about \$4,000, no part whereof was in tangible property; the whole consisting of claims now in litigation in the Massachusetts courts.

The defendant Sarah M. Cantwell is the bankrupt's wife, to whom he has been married since 1894. By deed dated November 1, 1909, John C. L. Dowling conveyed to her a parcel of land on St. Paul street, Brookline, containing, according to the deed, 11,730 square feet. The consideration named was \$1, etc., and the land was recited to be subject to a mortgage of \$2,000.

The actual transaction was in part an exchange. By deed of the same date there was conveyed to Dowling a parcel of land said to contain 6,107 square feet, with a house thereon, on Kent street, in Brookline, standing in Mrs. Cantwell's name. The deed, executed by her, recited that the conveyance was in her right, and the bankrupt

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

joined in it for the stated purpose of releasing his interest. The consideration named in it was \$1, etc., and the property was recited to be subject to a mortgage for \$6,500. Dowling also paid Mrs. Cantwell \$2,300 in cash.

The land thus conveyed to Mrs. Cantwell was thereafter surveyed into two lots, hereinafter referred to as A and B. Upon lot A, containing about 6,570 feet and having a frontage of 69 feet on St. Paul street, Mrs. Cantwell gave a construction loan mortgage, recited to be in her right, to W. W. Babcock, under date of May 15, 1911; the bankrupt joining as in the above deed of the Kent street property. Upon this lot there was thereafter erected a six-apartment house; the bankrupt being the architect and builder. It was completed about November 1, 1911, four weeks before his bankruptcy. Of his debts as scheduled, some part—how much is left uncertain—was incurred while he was constructing this building. The second of the above suits is concerned with lot A and this building thereon, as will below appear. The mortgage of \$2,000 on both lots, to which the conveyance received by her was subject, was paid off and discharged September 10, 1911.

Lot B still stands in Mrs. Cantwell's name. It contains about 5,159 square feet, is in the rear of lot A, and is connected with St. Paul street by a 10-foot passageway at the side of and over lot A. With this lot the first of the above suits is concerned.

The plaintiff is the trustee of Cantwell's estate in the bankruptcy proceedings above mentioned, being the case numbered 17,715 on the bankruptcy docket of this court. His bill in the first case is brought against Mrs. Cantwell only. In it he alleges that the bankrupt caused lot B to be conveyed to his wife in contemplation of bankruptcy; that the consideration for the conveyance was the bankrupt's property, not his wife's; that she furnished no part of the consideration; that in causing the title to be put in her name he acted with intent to hinder, delay, and defraud his creditors; that he thereafter incurred further debts in contemplation of bankruptcy; that she took the title with intent to assist the bankrupt's fraudulent purpose and to hold the title for his benefit, under the fraudulent appearance and claim, as to all others, of absolute ownership in herself; also that the bankrupt caused the conveyance to be made to her while himself insolvent and contemplating bankruptcy, with the view of preventing the property from coming to his trustee, and thus prevent its administration under the Bankruptcy Act for his creditors' benefit, and that she had reasonable cause to believe him insolvent and contemplating bankruptcy at the time. The bill alleges, further, that she was about to transfer the property to an innocent purchaser for value. It asks that the above deed of November 1, 1909, from Dowling, under which she holds the property, be declared void, and a conveyance of it to the plaintiff as assets of the estate be ordered, and that meanwhile any transfer or incumbrance of the land be restrained. An injunction ad interim has issued.

Dowling, who made the transfer which the plaintiff seeks to "avoid," is neither charged with any fraud nor is he made a party. It is not

claimed that the property he transferred was the bankrupt's, in any sense, at the time. The case, therefore, is not the ordinary suit by a bankruptcy trustee under section 70e of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565, 566 [U. S. Comp. St. 1901, p. 3452]). It is not sought to avoid the transfer as to the grantor but to treat the grantee as holding it under a conveyance lawful so far as the grantor was concerned, but for her husband the bankrupt, instead of for herself, and to obtain a conveyance accordingly from her.

Mrs. Cantwell, in her answer to the bill, denies all its allegations of fraud or fraudulent intent and of knowledge thereof, or cause to believe, on her part, that there was any such fraud or fraudulent intent; and she alleges that the property conveyed was at all times hers, paid for by her, and not by her husband, and never his property, either legally or equitably.

The plaintiff contends, and the defendant denies, that this Kent street property, transferred to Dowling subject to a mortgage for \$6,500 in exchange for the St Paul street land, whereof lot B is part, was really the bankrupt's. It stood in his wife's name, and she testified that she paid about \$4,800 of her own money for it and another lot on Kent street below referred to. The bankrupt testified that it belonged to her. But these statements must be considered in connection with the following facts which appear from the evidence:

The deed under which Mrs. Cantwell held this Kent street lot was from the trustees of the Aspinwall estate, dated March 25 and recorded March 26, 1902. It ran to her, and, so far as it showed, the lot was then unincumbered, save for certain restrictions. The same trustees had previously given another deed to her, dated November 1 and recorded December 26, 1901, of an adjoining lot on Kent street, containing 6,175 feet. This lot she had mortgaged to one Graffam for \$6,000; the deed being dated December 12 and recorded December 26, 1901. By deed dated March 25 and recorded March 26, 1902, she had mortgaged both lots to Graffam for \$1,500. By deed dated October 1 and recorded November 5, 1902, she had mortgaged both lots to Graffam for \$7,000; and by deed dated November 21 and recorded November 24, 1902, she had mortgaged both lots to the Curtis & Pope Lumber Company for \$1,200.

Each of the above mortgages was expressed to be in her right, and in each her husband had joined. The mortgage for \$6,000 on the first lot acquired was not expressed to be subject to any prior mortgage. That for \$1,500 on both lots was made subject to the \$6,000 mortgage. That for \$7,000 on both lots was not expressed to be subject to any prior mortgage. That for \$1,200 was made subject to the mortgage for \$7,000. Before the exchange for the St. Paul street property all these mortgages, except that for \$7,000, had been discharged, and a partial release from that had been given.

Upon each of the Kent street lots a three-apartment house had been built during 1902. The bankrupt was the builder. By deed dated August 1, 1907, Mrs. Cantwell conveyed the lot transferred by the trustee deed to her of November 1, 1901, with the house since built on it, to Ellen Shanahan, for what price does not appear, free from

incumbrances. The Graffam mortgages for \$6,000 and \$1,500, also the Curtis, etc., Company mortgage for \$1,200, were discharged, and this lot released from the \$7,000 mortgage. The remaining house on Kent street, on the lot covered by the trustees' deed of March 25, 1902, continued to stand in her name until conveyed by her as above in exchange for the St. Paul street property, subject to a mortgage for \$6,500, presumably the Graffam mortgage, given originally for \$7,000, less a payment for partial release. The Curtis & Pope mortgage she claims to have paid off.

The testimony of the bankrupt and of his wife was that he agreed with her to build the two Kent street houses on the above lots standing in her name for \$14,500, being the total amount of the three mortgages to Graffam—these being "construction loan" mortgages. If there was such an agreement, there is nothing but their testimony to prove it. It is not claimed to have been anything but an oral agreement, nor is anything in writing produced to show that it was ever carried out as made. It is not shown to have been based on any written specifications. Although he had then been carrying on building operations, sometimes involving considerable amounts, since before his marriage in 1894, and continued to do so until his bankruptcy in November, 1911, the bankrupt never kept any books. Nor, although his wife had similar transactions with him, both before and after this one, also involving considerable amounts, did she ever keep any books, or take from him any written receipts or accounts, showing what money raised on property in her name went into his hands or what he had done with it.

According to the testimony of both, while building the Kent street houses, he got money, under her authority, from time to time, from Graffam to the full amount called for by the Graffam mortgages, expending what he got as he saw fit, and without ever rendering any account of it to any one. It does not appear that she ordered any of the work or materials; these were furnished as he ordered them. They were not billed to her, but to him. The mortgage of \$1,200 to the Curtis & Pope Company was given to secure a debt contracted by him, not by her, in connection with what particular building operation does not appear. If it was for lumber which went into the Kent street house, then their cost to build was that much, at least, in excess of the alleged contract price, and there is other evidence tending to show that in building them no particular regard to any definite contract price was had. Although Mrs. Cantwell testified that she was "frightened" into executing this mortgage by the mortgagee or its representatives, I am unable to find that she manifested any particular reluctance to execute it, after the bankrupt had told her that the company wanted it, or that there was any remonstrance by him; and the fact that in 1898 she had executed two mortgages to the same concern on property standing in her name, under similar circumstances, also without remonstrance on his part, prevents me from believing that she gave this mortgage otherwise than voluntarily, and as a matter of course, because the exigencies of her husband's business required it. The fact that she so gave it is, to my mind, a strong

indication that there had been nothing that could in any sense be called a "contract" between her and her husband for the building of the houses. It is not claimed that she ever undertook to do business on her separate account. Except so far as it can be distinctly shown to have been an investment of her money, I must regard the enterprise as her husband's, carried on to suit his purposes, though on land standing in her name. It cannot be discovered from the evidence that anything, or how much, if anything, went to him as profit or compensation out of the transaction; if it was nothing, then his activities added value (it not appearing that the completed houses were worth less than the money invested) to property standing in his wife's name.

Though they stood in her name, the evidence relied on to prove that the Kent street lots represented an investment of money belonging to Mrs. Cantwell only must be regarded as by no means sufficient for that purpose. Her testimony that she paid "about \$4,800" for the two lots has been referred to. She also testified that she got \$2,400, paid for the first lot, from rents of her property at 31 Perry street, Brookline. She indicated no other source from which she could have got about the same amount to pay for the second lot, bought three or four months later. The lot at 31 Perry street she had held under a deed to her from the same trustees, dated February 26 and recorded March 19, 1897. Upon it, in 1898, the bankrupt had built an apartment house, also under an alleged oral contract with her to build it for \$4,500, and during its construction the proceeds of a mortgage for that amount, given November 11 and recorded November 12, 1897, in her right, her husband joining, had gone into his hands. In all essential features, the evidence regarding the carrying out of this enterprise is similar to that regarding the Kent street enterprise, and it leads to the same conclusion; i. e., that it was not an enterprise conducted wholly for her benefit, by her husband, under a definite understanding with her, but was really his enterprise, protected by the fact that the record title was in her. This house was sold March 31, 1906; one apartment having been occupied by the bankrupt and his wife since its completion. It is said to have been sold for \$7,500, subject to the above mortgage for \$4,500, and a later mortgage to the Curtis & Pope Company for \$700. There is no evidence of any accounting between her and the bankrupt with regard to the proceeds. She says they were disposed of as follows: Another Perry street lot (No. 58) was conveyed to her August 1, 1906. For this, with an apartment house on it, free from incumbrance, she says she paid \$7,775, using \$1,775, accumulated from rents and proceeds of the sale of 31 Perry street, and giving a mortgage on 58 Perry street for \$6,000. The property stood in her name until after her husband's bankruptcy, when she gave a deed of it (February 15, 1912), subject to the \$6,000 mortgage, for \$10,200. The money received (\$4,200) she had at home, in bills, at the time of her examination in April, 1912. This testimony, unsupported as it is by any contemporaneous accounts, memoranda, or vouchers, I am unable to accept as stating the whole truth, nor can I believe that when she bought the Kent street lots she could have had \$4,800 in rents received from

31 Perry street wherewith to pay for them. The conclusion strongly indicated is that some of this money, at least, came from her husband's other building operations. In these operations, some of them on land in her name and some not, he appears, at all times before his bankruptcy, when money or stock was needed, to have used what was most available at the moment. There is no proof at all of any pains taken by him, at any time, to keep what went into one distinct and separate from what went into another.

This conclusion seems to me further supported by testimony from the agent of the trustees, who conveyed the two Kent street lots to Mrs. Cantwell in November, 1901, and March, 1902. According to him, though Mrs. Cantwell testified that she saw him and talked with him about the price of the lots, and decided to buy them only "partly" on her husband's advice, his negotiations about them were with the bankrupt himself, who told him that he wanted to buy them, had three or four interviews with him about buying them, agreed in his own name to buy them, and made no mention of Mrs. Cantwell's name in connection with them, though he afterward had the deed made to her as grantee. There was similar testimony from a broker who conducted negotiations for the previous purchase of 31 Perry street in 1897.

For this lot at 31 Perry street Mrs. Cantwell claims to have paid \$1,200 in 1897, out of \$2,000 she had when married in 1894. She claims to have kept it on hand, in bills, during the intervening period. There is nothing but mere statements by herself or by her husband to prove that this was the fact; but, conceding its truth, I am still unable to conclude that nothing belonging to her husband went into the Perry street property, sold for \$2,300 above mortgages in March, 1906, or into the Kent street property, sold for an unnamed price in August, 1907, or into the other Kent street property, exchanged in 1909 for the land on St. Paul street, with which we are immediately concerned in this case.

The bankrupt testified that he had never represented any property standing in his wife's name to be his, and she testified that she had never heard him do so, or known of his doing so. I do not find any sufficient contradiction of this evidence. But it does appear that, while Mrs. Cantwell held the Kent street property, the bankrupt, in answer to inquiries of him, made in May and October, 1904, by a representative of the Building Trades Credit Agency, of Boston, stated, as matters among those affecting his financial standing, particulars regarding various pieces of real estate, among them the Kent street houses, one or both of them, with the statement however that they stood in his wife's name. Similar statements were made by him to a representative of the same agency in June, 1908. And later, in June, 1911, he again made similar statements to a representative of the same concern, although, this being after the transfer of both Kent street houses, the St. Paul street property was then mentioned instead. The defendant moved to strike out the evidence of the witnesses here referred to (Ells, Richardson, and Emerson), as incompetent against Mrs. Cantwell. This motion is denied, although I have not drawn

from their evidence the conclusion that the bankrupt told either of the witnesses referred to that the property was his.

[1] The statements made as above to the Building Trades Credit Agency indicate, what clearly appears also from the bankrupt's own evidence, that at no time prior to his bankruptcy did he have property standing in his own name to any substantial amount. He built nothing, from first to last, upon land standing in his own name. He never had any bank account of his own, but settled bills against him, whenever he did so, with money carried about with him. His assets were uniformly less than his liabilities. In incurring bills connected with his building operations, therefore, he was constantly incurring liabilities which he had reasonable ground to believe that he might not be able to pay, independently of the property transferred from time to time to his wife. The transfer to her of anything in which he was interested would, under such circumstances, be fraudulent and void as to creditors, even if not made with intent to escape payment of any particular debt or debts. *Mowry v. Reed*, 187 Mass. 174, 177, 72 N. E. 936.

The plaintiff contends that the evidence discloses a definite scheme on his part, to which his wife was a party, to build up equities in her name with the intention of defrauding his creditors. While I am not prepared to find an actual intent proved to defraud the particular creditors claiming his estate in these proceedings, or any particular creditors, or to find that he incurred liabilities with the distinct intent to go into bankruptcy when he did, or at any time, the evidence as a whole, including that relating to transactions prior to those mentioned above and to later dealings with regard to the St. Paul street property, shows a course of dealings followed by him while insolvent, the natural and probable result of which would be to accumulate property in his wife's name, which, at least in part, in case of his bankruptcy at any time, ought to have gone to his then creditors. And as Mrs. Cantwell participated in this course of dealing with full opportunity to know, if she did so without inquiry, she is so far chargeable with knowledge of these features of his course of dealing that her acquiescence amounts to co-operation in it.

[2] On her behalf it is insisted that the plaintiff has the entire burden of proving that what was conveyed in exchange for the St. Paul street land belonged to the defendant's husband. Under the circumstances shown, I think the burden is upon her, if she claims that it, or any part of it, was hers, to show how much, if any, belonged to her.

In *Seitz v. Mitchell*, 94 U. S. 580, 582 (24 L. Ed. 179), it is said:

"Purchases of either real or personal property made by the wife of an insolvent debtor during coverture are justly regarded with suspicion, unless it clearly appears that the consideration was paid out of her separate estate. Such is the community of interest between husband and wife, such purchases are so often made a cover for a debtor's property, and are so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors and preserving it for his own use, and they hold forth such temptations for fraud, that they require close scrutiny. In a contest between the creditors of the husband and the wife there is, and there should be, a presumption against her which she must overcome by affirmative proof. Such has always been the rule of common law; and the rule continues, though

statutes have modified the doctrine that gave to the husband absolutely the personal property of the wife in possession, and the right to reduce into his possession and ownership all her choses in action."

I think the creditors represented by the plaintiff, against whom Mrs. Cantwell has failed to overcome the above presumption against her and to make it clearly appear that the consideration for the St. Paul street land came out of her separate estate, are entitled on the above principles to avoid the transfer, and to have reconveyed to the plaintiffs for their benefit so much of that land as she now holds—in other words, lot B. Especially does this seem to me the just conclusion in view of the fact that a principal reason for her failure to show with whose funds the properties standing in her name were acquired is the entire failure through a series of years, on the bankrupt's part and on hers, to keep any accounts or records of transactions in their nature such as to make proper accounts indispensable to assure her husband's creditors that his dealings with her were honest as to them. Their testimony, given in the present case, has seemed to me calculated rather to take advantage of the absence of any such accounts than to do everything in their power to supply the want.

This result would dispose of the second suit, relating to lot A, but for its alleged transfer to the other defendant therein, Ford. It remains to inquire whether or not his defense, that he bought this lot of Mrs. Cantwell in good faith and for an adequate consideration, is established. A temporary injunction has issued in this case as in the first.

[3] As has been stated, the bankrupt proceeded in 1911 to build a six-apartment house on lot A, incurring in its construction some of his scheduled debts. The operation was conducted in a manner similar to that followed in the previous similar transaction. He ordered materials and labor, which were billed to him. She claims to have given him \$1,000, apparently from the \$2,300 paid her in the exchange by Dowling. Under her authority, he got from Babcock the amount of the construction loan mortgage dated May 15, 1911, \$13,000. Both of them say that he made an "oral contract" with her to construct the building for \$14,000. The building having been completed about November 1st, all liens thereon having been waived, and the mortgage for \$2,000 on the land when Dowling conveyed it paid off September 10th, as above stated, she gave a permanent mortgage on November 6, 1911, for \$13,000 to the Home Savings Bank. The mortgage to Babcock was then assigned to the bank. The mortgage to the bank was "in her right," her husband joining; but the application for it, dated October 26, 1911, was signed by the bankrupt alone, without mention of her. In this application he gave the estimated value of the land (lot A) as \$4,000, of the building \$20,000, and he asked in it for a loan for \$15,000. The mortgage taken by the bank for \$13,000, dated November 6th, was recorded on the same day at 11:50 a. m.

During the construction of this building, the bankrupt had also been engaged in building another house on Brook street, upon premises owned by one Halloran, not far off. The amount of his contract for

this building is said to have been nearly \$9,000. He never completed it, but went into bankruptcy after having received \$6,000 on account, \$3,000 or \$4,000 whereof he used, according to his testimony, to pay off old debts. During the same period, and from a time preceding the building of the Kent street houses, it is claimed by the bankrupt and by his wife that he paid to her an average allowance of \$30 a week for household expenses, besides from time to time paying other living expenses of his family.

The bankrupt, though he produced some bills and vouchers, or other papers, relating to his building operations during 1911, failed for the same reasons as above to show with any exactness what the actual cost of building the St. Paul street house was. Upon all the evidence tending to show the amount of its probable cost, together with the evidence relating to its value when completed, with the land on which it stood, I think the conclusion is warranted that the amount expended in its construction considerably exceeded \$14,000, testified to have been the agreed amount. The evidence shows, further, that a not inconsiderable part of the material which went into it was of quality distinctly better than would ordinarily go into a \$14,000 building of that size. It appears, also, that the bankrupt put into it some material which he had ordered for the house he was building on Brook street. Even on the assumption that lot A and the \$14,000 were wholly Mrs. Cantwell's separate property, I should be unable to find it proved that no property which his creditors would have a right to call her husband's property went into this house.

The defendant Ford took a deed of the property from Mrs. Cantwell, her husband joining, dated November 4, 1911, and recorded November 6, 1911, but some hours after the record of the bank mortgage on the same day. The consideration named in the deed was \$1, etc., and it was made subject to "a first mortgage" for \$13,000. The certificate upon it shows it to have been acknowledged by both grantors on November 4th.

Ford is Mrs. Cantwell's brother. He then lived in Chelsea, with two other sisters and their mother. He had carried on a grocery business in Chelsea in conjunction with one of these sisters for about 10 years. He testified that the actual consideration given by him for the deed dated November 4th was \$2,000 in money, paid by him to Mrs. Cantwell on the morning of November 6th, and a so-called note for \$2,500, given to her at the same time. The "note" was offered in evidence and is as follows:

"Brookline, Nov. 6, 1911.

"In consideration of purchase of a lot of land designated on plan as [lot A] with building thereon numbered 43 and 45 St. Paul street, Brookline, Massachusetts, Co. of Norfolk, I hereby promise to pay unto the said Sarah M. Cantwell, or order, twenty five hundred dollars in three years from date, with interest at the rate of six (6) per cent., to be paid semiannually, providing all plumbing, electric lighting, gas and gas ranges, heating apparatus, and window screens, which is as agreed on or described in a first-class condition; if not, the purchaser can hold back a reasonable amount of money to make satisfactory any defects which may arise six months from the above date.

"[Signature] Bennet A. Ford. [Seal.]

"Witness by Joseph Foster. [Seal.]"

The words "signature" and "witness by" are in the same handwriting as the body of the document.

Upon all the evidence relating to the question, I think \$17,500 less than the fair market value of the property and \$4,500 less than a fair market value of the equity in it, on November 6, 1911. It can hardly be said, however, that these values are proved to have been so much below the true values as of themselves to justify avoiding the transfer merely because of inadequacy in the consideration. But if \$4,500 be regarded as the value of the equity, \$2,000 was a grossly inadequate price for it, and such a promise to pay as the above, made as this was between brother and sister and unsecured, cannot be regarded as the equivalent of \$2,500 in money, where creditors' rights are concerned. In view of all the evidence relating to Ford's responsibility, there is difficulty in assigning to this "note" any substantial value.

Not only was Ford Mrs. Cantwell's brother, and partner in business with one of her sisters, but he had known the bankrupt for 20 years, according to the latter's testimony, and they were intimate friends. On his own statement he knew the bankrupt had no property "from the time they owned the Kent street property, also the Perry street property," and he had often heard Mrs. Cantwell speak of this. She first spoke to him about buying the St. Paul street property, telling him she needed the money and had to sell it. He had never had business transactions with her before, nor had he made any previous purchase of real estate.

The bill in the second suit charges Ford with reasonable cause to believe Cantwell insolvent and acting in contemplation of bankruptcy, and with accepting and taking title to lot A with the intent of holding it for Cantwell's benefit under the fraudulent appearance and claim, as to all save him and his wife, of absolute ownership. These allegations he denies, neither admitting nor denying allegations of fraud regarding claim to the property on the part of Mrs. Cantwell and of the bankrupt similar to those made in the first suit.

The conveyance to Ford was not only a transaction between brother and sister, but was out of the ordinary course of business, and for a consideration unusual in character and inadequate. These features of the transaction are enough in themselves to subject it to strong suspicion, and to throw upon him the burden of proving the absence of any reason on his part to know those conditions under which she held the property which I have regarded as making its transfer by her inequitable as to her husband's creditors. Ford's relationship with her and his intimate friendship with her husband prevent him, under such circumstances, from saying that he was without opportunity to know the facts regarding the bankrupt's solvency and relation to property standing in his wife's name. If, knowing, as he did, that the bankrupt's building operations had been extensive, that he had had no property of his own while carrying them on, and that all property acquired in the course of them had been carried in Mrs. Cantwell's name, he took the transfer from her without inquiry, and upon the assumption, without inquiry, that she had an unqualified right to convey the property, I must consider him chargeable with knowledge,

whether he had actual knowledge or not, of the real situation of affairs.

Not only would these reasons prevent me from sustaining the transfer to him of November 6, 1911, but there is much in the evidence which tends strongly to the conclusion that the whole truth regarding his dealings in the matter with Mrs. Cantwell and the bankrupt has not been told, and that he must have had much more actual knowledge as to their motives in making the transfer than he is willing to admit. According to his testimony, the terms of the transfer were not settled between him and Mrs. Cantwell until Sunday, November 5th; but the deed to him, as has been stated, had been executed and acknowledged by both grantors the day before. According to his testimony, he went, on the morning of Monday, November 6th, from Chelsea to Brookline, with \$2,000 in bills, which he there paid over to Mrs. Cantwell, and there signed the "note" which she then drew up, thereafter going with her from Brookline to the Home Savings Bank, in Boston, and taking delivery of the deed to him after the Savings Bank mortgage had been delivered and sent for record. All this makes the transaction appear one still more out of the ordinary course of business. The bankrupt's testimony, which Ford and Mrs. Cantwell both endeavor to support, was that the transaction was a matter of business wholly between Ford and Mrs. Cantwell, with which he had very little to do. The evidence shows, however, that besides being present on November 4th when the deed to Ford was acknowledged, he was present on Sunday, November 5th, while the matter was being discussed, and again present at Brookline on Monday, November 6th, when the \$2,000 is said to have been paid Mrs. Cantwell and the "note" prepared and given to her.

It is proper to state that Mrs. Cantwell gave her testimony in my presence, all the remaining evidence being taken out of court and before a stenographer.

I am obliged to hold in both cases that the plaintiff is entitled to a decree in accordance with the prayer of his bill. A decree may be submitted accordingly in each case.

THE CURTIS BAY. THE EDWARD B. WINSLOW. THE WEGADESK.

(District Court, D. Maryland. July 30, 1913.)

COLLISION (§ 95*)—STEAMER AND SCHOONER IN TOW—FAULT OF TUG.

A collision in Curtis Bay channel, Baltimore, between a large steamer leaving the coal docks and a large schooner approaching, *held*, on conflicting evidence, due to the fault of the tug, which had the schooner in tow, and which made fast to her starboard quarter, where it could not be seen from the steamer, and moved her into the channel ahead of the steamer so slowly that the movement was not noticeable at first to the pilot of the steamer, who had seen the schooner at anchor a short time before.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Admiralty. Suit for collision by Gerhard Johannsen, master of the steamship Wegadesk, against the steam tug Curtis Bay (the Curtis Bay Towing Company, claimant) and the schooner Edward B. Winslow (Henry W. Butler, master, claimant), with cross-libels. Decree against the tug Curtis Bay.

John W. Griffin and Haight, Sandford & Smith, all of New York City, for the Wegadesk.

Hill, Ross & Hill, Jacob France, and Harry N. Abercrombie, all of Baltimore, Md., for the Curtis Bay and the Edward B. Winslow.

ROSE, District Judge. On April 21, 1913, the Norwegian steamship Wegadesk was in collision with the American schooner Edward B. Winslow, the latter at the time in tow of the tug Curtis bay. The master of the Wegadesk libeled the schooner and the tug. Their respective owners each filed cross-libels against the steamer. All these proceedings have been consolidated.

The vessels came together from 300 to 600 feet west of the place at which the Curtis Bay channel begins to widen out into the turning basin or pocket lying immediately to the front and eastward of the Baltimore & Ohio coal pier at Curtis Bay. The Curtis Bay channel proper is 250 feet wide and 30 feet deep. It leads from the coal pier or the turning basin to the main ship channel of the port of Baltimore. At about half a mile to the eastward of the seaward end of the pier the channel is gradually widened out to some 700 feet or more, in order to give room for the large vessels coming to or from the pier to turn or to be turned. This widening is all to the north of the channel line. At the point where, for the purpose of forming the basin, the north bank of the channel turns to the north, there is a red buoy, numbered 4. Precisely opposite it, and approximately 250 feet away, is black buoy No. 9. The latter buoy is on the southern line or bank of the channel, the prolongation of which line forms the southern boundary of the basin.

At the place at which the steamer and the schooner came together, the channel, or the basin, as one may prefer to call it, is approximately 400 feet wide. In proportion to the extent of available water, both vessels were large. The steamer had just finished taking on board some 6,600 tons of coal and had started on its way to sea. It was 365 feet long and of 52 feet beam. It was drawing $26\frac{1}{2}$ feet of water. The Edward B. Winslow was a six-masted schooner, which measured some 400 feet over all; the length of its hull being 318 feet. It had a beam of 50 feet and a depth of $29\frac{1}{2}$. It was at the time light, and was in charge of the tug Curtis Bay, which had started to take it to the berth at the coal pier, vacated a few minutes before by the Wegadesk. This berth was at the inshore end of the pier and on its north side. When lying there the Wegadesk had its bow to the shore. It was consequently necessary for it to turn around or be turned around before it could head for the channel. About half an hour before the collision, the tug Dalzelline had made fast to it to assist in this operation. It proved a rather troublesome one, partly because there was very little greater depth of water than was absolutely necessary for so

heavily laden a vessel. When the Wegadesk was at last turned around and had been headed in the general direction of the channel, the tug cast off. A few minutes later the collision took place.

For a number of days the Winslow had been lying at anchor a little to the south of the channel and in the immediate vicinity of black buoy 9. During the latter part of this time, at least, it had been awaiting its turn at the coal pier, although there is nothing in the record to suggest that any one on the Wegadesk had any reason to suppose that the schooner was to take the former's place. The Curtis Bay is some 90 feet long. It made fast to the Winslow's starboard quarter. The schooner being light, its hull was high out of water, much higher than any portion of the tug or its superstructure. It followed that the latter was completely hidden from every one to the port of the former.

There are two mutually contradictory stories as to what took place. The most detailed version of that told on behalf of the tug and the schooner is given by the master of the Curtis Bay. He is obviously the dominant personality on that side of the litigation, as he is admittedly the individual who controlled the movements of the Winslow and the tug. He says that he made fast to the Winslow as early as 4:10, or about an hour and a half before the collision. The Winslow was at the time at anchor some 500 feet to the south and east of black buoy 9. After some time the schooner in tow of the tug got under way and crossed the channel between black buoy 9 and red buoy 4, having the former on their port, the latter on their starboard, side. When they got well up on the north bank of the channel, they stopped and lay motionless, or practically so, for the 20 minutes preceding the collision. During this time the stern of the Winslow was about 150 feet to the west and north of red buoy No. 4, which was about half a point on its port quarter. The witness says that during all this time he was in the eyes of the Winslow. He communicated his directions to the pilot house of his tug, which was about 275 feet away from him, by signaling with his hands or with a whistle which he carried. After the Wegadesk had turned round, and the tug which had assisted it had cast off, the narrator says the steamer's head did not appear to him to be on the range of the channel buoys so that it could safely pass out. He accordingly blew it one long whistle. There was no reply. In about two or three minutes he says he saw the steamer gathering up headway. He then blew several short toots, but got no answer. The schooner and the tug were lying perfectly still. The steamer came on, heading directly for the fore rigging of the schooner. The tug blew a toot and a long whistle. The steamer was still dumb. The tug blew three short toots. By this time the steamer had for seven or eight minutes been headed directly for the schooner. Then, and for the first time, the steamer answered by blowing three short blasts. At that moment the two ships were within 20 or 25 feet of each other. The steamer then reversed. The tug had done the same an instant earlier, but such action had up to the time of the collision little or no perceptible effect upon the position of the schooner, as the latter was a heavy vessel—in the language of the witness a pine forest. The steamer's starboard forecandle head came into contact with the Winslow's port anchor. At the moment of collision the Winslow was

headed about west northwest. The contact of the steamer swung the schooner's head to north. Under the influence of the reverse motion which had been given by the tug, the schooner went astern until about two-thirds of it was south of the channel and one-third in the latter. It then anchored with its head pointing north northeast. The steamer, after backing and filling, came on again and almost ran into the schooner a second time. It passed very close to the red buoy. He saw it list to starboard as its port side ran up on the north bank of the channel.

The branch pilot, who was in charge of the Wegadesk, tells its story. He says that when he passed in on the tug Dalzelline, somewhere about 4:15, he noticed the Winslow at anchor slightly to the south of the channel, but so close to it that the end of its jib boom was about on the line of the black buoy 9. At that time there was no tug alongside of it. He got under way at 5:15. About 25 minutes were consumed in getting out from the pier and in turning around. When the tug was cast off the red buoy was about a point and a half on the starboard bow. The steamer in that position would go down the channel under a port wheel with engines full speed ahead, and he so ordered. The steamer promptly rounded to its helm. It swung even with the channel. He ordered the wheelsman to ease the helm. It was put amidships. The order was then given, steady as you go, "Put that red buoy on your port hand and the black on your starboard." The order was obeyed, and the vessel was headed directly on the channel course. He looked at his watch at the moment and saw that it was 5:40. The collision happened five minutes later. During this time the schooner seemed to be in the same position in which it was when the witness had passed it when he came in an hour and a half, or thereabouts, earlier. He had heard no signals from it. Within a couple of minutes he saw that the schooner was moving. He immediately put the engines full speed astern, ordered the wheel astarboard to offset the probable effect of the propeller when reversed in swinging the head of the steamer to the starboard, and blew three short blasts. These were unanswered. Then the vessels came together. The schooner had a slight way on, and the steamer none. He says that just before the collision he saw the master of the Curtis Bay, whom he knows, and another man come forward from the schooner's port quarter. The collision was then inevitable.

According to the witnesses for the steamer, the schooner's stem struck its starboard bow about 10 or 12 feet from the stem. The pilot testifies that at the time of the collision the steamer was about 115 feet from the line of the black buoys; that is, from the southern side of the channel. The schooner was then partly in the channel moving across it. Its mainmast—that is, the second mast from its bow—was in the channel; the rest of the schooner to the south of it. After the collision the schooner backed away to the south about a length over all and anchored. The steamer starboarded its helm a half a point to straighten out again, and then went down the channel, keeping well within it and passing the schooner with plenty of room to spare and without touching ground.

Generally speaking, all the other witnesses for the schooner or the tug, who undertake to locate the former at the time of the collision, put them on the north side of the channel; those for the steamer say they were crossing it, and that the collision happened in mid-channel or a little to the south of it.

The account given by the pilot of the steamer is simple and natural. If it be true, it is quite easy to understand what everybody did, and why they did it. The tug, with the schooner in tow, had just gotten under way. At first the motion was very slight. The "pine forest" moved slowly. Its motive power was absolutely invisible from the deck of the steamer. It was not until the latter had gotten straightened out on its channel course that those on board of it would be in a favorable position to note small changes of the schooner's position relative to the channel line.

Other witnesses establish that the tug at some time before the collision blew one blast. Some of them who heard it describe it as faint. The high hull of the schooner was interposed directly between the tug and the Wegadesk. It may have been that the whistle of the tug could not, under such conditions, have been heard on the steamer at all. It is equally possible that it sounded so faintly, and as if coming from so considerable a distance, that in the absence of anything in view on which it appeared likely to be sounded, it was, though heard, subconsciously supposed to be from some remote craft with which the steamer had no concern, and was consequently unnoticed and forgotten.

The master of the Curtis Bay himself testifies that he thought the Wegadesk was going to anchor for the evening in the turning basin. There was a reason why he should be in something of a hurry to get the Winslow to the coal pier. The day gang at the pier would leave a few minutes before 6. If he brought the schooner alongside thereafter, he would have to wait to have his lines handled until the night gang came on duty at about 6:30. Occupied with getting the schooner under way, compelled to give special attention to it by the fact that he had to make sure that every order he gave was understood and obeyed by some one nearly 100 yards away, there would be nothing surprising in his losing thought of the steamer for the few minutes.

On the other hand, the story he tells presupposes that those on the steamer were, as he says, "crazy." According to him the steamer was for seven or eight minutes steered directly for a motionless schooner. Even if there had been no schooner where he places it, the course he gives the steamer would have put it hard and fast aground in another minute or less, had not the engines been reversed—a reversal which was, however, made for no other purpose than to escape collision with the schooner, and which would consequently not have been made at all, had the schooner been somewhere else.

That an experienced pilot, who appears to be a man of intelligence and sobriety, could have so grossly erred, is not lightly to be presumed. It is true that the ablest and the most thoroughly trained may have now and then curious and inexplicable mental lapses. Such explanation is not to be accepted when a more natural one lies ready at hand. The able and ingenious advocates for the tug now suggest a

theory upon which they think the truthfulness of the story of the master of the Curtis Bay may be accepted, without supposing, as he says he did, that the pilot of the Wegadesk had lost his mind. They say that the schooner, after it reached the north side of the channel or turning basin, was headed very much in the same general direction as that in which it had been lying when at anchor. The pilot had seen it at anchor when he came in. When he was completing his turning around, he accepted the schooner as a fixed point, and in his mind located the channel, not by the buoys, but by what he assumed was the channel's relation to the position in which he supposed the schooner to be, and that he steered across the schooner's bows, supposing that he was heading for the channel.

Such a theory appears, in view of the long acquaintance of the pilot with those waters, at least as improbable as that he had suddenly gone crazy. Moreover, to believe it, it is necessary to disbelieve the testimony of the master of the Curtis Bay that the schooner had for many minutes been practically stationary, or that for seven or eight minutes the steamer headed directly for the schooner's fore rigging. But when we begin to discredit some of the always positive statements of the master of the Curtis Bay, the most rational course is to disbelieve all of them which require us to suppose that other people acted in an absolutely irrational—or, as he himself says, criminal—way.

There is much in his story that is unbelievable, as, for example, when he says that the Wegadesk did not reverse until it was within 20 or 25 feet of the Winslow. If that had been true, the results of the collision would have been far more serious than fortunately they were. Neither vessel was seriously hurt. No inquiry as to damages has as yet been had; but, as throwing light upon the relative positions of the vessels at and immediately before the collision, the physical injuries suffered by them have been proved. It is probable that the few days lost by each of the large and valuable vessels concerned while making the repairs were more costly than the repairs themselves, or at all events that they will be claimed so to be.

It is true that there are a number of other witnesses produced to confirm the story of the master of the Curtis Bay. A number of these are not in the employ of the owner of either the tug or the schooner. It is, however, also true that the master of the Curtis Bay has been for three years continuously engaged in towing vessels to and from the coal pier. He appears to be the sort of man who would easily acquire a dominating influence over not a few people with whom he came habitually into contact. In this case he now says that he blew at least four signals—first, one blast; second, three blasts; third, one blast; and, fourth, three blasts again. There are produced a number of persons employed on the coal pier who testify that they remember to have heard all of these. They, for the most part, say that they have talked with no one about the accident from the time it happened until they gave their testimony, a period of about two months. They now all remember without difficulty the precise order of all these signals. One of them, and not by any means the least intelligent, claims that, attracted by the first of these signals, he went out to the end of the coal

pier to see what was the matter. He heard them all, saw that a collision was probable, if not inevitable, and then for no particular reason turned around and walked away without having curiosity enough to wait a few seconds to see what would happen.

A number of other apparently disinterested witnesses produced by the steamer say that they heard but two signals from the tug, first one faint blast, and afterwards three. It is significant that the log book of the schooner mentions two, and no others.

The story of the master of the Curtis Bay is in a number of respects in conflict with that of witnesses produced by the schooner and the tug. Some of these differences, although in a sense important, are the kind which are naturally to be expected in accounts given by the different lips of what different minds recall of what different eyes saw. It is significant, however, that wherever there are such differences the version given by the master of the tug is always, or nearly always, that which it is the hardest to believe. He testified in open court. It is unnecessary to say more than that, after seeing and hearing him testify, I cannot accept his account of what occurred as even in substance accurate.

I find that the collision happened while the schooner was crossing the channel; that at the time the vessels came together the bow of the schooner was approximately in mid-channel, a little to the south or a little to the north of it.

The primary cause of the collision was the failure of the master of the Curtis Bay to appreciate how difficult it would be for any one on the port side of the schooner to detect its first movements, and how easy it would be for the steamer, before those on board did detect them, to acquire a headway which could not be checked in time. There was all the more danger of a collision, because it was not easy for the tug and its tow to maneuver quickly. The tug knew that the steamer was under way. It is true that the master of the tug took it for granted that the steamer would not go out that night; but there was no reason why he should have done so. It was still about an hour before sunset, of a clear April afternoon. According to his own story, he sounded no signal before he started to move the schooner. He did give one blast before the collision. It was not heard on the steamer. Whether, if it had been, the collision could have been avoided, there is no means of knowing. It has pleased the captain of the tug to say that it was not blown until after the schooner had crossed the channel and when the schooner was lying motionless. The precise time at which it was given is therefore hard to fix. At all events, the tug under the special circumstances should not have carried the schooner into the channel until it had made certain, by signals answered, as well as given, that the steamer understood what was proposed.

The tug must therefore be held in fault. The facts are analogous to those of *The Flemington* (C. C. A.) 204 Fed. 980. There the tug, which was held in fault, backed out from a pier without taking proper precautions to warn vessels navigating the channel of its intention so to do. In that case the tug was hidden by the pier. Here it was concealed behind the schooner. The schooner was under the control of the Curtis Bay. It does not appear that it was to blame.

There is some question whether the Wegadesk should not have detected the movement of the schooner before it did. There is much reason to believe that such movement was suspected by its captain before the pilot recognized it. As in the end the vessels merely touched, a reversal of engines a few seconds earlier than it was made would have prevented the collision altogether. All this is true. Yet there is nothing in the evidence to suggest that the pilot was not carefully and intelligently attending to his duties, or that he was not observing the schooner closely. Some one else may have been a little quicker than he to fear that it was moving; that was all. There is no such default as would impose liability upon the vessel under his control.

A decree in accordance with the conclusions herein reached may be submitted.

NEW ENGLAND TELEGRAPH CO. OF MASSACHUSETTS v.
TOWN OF ESSEX.

(District Court, D. Massachusetts. August 14, 1913.)

No. 32 (C. C. 198).

1. TELEGRAPHS AND TELEPHONES (§ 10*)—CONSTRUCTION—STATUTORY PROVISIONS—"POST ROUTES"—"POST ROADS."

Under Act March 1, 1884, c. 9, 23 Stat. 3, providing that all public roads and highways, while kept up and maintained as such, are thereby declared to be post routes, "post routes" means the same as "post roads," as used in Rev. St. § 5263 (U. S. Comp. St. 1901, p. 3579), authorizing telegraph companies to construct, maintain, and operate lines of telegraph over and along any of the post roads of the United States, which have been or may hereafter be declared such by law.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 6; Dec. Dig. § 10.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5473, 5474.]

2. COMMERCE (§ 28*)—TELEGRAPH LINES—STATUTORY PROVISIONS.

Under Rev. St. § 5263 (U. S. Comp. St. 1901, p. 3579), authorizing telegraph companies organized under the laws of any state to construct, maintain, and operate lines of telegraph over and along any of the post roads of the United States, and the subsequent sections, providing the conditions upon which such right is to be exercised, a state, or a town within a state, cannot exclude a telegraph company, engaged in transmitting interstate, international, and government messages, which has accepted the terms proposed by the national government, even though such company is organized under the laws of that state, since, because of its powers to regulate interstate and foreign commerce, and the operation of the national postal service, the legislation of Congress, so far as it has gone, is supreme.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 22; Dec. Dig. § 28.*]

3. TELEGRAPHS AND TELEPHONES (§ 10*)—USE OF HIGHWAYS—STATUTORY PROVISIONS.

Under Rev. St. § 5263 (U. S. Comp. St. 1901, p. 3579), authorizing telegraph companies to construct, maintain, and operate lines over and along any of the post roads of the United States, the authority thereby granted is merely permissive, and gives no right to use the soil, even of post

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

roads, as against private owners, or as against the state or municipality, where it owns the land, nor is any right of eminent domain included, and the company may be required to make reasonable compensation to the municipality entitled thereto for the occupation of its post roads.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 6; Dec. Dig. § 10.*]

4. COMMERCE (§ 73*)—REGULATION—TAXATION—TELEGRAPH LINES.

Under Rev. St. § 5263 (U. S. Comp. St. 1901, p. 3579), authorizing telegraph companies to construct, maintain, and operate lines of telegraph over and along any of the post roads of the United States, such companies are subject to the taxing power of the state, and to police or other regulations by the state not inconsistent with those established by Congress, provided such taxes or the methods of collecting them are not of such a character as to exclude the company from the state, or stop its business, and are not arbitrary or unreasonable.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 124-134; Dec. Dig. § 73.*]

5. TELEGRAPHS AND TELEPHONES (§ 10*)—USE OF STREETS—REGULATION.

Under Rev. Laws Mass. c. 122, § 1, authorizing telegraph companies to construct lines along the public ways within the state, section 2, providing that the selectmen of a town through which lines of such a company are to pass shall give the company a writing specifying where the poles may be located, the kind of poles, and the height at which and places whereon the wires may run, and that the selectmen may direct any alteration in location or erection of the poles, and in the height of the wires, and section 26, providing that no enjoyment of the privilege of maintaining poles or wires in, upon, or over the land of other persons shall give a legal right to continue the enjoyment of such privilege or raise any presumption of a grant thereof, where a telegraph company constructed its lines along the roads of a town without obtaining a location for its lines from the town authorities, and nearly 20 years afterwards applied to the selectmen for a location in order to make certain repairs, which location was refused by the selectmen, its continued occupation of such roads was not thereafter unlawful; the laws of Massachusetts nowhere penalizing or making illegal the construction of a telegraph line without a permit or specification.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 6; Dec. Dig. § 10.*]

In Equity. Bill for an injunction by the New England Telegraph Company of Massachusetts against the Town of Essex. Heard on pleadings and proofs. Cross-bill dismissed, and permanent injunction issued.

Carver & Blodgett, of Boston, Mass., for complainant.

Frank C. Richardson and William B. Sullivan, both of Boston, Mass., for defendant.

DODGE, Circuit Judge. This bill was filed July 31, 1905. The defendant town has been under a temporary injunction since September 5, 1905, which it has never moved to dissolve. On September 26, 1905, it filed a cross-bill against the plaintiff. This has been followed by an answer and a replication, as has the original bill.

Both plaintiff and defendant are Massachusetts corporations. The plaintiff was incorporated April 7, 1884, "for the purpose of constructing lines of aerial or underground wires of telegraph, con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

within and without the limits of [the] commonwealth, and owning, constructing, maintaining, and operating lines of aerial or underground electric telegraph, both within and without the limits of said commonwealth, and the owning of interests in such lines," with a capital of \$30,000. It is therefore a telegraph company within the meaning of Rev. St. §§ 5263-5269 (U. S. Comp. St. 1901, pp. 3579-3582) which are the laws of the United States under which the controversy between the parties, involving more than \$2,000, is said to arise.

Section 5263 has given to any telegraph company, organized under the laws of any state since its enactment, the right to construct, maintain, and operate lines of telegraph over and along any of the post roads of the United States which have been or may hereafter be declared such by law. It provides, however, that such lines shall be so constructed and maintained as not to interfere with the ordinary travel on such post roads.

Section 5266 gives priority over all other business, at such rates as the Postmaster General shall annually fix, to telegrams between the government departments, their officers and agents, in transmission over the lines of any telegraph company having the right of way provided for in section 5263.

Section 5267 gives to the United States the right to purchase all the telegraph lines and property of any company acting under section 5263, at an appraised value to be ascertained according to other provisions contained in the section.

Section 5268 requires the filing of a written acceptance, with the Postmaster General, of the restrictions and obligations required by law, before the exercise by any telegraph company of the powers and privileges conferred by section 5263.

I find no other provisions in the sections referred to material for the purposes of this case. The plaintiff avers that it has filed the acceptance required by section 5268, and has transmitted departmental messages in accordance with section 5266, and has in all other respects complied with the requirements of the sections referred to. These averments are sustained by the evidence.

The following facts appear by admission or from the evidence:

After its incorporation in April, 1884, the plaintiff constructed a telegraph line, about 4 miles in length, consisting of 186 poles and wires thereon, carried through Essex from the line between it and the adjoining town of Hamilton, through highways or roads within Essex known as Western avenue, Main street, and Eastern avenue, to the line between Essex and the adjoining town of Gloucester. The line constructed formed part of a line constructed by the plaintiff through Massachusetts from the Rhode Island line to Rockport, passing on its way through various Massachusetts towns or cities, which need not be specified. At Rockport it connects with a line of telegraph cable to Europe. At the Rhode Island line it connects directly or intermediately with telegraph lines constructed by telegraph companies in alliance with the plaintiff, affording telegraphic communication to points throughout the United States. It was constructed to be, and it has

been since, used as part of a system of lines in connection, affording telegraphic communication between these United States points and Europe, as well as between points on the connected lines within the United States. During the 21 years from 1884 to 1905, the plaintiff maintained and operated the line constructed through Essex as above, without interference on the part of that town. The evidence does not show any interference by this line with the ordinary travel on the roads mentioned.

On June 1, 1905, repairs to the line through Essex having become necessary, and relocation desirable in connection with them, an application for a location through the roads above mentioned was presented to the Essex selectmen. It was stated in the application that the new poles were to occupy practically the positions occupied by the old ones, and that any changes in the present location were to be under the direction of the selectmen. This application was made in the name of the New England Telegraph Company of New York, one of the companies with which the plaintiff was allied in the maintenance and operation of the through line above described. After a hearing, the selectmen voted, on July 10, 1905, not to grant "the New England Telegraph Company" a location. Under date of July 11, 1905, they sent a notice to that effect, addressed to "New England Telegraph Co., 84 State St., Boston, Mass." I find that their refusal to grant the application was not upon the ground that it was applied for in the name of the New England Telegraph Company of New York, instead of in the name of the plaintiff, but was a refusal, upon other grounds below appearing, to grant the plaintiff, or any company connected with it, any location within the town. At a subsequent conference between the selectmen and representatives of the plaintiff, it was stated to the plaintiff, by or on behalf of the selectmen, that they would not grant a location to any company, in any street of the town, unless actually forced to give it, and that they desired to raise the question of the company's rights to be in the town; also that the selectmen wanted the poles taken entirely out of the town, and would prevent construction work by force if necessary. The selectmen or their chairman were asked if there was objection to the repair of the line as it stood, merely replacing old poles with new ones. The reply was that there was objection, and that any work by the company within the town would be stopped.

The temporary injunction issued September 5, 1905, in this case, forbade the town, until the further order of the court, to interfere in any manner with the plaintiff's line or its relocation on the roads and highways then occupied thereby, or with the resetting of its poles, or the making of necessary repairs. The defendant did not appear to oppose the granting of this injunction. The bill asks for a permanent injunction to the same effect.

In the cross-bill, filed by the town on September 26, 1905, it is alleged that the plaintiff's line was erected without obtaining any rights whatever in the highways and roads mentioned, which were alleged and are admitted to be public highways; that the defendant had requested the plaintiff, since its bill was filed, to remove its poles and

wires, which the plaintiff had refused to do; that it was trespassing upon the defendant's highways without right and without authority, and was threatening to continue to do so; that it had, since the preliminary injunction issued, not only repaired its line, but had reset its poles in different locations, and that it had changed its line from its original location. The cross-bill asks that the plaintiff be ordered to remove its poles, and for an injunction forbidding the plaintiff to use its line within Essex for the purposes of its business until it shall have first obtained a franchise from the board of selectmen, as provided by the laws of Massachusetts. In the plaintiff's answer the request and refusal to remove are admitted, also the resetting of a few poles in different locations. The other allegations are denied. I find, on the evidence, that the admitted changes in the location of some of the poles were only such as were necessary to keep the line in a reasonably safe condition, and that there have been no changes amounting to a change of the location occupied in 1884 and since.

The defendant's contentions are based upon provisions contained in the Revised Laws of Massachusetts. Chapter 122, "Of companies for the transmission of electricity," in section 1, authorizes any company incorporated for the transmission of intelligence by electricity to construct lines for such transmission upon and along the public ways within Massachusetts under the provisions of sections which follow. Section 2 provides that the selectmen of a town through which lines of such a company are to pass "shall give the company a writing specifying where the poles may be located, the kind of poles and the height at which and the places whereon the wires may run"; also that, when the lines are erected, the selectmen "may direct any alteration in the location or erection of the poles * * * and in the height of the wires," after an opportunity to be heard given the company, all specifications and decisions made to be put on the town records. Section 26 provides that no enjoyment for the purposes specified in section 1, for any length of time, of the privilege of maintaining poles or wires in, upon, or over the land of other persons shall give a legal right to continue the enjoyment of such privilege, or raise any presumption of a grant thereof. There are also provisions in chapter 25, § 56, that the selectmen of towns may authorize citizens of the state to establish and maintain, in their town, poles, wires, and other apparatus for telegraphic communication in conformity with chapter 122. All these provisions were contained in the Public Statutes, superseded in 1902 by the Revised Laws, but in force from 1884 to 1902. The defendant contends that the plaintiff's right to construct or maintain its line in Essex depends upon these provisions, and that, unless it can show authority under them, it was and is without any right either to construct or to maintain its line. It contends that the acts of Congress referred to give the plaintiff no rights for those purposes in the public highways of the town through which the line passes.

[1] If these highways are "post roads," within the meaning of Rev. St. 5263, the plaintiff's right under that section to construct, maintain, and operate its line cannot be denied; the plaintiff having, as

above shown, met all the requirements of the federal statutes upon which this right is made to depend. Whether the public highways here in question, or any of them, were established as post roads by Rev. St. 3964 (U. S. Comp. St. 1901, p. 2707), it is unnecessary to consider, because, subsequently to the Revised Statutes, on March 1, 1884, Congress enacted that "all public roads and highways while kept up and maintained as such are hereby declared to be post routes" (23 Stat. 3). That "post routes," as there used, means anything different from "post roads," I am unable to believe, in view of the decisions which have treated this enactment as an exercise of the express power given Congress by the Constitution (article 1, § 8) to establish post offices and post roads. In *Western, etc., Co. v. Penna. R. R. Co.*, 195 U. S. 540, 557, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517, it is said that by the acts of Congress railroads within the United States were made "post routes or roads." See, also, *Western, etc., Co. v. Richmond*, 224 U. S. 160, 165, 166, 32 Sup. Ct. 449, 56 L. Ed. 710, where the act of March 1, 1884, is cited with Rev. St. § 3964, as having made all public highways post roads. A recent District Court decision (*Mackay Co. v. Texarkana*, 199 Fed. 347, 348) refers to these enactments as "the post roads act and amendments thereto."

[2] However it might be in the case of a telegraph company doing a purely private business, confined, for all purposes, within the limits of a state, there can be no doubt that in the case of a company like the plaintiff, engaged in transmitting interstate, international, and government messages, the legislation of Congress, so far as it has gone, is supreme, because of the powers possessed by Congress to regulate for the whole nation its commerce between the states and with foreign nations, and also the operation of the national postal service.

[3, 4] While the plaintiff owes its existence, its capacity to contract, its right to sue and be sued, and to exercise the business of telegraphy, to the laws of Massachusetts, under which it is organized, it holds its privilege to run its lines through the post roads referred to under the laws of Congress. *Western, etc., Co. v. Massachusetts*, 125 U. S. 530, 548, 8 Sup. Ct. 961, 31 L. Ed. 790. No state can exclude a telegraph company which has accepted the terms proposed by the national government for this national privilege, from prosecuting its business within the state. *Western, etc., Co. v. Penna. R. R. Co.*, 195 U. S. 540, 562, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517. It is true that the authority granted by Congress to such a company is merely permissive, and gives no right to use the soil, even of post roads, as against private owners, or as against the state or municipality where it owns the land. *Western, etc., Co. v. Richmond*, 224 U. S. 160, 169, 32 Sup. Ct. 449, 56 L. Ed. 710. No title is acquired by the mere exercise of the authority granted, nor is any right of eminent domain included. A company exercising the authority may be required to make reasonable compensation to the municipality entitled, for the occupation of its post roads. *St. Louis v. Western, etc., Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380. The company is subject to the taxing power of the state, and to the imposition by the state of police or other regulations not inconsistent with those established by Congress. The taxes imposed, however, must not be of a character, nor the methods

of collecting them such as to effect the exclusion of the company from the state or the stoppage of its business. The regulations must not be arbitrary, unreasonable, nor such as have the effect of excluding the company from the state or forbidding it to carry on its business therein. A state cannot so exclude or prohibit, either directly or indirectly. *Western, etc., Co. v. Mass.*, 125 U. S. 530, 548, 8 Sup. Ct. 961, 31 L. Ed. 790; *Postal, etc., Co. v. Adams*, 155 U. S. 688, 696, 15 Sup. Ct. 268, 360, 39 L. Ed. 311. And if the state cannot so exclude or prohibit, no town within the state can do so under state authority. To concede such power to a town might be, in some cases, to enable one town to shut out all telegraph wires from territory beyond it and not accessible save through it.

[5] Ownership of the soil of these post roads is not claimed by the defendant town, which justifies its attempt to exclude the plaintiff, or stop the operation of its line within Essex, only by the claim that the company has never obtained a location for the line from the town authorities, according to the state statute. As has been stated, the specification in writing provided for by chapter 122, § 2, Rev. Laws, has been, though applied for, expressly withheld and refused since 1905; nor is the evidence sufficient to prove that such a specification was ever given the plaintiff by the selectmen. None is produced by the plaintiff, nor is any record of one found in the town records. But the laws of Massachusetts nowhere penalize or make illegal the construction of a telegraph line like this without the permit or specification. See *Suburban, etc., Co. v. Boston*, 153 Mass. 200, 26 N. E. 447, 10 L. R. A. 497. And no failure on the plaintiff's part to do anything which the town has the right to require under the statutes, state or federal, or can otherwise reasonably require as a condition of giving the specification, appears. The plaintiff has been, at least since 1905, constantly in the attitude of requesting the town to give the specification.

Under those circumstances, I am unable to hold that the plaintiff is not lawfully occupying its location within Essex, or is not lawfully operating its line within that town. In view of the federal statutes and their scope, I can find nothing in the Massachusetts legislation referred to, nor in the facts as shown, which can have the effect of abridging or restricting the plaintiff's rights to maintain and operate the line referred to.

The cross-bill must therefore be dismissed, and a permanent injunction will issue as prayed for in the bill.

In re RICHARDS BROS.

(District Court, E. D. Michigan, N. D. April 14, 1913.)

PARTNERSHIP (§ 64*)—FIRM NAME—"ASSUMED NAME."

Pub. Acts Mich. 1907, No. 101, provides that no persons shall carry on business in the state under any designation, name, or style other than the real name or names of the individuals owning the business, unless such persons shall file in the office of the county clerk of the county in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which they do business a certificate showing the name under which such business is or is to be conducted, and the true or real full name or names of the same, with the home and post office address or addresses of such persons. *Held* that, where the bankrupts were two brothers, named respectively Charles J. Richards and Harry Richards, and they did business as a partnership under the name "Richards Bros.," such name was not an "assumed name," or a designation, name, or style other than the real name or names of the partners conducting the business, within such act, and hence their business so conducted was not rendered illegal because of their failure to file the statement provided for, so as to preclude their right to exemptions on the administration of their estate in bankruptcy.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 87-91; Dec. Dig. § 64.*]

In Bankruptcy. In the matter of Richards Bros., bankrupts. Application by bankrupts for allowance of exemptions, to which the receiver filed objections. Objections overruled, and exemptions allowed.

Coumans & Gaffney, of Bay City, Mich., for bankrupts.

Oscar W. Baker, of Bay City, Mich., for trustee in bankruptcy.

TUTTLE, District Judge. Two brothers, Charles J. Richards and Harry Richards, entered into partnership, doing business under the firm name and style of "Richards Bros." They did not file a certificate or do anything in the way of complying with Act No. 101 of the Public Acts of Michigan for 1907, which contains the following provision:

"No person or persons shall hereafter carry on or conduct or transact business in this state under any assumed name, or under any designation, name or style, corporate or otherwise, other than the real name or names of the individual or individuals owning, conducting or transacting such business, unless such person or persons shall file in the office of the clerk of the county or counties in which such person or persons own, conduct, or transact, or intend to own, conduct or transact such business, or maintain an office or place of business, a certificate setting forth the name under which such business owned is or is to be conducted or transacted, and the true or real full name or names of the person or persons owning, conducting or transacting the same, with the home and post office address or addresses of said persons."

Richards Bros. have been adjudicated bankrupts, both as individuals and as a copartnership, and now ask that they be allowed their exemptions of \$250 each under the Michigan statute. The receiver opposed the allowance of these exemptions on the following grounds:

1. That "Richards Bros." is an assumed name, and a designation, name, and style other than the real names of the individuals conducting the business, and a violation of said act, and that therefore the business of said copartnership was illegal.

2. That, inasmuch as the business of the copartnership was illegal, the members of the copartnership are not entitled to their exemptions.

Is the name "Richards Bros." an "assumed name," or "designation, name, or style" other than the "real name or names" of the partners conducting the business of Richards Bros.? This court is of the opinion that the question should be answered in the negative. Since men began to combine their capital, efforts, and interests in a common business, it has been customary for actual brothers to use their surname

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

followed by the word "Bros." in carrying on their partnership business. While the act in question provides that the certificate shall set forth "the true and real full name or names" of the parties carrying on the business, it does not require the certificate to be filed except when they are carrying on the business under an "assumed name," or "designation, name, or style" other than the "real name or names" of the partners. The very fact that this same section of the act in express terms provides for "full names" in preparing the certificate leads the court to the conclusion that the Legislature did not intend that the word "name" should be construed as meaning both the surname and the Christian name, without the use of the adjective "full." This is a criminal statute, and a penalty is attached for its violation. It ought to be strictly construed against the party invoking it, and, giving it such construction, "Richards Bros." is not an assumed name, and is in fact the real name of the partners. It is not the full name, but this statute does not require the use of the full name, and it is plainly shown that the Legislature did not so intend by the fact that in this very section, when they intended to require the full name as in the certificate, it is expressly so stated.

The court is strengthened and supported in the opinion above stated by the opinion of other courts. Our statute is taken verbatim from the statute of New York. Section 363b, Penal Code N. Y., is identical with the section in question of the Michigan statute. The New York statute contained one exception which was not included in the Michigan statute, which exception is as follows:

"Nor shall this section be deemed or construed to prevent the lawful use of the partnership name or designation, provided that such partnership name or designation shall include the true or real name of at least one of such persons transacting such business."

This exception would make lawful a designation which contained the true or real name of one of the copartners. Our statute is more restrictive than the New York statute, because our statute requires that the real name of all the partners be used. This exception, however, does not in any way alter or change the construction as applied to the designation "Richards Bros." At the time that this act was passed in Michigan, the New York statute had been construed in the case of *Castle Bros. v. Graham*, 87 App. Div. 97, 84 N. Y. Supp. 120, heard before the Supreme Court, Appellate Division, on October 22, 1903, in which case the New York Supreme Court held that *Castle Bros.* was not an assumed name, and was the real name of the two brothers composing the partnership. It therefore should be assumed that the Legislature of the state of Michigan, when they enacted this statute prohibiting the use of assumed names and requiring the use of real names, did so with the intention that these terms should have the same meaning as that previously given by the New York courts.

Other courts have considered this same question, and a study of their decisions is both interesting and helpful. The states of Ohio, Montana, North Dakota, South Dakota, and California have similar statutes. They differ, however, from the New York and Michigan statutes, in that they are not penal, and do not impose the extreme con-

sequence of failure to comply with them, as do the statutes of Michigan and New York. The only penalty fixed by the statutes of these other states for failing to file the certificate is a bar to bringing suit until such certificate has been filed.

In the case of *Pendleton et al. v. Cline*, 85 Cal. 142, 24 Pac. 659, a man by the name of Pendleton and another by the name of Williams were conducting business under the name of "Pendleton & Williams" and the California court held that such name of "Pendleton & Williams" did not fall within the provision of section 2466 of the California Civil Code, which provided that:

"Every partnership transacting business in the state under a fictitious name, or a designation not showing the names of the persons interested, * * * must file * * * a certificate."

The California court held that the name of "Pendleton & Williams" was not a fictitious one, and expressly stated that, if the Legislature had meant so unusual a thing as requiring the full name of all of the parties, it would have said so explicitly. This is an early case, and the opinion is fully and carefully reasoned. It has been cited by the courts of many other states. The California court followed the same rule in two later cases: *Carlock v. Cagnacci*, 88 Cal. 600, 26 Pac. 597; *McLean v. Crow*, 88 Cal. 644, 26 Pac. 596.

Subsequent to the decision in *Pendleton v. Cline* by the California court, the Montana court in *Guiterman v. Wishon*, 21 Mont. 458, 54 Pac. 566, held that three brothers doing business in their surname with only the word "Bros." added, did not come within the act, and that the name was not a fictitious one; the Montana court citing the California case, and assuming that the decision holding that "Pendleton & Williams" was not an assumed name was authority for the conclusion reached in the Montana case.

The courts of Oklahoma, South Dakota, and North Dakota followed the reasoning of the California court in *Pendleton v. Cline*, *supra*. *Patterson v. Byers*, 17 Okl. 633, 89 Pac. 1114, 10 Ann. Cas. 810; *Bovee v. De Jong*, 22 S. D. 163, 116 N. W. 83; *Walker v. Stimmel*, 15 N. D. 484, 107 N. W. 1081.

The Ohio court, after certain conflicting decisions between the inferior courts, finally decided this matter in *Cochran v. Hirsch*, 6 Ohio Dec. 41, holding that the style "Hirsch Bros." was not a fictitious name. In this case the Ohio court again cites with approval the California case of *Pendleton v. Cline*, *supra*.

After the courts of all these other states, with statutes similar to California, had followed the case of *Pendleton v. Cline*, and had assumed that, if a man by the name of Pendleton and a man by the name of Williams could do business under the name of "Pendleton & Williams" without violating the statute, two brothers could do business in their surname with the word "Bros." added, then in 1902 came the decision in the California Supreme Court in *North v. Moore*, 135 Cal. 621, 67 Pac. 1037, holding that the name "Abrams Bros." was a violation of the California statute, and that it did not show the names of the persons interested as partners. It is a very brief opinion. No argument nor reasons are given for the results reached. Absolutely no

reference is made to their own opinion in *Pendleton v. Cline* and the other decisions of their own court, and in numerous other states which had followed *Pendleton v. Cline*. A careful reading of the case of *North v. Moore*, *supra*, indicates that no one appeared before the court to represent the appellant, and that the decision of the lower court was affirmed on the supposition that the appeal from the order of the lower court had been abandoned. There is nothing in this case to indicate that there was any intention on the part of the California court to change the rule laid down in *Pendleton v. Cline*, and there is nothing in this decision which should change the uniform holding of the courts that names like "Richards Bros." are not assumed or fictitious.

It is urged that the statute in question is more strictly construed in Michigan than in any of the other states, and the case of *Cashin v. Pliter*, 168 Mich. 386, 134 N. W. 482, is cited as authority for this contention. In this case the Michigan Supreme Court held that the use of the name "Flint Realty & Construction Company" was a violation of the statute, and in discussing the matter mentioned its objects and merits, and went far in stating that it was the purpose of the Legislature to advise the public by the certificate as to just what individuals were engaged in any particular business. Of course, the designation "Flint Realty & Construction Company" was plainly an assumed and fictitious name, and, no matter what the Michigan Supreme Court may have said in deciding that question, it cannot possibly be contended that in that case they have decided that a name like "Richards Bros." falls in the same class.

It was not a violation of the statute for the bankrupts to do business under the name "Richards Bros.," and, inasmuch as this court holds that they were not engaged in an unlawful business, it is not necessary to pass upon the second question raised by the trustee.

The usual exemptions under the Michigan statute will therefore be allowed to each of the bankrupts.

SCHWARZ et al. v. HARRIS.

(District Court, D. Oregon. July 28, 1913.)

No. 3,095.

1. SALES (§§ 343, 344*)—RIGHT TO PURCHASE PRICE—CONVERSION—JUDGMENT—EFFECT.

Plaintiffs having purchased hops from certain Chinamen and having been vested with the title, the Chinamen sold and delivered the hops to defendant's intestate, whereupon plaintiffs recovered judgment against the latter in conversion. *Held*, that the judgment stood in the place of the hops, and on collection thereof, but not before, plaintiffs would be liable to the Chinamen for the purchase price plaintiffs had agreed to pay.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 947-955; Dec. Dig. §§ 343, 344.*]

2. COURTS (§ 371*)—FEDERAL COURTS—EQUITY JURISDICTION—LAW OF DOMICILE.

While federal equity jurisdiction extends to the administration of decedents' estates, where it concerns citizens and residents of different states, the courts, in exercising such jurisdiction in the enforcement of claims against personal representatives, administer the law of the state of the domicile, and are governed by the local rules and regulations applicable to the adjustment of such claims.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 907, 972-976; Dec. Dig. § 371.*]

3. EXECUTORS AND ADMINISTRATORS (§ 242*)—CLAIMS—EQUITABLE SET-OFF.

Under the Oregon statute, requiring that a person presenting a claim in probate shall make affidavit that the amount claimed is justly due and that there is no just counterclaim to the same, a demand against which there exists an equitable set-off or counterclaim may be adjusted in the court of equity before it is allowed and paid out of the decedent's estate.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 242.*]

4. SET-OFF AND COUNTERCLAIM (§ 8*)—EQUITABLE SET-OFF—CLAIM AGAINST ESTATE.

Plaintiffs recovered judgment against defendant for conversion of certain hops, which defendant's intestate had bought from Chinese raisers and paid for; plaintiffs having previously bought the hops and become vested with the title. Plaintiffs, however, had not paid for them, and after judgment defendant obtained an assignment from the sellers of their claim against plaintiffs for the price. Intestate's estate, against which the judgment was filed as a claim, was solvent, and it appeared that plaintiffs were not residents of the state. *Held*, that plaintiffs' liability for the purchase price so assigned constituted a valid equitable set-off against the judgment.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 9-11; Dec. Dig. § 8.*]

In Equity. Action by Moritz Schwarz and others, doing business as Benjamin Schwarz & Sons against Joseph Harris, as administrator de bonis non of the estate of John Kennedy, deceased. Judgment for plaintiffs, less a set-off pleaded by defendant.

John A. Carson, of Salem, Or., for plaintiffs.

Martin L. Pipes, of Portland, Or., for defendant.

WOLVERTON, District Judge. The facts out of which this litigation springs are sufficiently stated in an opinion heretofore rendered in the same cause. See (C. C.) 156 Fed. 316.

[1] It is clear that, had plaintiffs received the hops from the Chinamen, they would have become indebted to the Chinamen for the purchase price thereof. There is a dispute whether the hops were delivered to the plaintiffs before Kennedy took them. But let us assume that they were not so delivered. Plaintiffs have recovered judgment against Kennedy for their value, and, the action being in trover, the judgment is effective to transfer title as between plaintiffs and Kennedy to the latter, and it stands, as it respects the former, in the place and stead of the hops. It could hardly be urged that the Chinamen would be entitled to their purchase price while plaintiffs

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

had neither received the hops nor realized upon their judgment against Kennedy; for Kennedy might be insolvent, and the plaintiffs would have received nothing in pursuance of their contract with the Chinamen to deliver the hops. So that, until Kennedy has paid his judgment, at least, the Chinamen's claim for the purchase price of the hops against plaintiffs could avail them nothing, and an assignee from them could obtain no greater rights than they had. However, when plaintiffs shall have received the amount of their judgment from Kennedy, there seems no good reason why they should not pay the Chinamen or any one standing in their right; for when has it been decreed in equity that a person shall have something for nothing? In legal effect, the plaintiffs would have the hops, and, having them, why should they not pay for them? If Kennedy wrongfully took the hops from the Chinamen, so that they could not perform their contract with plaintiffs by delivery, why should not the Chinamen be entitled to their purchase price, when the hops have been restored and delivery had? But we have seen that, when the plaintiffs have been paid their damages equivalent to the value of the hops, then will the plaintiffs have in legal effect received the hops, and thus will the Chinamen's right to the purchase price be complete.

There is no charge that the Chinamen converted the hops. Nor could they have done so until title was vested in the plaintiffs by delivery. Until so vested, the plaintiffs' right of action against the Chinamen would have been upon the contract, for breach thereof for failure to deliver, and not in tort. So that, under the hypothesis that Kennedy wrongfully took the hops from the Chinamen and thus prevented delivery, the Chinamen would be entitled to recover the purchase price which the plaintiffs agreed to pay therefor, whenever the plaintiffs received the full value of the hops which the Chinamen agreed to deliver; and the fact that the plaintiffs had gotten the hops or their value through some one else would not alter the case.

The case is illumined by supposing that Kennedy, after taking the hops, had concluded that he had no right to them, and had voluntarily delivered them to plaintiffs, or that plaintiffs had recovered them from Kennedy by replevin. The plaintiffs could not then avoid payment of their price because the Chinamen did not deliver the hops directly to them. If, on the other hand, there was delivery of the hops to the plaintiffs, and Kennedy took them from plaintiffs, the Chinamen's right of action against plaintiffs for their value would have accrued, and the litigation that afterwards followed between plaintiffs and Kennedy could not have affected that right, because the plaintiffs would have gotten what they contracted for.

Now, whatever right the Chinamen had has been assigned to Kennedy, and the question to be resolved is whether the latter's representatives can avail themselves thereof as against plaintiffs' judgment. I have been speaking of Kennedy as though he were defendant but for convenience. This judgment is against the wife as administratrix of his estate, and, since the present suit was started, Joseph Harris has been substituted in her stead as administrator de bonis non.

The purpose of this suit is to prevent the defendant from availing

himself of the assigned claim from the Chinamen in any way, as a set-off or otherwise, against the plaintiffs' judgment.

[2] It is settled law that federal equity jurisdiction extends to the administration of the estates of deceased persons, where it concerns citizens and residents of different states. But in exercising such jurisdiction in the enforcement of claims against the personal representatives of decedent's estate, federal courts but administer the law of the state of the domicile, and are governed by the local rules and regulations applicable in the adjustment of such claims. *Security Trust Co. v. Black River Nat'l Bank*, 187 U. S. 211, 23 Sup. Ct. 52, 47 L. Ed. 147; *Newberry v. Wilkinson et al.*, 199 Fed. 673, 118 C. C. A. 111.

[3] A person, in presenting his claim in probate in this state for allowance by the executor, administrator, or probate judge, as the case may be, must make affidavit that the amount claimed is justly due, and that there is no just counterclaim to the same. Thus it is the intentment of the law that no debt shall be allowed or paid out of the estate, unless it is just and represents a true balance due from such estate. While the statute seems to contemplate legal demands only, there is no good reason why a demand against which there exists an equitable set-off or counterclaim may not be adjusted in a court of equity before it shall be allowed or paid out of the decedent's estate. In *Rolling Mill Co. v. Ore & Steel Co.*, 152 U. S. 596, 615, 14 Sup. Ct. 710, 715 (38 L. Ed. 565), wherein it was sought to set off an unliquidated claim for damages against a demand which had been ordered paid at law in a garnishee proceeding, it was said:

"Cross-demands and counterclaims, whether arising out of the same or wholly disconnected transactions, and whether liquidated or unliquidated, may be enforced by way of set-off whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice. Again, it is well established that equity will entertain jurisdiction and afford relief against the collection of a judgment where in justice and good conscience it ought not to be enforced, as where there is a meritorious equitable defense thereto, which could not have been set up at law, or which the party was, without fault or negligence, prevented from interposing."

The set-off as sought was allowed. To a like purpose, see, also, *Central Appalachian Co. et al. v. Buchanan*, 90 Fed. 454, 33 C. C. A. 598, and *Brown v. Pegram et al.* (C. C.) 149 Fed. 515.

[4] Now, whether the defendant's right to the purchase price of the hops is contingent upon the payment of the judgment or not, it appears that the Kennedy estate is solvent, and that the judgment will be paid in full, whether it remains as it is or is reduced by the amount of the purchase price agreed to be paid the Chinamen by plaintiffs; and it furthermore appears that the plaintiffs are nonresidents of the state, which in itself is a ground for equitable interposition. See *Rolling Mill Co. v. Ore & Steel Co.*, supra. Indeed, plaintiffs can have their right of suit in a federal court only by reason of being nonresidents of the state. Under such conditions, it would seem to be only equitable and just to set off the claim of Kennedy's estate derived from the Chinamen against the judgment, rather than to require the estate to pay the judgment in full and remit it to its action in another state to recover what is or would be its due. I come the more readily to this

conclusion, inasmuch as my memory is refreshed by a reference to my instructions in the case in trover; for there the question of the plaintiffs' right to a recovery was made to depend with the jury upon whether possession as it respects the hops had passed to plaintiffs prior to the time when Kennedy took them.

I conclude that plaintiffs are entitled to recover from the estate of Kennedy the difference between the price of the hops, which plaintiffs agreed to pay the Chinamen, and the amount of their judgment and costs, with accrued interest thereon to the present date, together with the costs and disbursements of this suit.

KENDRICK STATE BANK v. FIRST NAT. BANK OF PORTLAND.

(District Court, D. Oregon. August 4, 1913.)

No. 5,877.

1. EVIDENCE (§ 459*)—PAROL EVIDENCE—CONTRACT IN NAME OF AGENT—LIABILITY OF PRINCIPAL.

The Oregon rule, that the presumption that a simple contract made in the name of an agent of a known principal is the contract of the agent and not of the principal is a disputable one, and that it may be shown by parol that the principal is bound also, but that in no event may the agent be discharged, does not apply to negotiable instruments and specialties under seal.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1722, 1906-1910, 2109-2114; Dec. Dig. § 459.*]

2. BANKS AND BANKING (§ 134*)—DEPOSITS—LOANS—SECURITIES—NOTE OF OFFICER—SET-OFF.

The K. Bank, plaintiff's predecessor, having issued a certificate of deposit to defendant, a national bank with which the K. Bank did business, the K. Bank's president, desiring to change the form thereof, so that it would not appear among the bank's liabilities, gave defendant his own note therefor, secured by certain stock certificates. The proceeds of the loan were passed to the K. Bank's credit, and were used by it in the course of its business; the president having no personal advantage therefrom. *Held*, that the loan constituted an indebtedness of the bank, so that, on the failure thereof, defendant was entitled to set off the amount due thereon against the K. Bank's deposit, and to recover the balance from the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. § 134.*]

3. BANKS AND BANKING (§ 134*)—DEPOSITS—INDEBTEDNESS—SET-OFF.

Where the K. Bank's president executed a note to defendant bank for money advanced to and used by the K. Bank in the ordinary course of its business, it was no objection to the right of defendant bank to set off such indebtedness against the K. Bank's deposit, on the failure of the latter, that the loan was made in that form to withhold a full statement of the K. Bank's liabilities from the bank commissioner.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. § 134.*]

4. BANKS AND BANKING (§ 113*)—OFFICERS—AUTHORITY—OBJECTIONS—ESTOPPEL.

Where a bank received the sole and entire benefit of a loan, obtained for it by its president on his own note from defendant, the bank so re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ceiving the funds could not thereafter deny the authority of its president to obtain the loan.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 273-276; Dec. Dig. § 113.*]

At Law. Action by the Kendrick State Bank against the First National Bank of Portland. Judgment for defendant.

Prior to June, 1910, the Kendrick State Bank of Idaho had been a correspondent of the defendant, the First National Bank of Portland, Or. J. W. Bradbury, who was the president of the former bank, was the owner of the capital stock thereof to the amount of \$23,000 out of an entire capitalization of \$25,000. In practical reality, he was the owner and manager of the bank, and transacted its business affairs very much as if no one else were interested with him. About the 11th day of June, 1910, the Kendrick Bank, acting through J. W. Bradbury, its president, arranged by correspondence with the Portland Bank to issue to the latter its certificate of deposit for \$5,000, accompanied by certain collateral, in consideration of which the Portland Bank extended a credit to the Kendrick Bank in a like sum, the same to bear interest at 6 per cent. per annum. This credit was extended from time to time under the same arrangement until December 6, 1910, when J. W. Bradbury, as president of the Kendrick Bank, wrote the Portland Bank as follows:

"Kendrick, Idaho, Dec. 6, 1910.

"J. W. Newkirk, Cashier, The First National Bank, Portland, Ogn.—Dear Sir: In reference to our C. D. due Dec. 12th, for \$5,000.00, would it be possible for us to get an extension on this for six months? The collections with us are at a standstill, and from the outlook I am of the opinion they will continue so until another crop is harvested. We inclose our C. D. for \$5,000.00 for the time asked for, in case you can grant us the extension asked to replace the one you hold. We are writing you on another sheet for this to be carried in another way, with our reasons for asking for the change. Hoping you will grant us the favor of an extension, and thanking you for your many kindnesses of the past, I am,

"Very truly yours,

J. W. Bradbury, Prest."

The letter referred to in the above is as follows:

"Kendrick, Idaho, Dec. 6, 1910.

"J. W. Newkirk, Cashier, The First National Bank, Portland, Ogn.—Dear Sir: I am sending herewith my personal note for \$5,000.00 with Kendrick Bank stock for like amount attached for your consideration. We would like to have you, in case you can grant us the extension asked in letter regarding our C. D. for \$5,000.00 due Dec. 12, 1910, to have you take this note and pass to our credit in place of the C. D. The reason for this is in our statements to the state bank examiner which are published we now have to publish any certificates of deposit to other banks for borrowed money as such, and in a farming community this always causes unfavorable comment and naturally hurts. I feel sure our average daily balance as we have kept it for the past few months will be kept as strong, and we want this extension more to keep our reserve in as good shape as possible. Hoping, if you can carry us for the extension, you will accept this method of loaning us this amount, and again thanking you for your great kindness of the past, I am,

"Yours truly,

J. W. Bradbury, Prest."

On the 7th the Portland Bank, through its cashier, wrote the Kendrick Bank:

"Answering yours of the 6th instant, we will be pleased to make the extension referred to by you, and will accept the note in lieu of the certificates of deposit."

Certain certificates of stock in the Kendrick Bank were indorsed by Bradbury and another to the Portland Bank as security for the extension. In

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pursuance of this arrangement credit was extended to the Kendrick Bank from time to time in the amount of \$5,000, the note of Bradbury in like amount being renewed until December 11, 1911, when, under a like arrangement, the credit to the Kendrick Bank was enlarged to \$10,000, Bradbury giving his individual note in like amount to the Portland Bank. At the same time Bradbury indorsed to the Portland Bank an additional 50 shares of stock of the Kendrick Bank as security for the loan or credit. The money in either instance, whether credit was extended the Kendrick Bank by reason of the issuance of its certificate of deposit or by reason of the execution by Bradbury of his note to the Portland Bank, was placed to the account of the Kendrick Bank by the Portland Bank, and was checked against at all times by the Kendrick Bank, and by none other.

Speaking of the enlarged credit, Mr. Newkirk, of the Portland Bank, testifies that they were not loaning any money to Bradbury individually—"absolutely none." At this time Bradbury visited Portland, and the arrangement for the enlargement of the loan was then agreed upon. Newkirk knew nothing of Bradbury's personal responsibility, and cared nothing about it, as he supposed he was dealing with the Kendrick Bank and upon its sole credit and responsibility. He says, "I accepted that note for the Kendrick State Bank," and, in effect, that the transaction was with Bradbury as president, and for account of the Kendrick State Bank.

Bradbury corroborates Newkirk, and declares that he had no arrangement with the Portland Bank for his individual account. The interest on the note executed in his name was paid by the Kendrick Bank, and the account was carried wholly between the Portland and Kendrick Banks, the money arising from the loan having passed to the credit of the latter bank. The account was checked against and replenished from time to time as the nature of the business between the banks required.

About the 1st of February, 1912, the Kendrick Bank failed, and passed into the hands of the state bank commissioner. Prior to its failure, all the collateral except the bank stock had been returned to the Kendrick Bank, and some time after such failure the bank stock was handed over to Bradbury. The Kendrick Bank was subsequently reorganized, it having secured Bradbury's stock, which was utilized for that purpose. In the course of the negotiations leading up to the reorganization, Bradbury was induced to transfer by check \$10,000 from his account then standing to his credit in the Kendrick Bank, which was something above that amount, and at the same time the depositors' committee turned over to Bradbury certain notes, being assets of the bank.

It should be stated that, when credit was negotiated for the Kendrick Bank with the Portland Bank by the use of Bradbury's note, Bradbury passed to his credit in the Kendrick Bank a like amount, charging the Portland Bank with the same amount, which would be the usual and regular method of keeping book account of the transaction. The Portland Bank was not a party to the negotiations of Bradbury with the committee, nor did it have knowledge concerning them.

Bradbury further testifies that he instructed the Portland Bank to, at any time it saw fit, charge the account of the Kendrick Bank with the note. When the Kendrick Bank failed, there was a balance standing to its credit on account with the Portland Bank of \$8,283.09. The Portland Bank thereupon took credit for this balance, and charged it against the Bradbury note. Now the Kendrick Bank has sued the Portland Bank for this balance as for moneys deposited with it subject to check or draft.

The Portland Bank answers, setting up the facts leading up to and touching the transaction in detail, and alleges as the ultimate fact that the Portland Bank loaned to the Kendrick Bank the sum of \$10,000, and as evidence of such loan the latter bank delivered to defendant the note of J. W. Bradbury for the amount; Bradbury being then the president of said bank, and acting for it and in its behalf, as its representative and agent. The Portland Bank also sets up a counterclaim for the difference between the amount sued for and the amount of such note, less \$15 paid subsequent to the failure of the Kendrick Bank, being for the sum of \$1,701.91, with interest at 6

per cent. per annum from the time such balance was charged against the note by the Portland Bank.

Stapleton & Sleight, of Portland, Or., and C. N. McDonald, of Lewiston, Idaho, for plaintiff.

Dolph, Mallory, Simon & Gearin, of Portland, Or., for defendant.

WOLVERTON, District Judge (after stating the facts as above). It is admitted on the part of plaintiff's counsel that if the loan made by the Portland Bank was to the Kendrick Bank, and not to Bradbury individually, and can be so treated in legal contemplation, then the Portland Bank was legally authorized to charge off the balance standing to the credit of the Kendrick Bank against the Bradbury note, and thus protect itself against loss on account of the failure of the Kendrick Bank to that extent. The vital question depends upon whether, in an action at law, the defendant will be permitted to show that the debt incurred by the execution of the Bradbury note is the debt of the Kendrick Bank, as it was really intended to be by the plain agreement and understanding of the parties.

[1] It is the doctrine in Oregon that, as it relates to simple contracts, the presumption that a contract made in the name of the agent of a known principal is the contract of the agent and not of the principal is a disputable one, and that it may be shown by parole that the principal is bound also, but that in no event may the agent be so discharged. *Barbre v. Goodale*, 28 Or. 465, 38 Pac. 67, 43 Pac. 378. But it was said in that case:

"This doctrine must be limited to simple contracts, and may not be extended to negotiable instruments and specialties under seal, as they constitute an exception to the rule."

[2] In the present case, however, the defendant, in purpose and effect, is not suing on the note, but to recover on the contract of the parties, of which the note is only an incident. It is a contract of which the principal has received, as it was so intended, the sole and entire benefit. The money obtained through the arrangement went at once to the credit of the Kendrick Bank, and was so held by its correspondent, against which the Kendrick Bank drew checks and drafts as occasion required, and constituted its source of credit with the Portland Bank. Indeed, the contract was entered into by the bank through its recognized officer, and the case does not stand upon the footing of a mere agent contracting in the name of his principal. Individually, Bradbury received not the slightest benefit from the arrangement, and, while he probably would not be allowed to escape being bound by his obligation, yet I am constrained to the view that the bank also, in an action directly between the parties to the contract, cannot escape liability. See *Appeal of Third National Bank of Philadelphia et al.*, 141 Pa. 214, 21 Atl. 598, 12 L. R. A. 223. It would work a glaring injustice here to adopt the opposite view. This is readily apparent from the simple facts of the case.

[3] If it be said that the Kendrick Bank, or its president in its behalf, adopted this method of obtaining credit with the Portland Bank with a view to suppressing a full statement of its liabilities to the bank

commissioner, it may be conclusively answered that the Kendrick Bank will not be permitted to take advantage of its own wrong, and thereby perpetrate an injustice upon the Portland Bank.

[4] Another question presented is whether the president of the bank was authorized to enter into such a contract in behalf of the corporation; but, the bank having received the sole and entire benefit of the transaction, it has ratified the acts of its chief officer, even conceding that he acted beyond the scope of his authority, a question we are not now called upon to determine. *Aldrich v. Chemical National Bank*, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611.

In view of these considerations, the defendant is not only entitled to its set-off as claimed, but to recover the balance due from the plaintiff upon the account between the banks.

In re ROMADKA BROS. CO.

(District Court, E. D. Wisconsin. July 5, 1913.)

BANKRUPTCY (§ 316*)—CORPORATION—PROVABLE DEBTS—GUARANTY.

Claimant, who was a stockholder in the corporation, bankrupt, sold his interest to the other stockholders, who were his niece and nephews, taking their notes in part payment, secured by a pledge of practically all of the corporate stock. When the last note only remained unpaid, amounting to \$30,000, the corporation was in financial difficulty, and it became necessary to obtain money, which it was decided to do by increasing the capital stock. The individual stockholders had also become indebted to it in a considerable amount for overdrafts. In the adjustment of these matters it was deemed necessary to obtain the consent of claimant as pledgee of the stock, and he was present at a stockholders' meeting at which a plan was adopted, with his consent, by which the stockholders conveyed to the corporation a large amount of real estate; the common stock was increased and distributed between them, and an issue of preferred stock authorized to be sold; claimant surrendered the pledged stock and took a new note, signed by the stockholders and guaranteed by the corporation, which was to assume its payment. *Held*, that under the circumstances existing, such guaranty was within the corporate powers, and based on a valid consideration, and that the note was provable against its estate in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 474-477; Dec. Dig. § 316.*]

In the matter of Romadka Bros. Company, bankrupt. On review of order of referee rejecting the claim of the executors of Charles P. Romadka, deceased. Reversed.

This is a proceeding to review the determination by the referee of the issues raised by the trustee's objections to the claim, made by the executors of the estate of Charles P. Romadka, upon a note and the guaranty thereof by the bankrupt corporation, as follows:

"\$30,000.00.

Milwaukee, Wis. March 17, 1909.

"On or before three (3) years after date, for value received, we jointly and severally promise to pay to the order of Charles P. Romadka, at the office of the Citizens' Trust Company, in Milwaukee, Wisconsin, the sum of thirty thou-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sand dollars (\$30,000.00) with interest thereon at the rate of six per cent. per annum, payable semiannually until paid.

"[Signed]

Amelia J. Talmadge.

"Clem. F. Romadka.

"A. J. Romadka.

"C. J. Romadka.

"Francis J. Romadka.

"For value received, we hereby guarantee the payment of the within note at maturity, and the interest thereon at its respective maturity.

"Romadka Brothers Company,

"By Clem. F. Romadka, President.

"A. J. Romadka, Secretary."

The matter will be better understood if considered in the light of the bankrupt company's history, the relations of the shareholders to each other, and the other circumstances attending the execution and delivery of the instruments thus made the basis of the claim.

For many years prior to May 8, 1898, John M., Anthony V., and Charles P., Romadka, brothers, had been copartners in the conducting of a trunk manufacturing business, which from very small beginnings had grown to large proportions and evidently enjoyed great prosperity. Upon the date above noted, a corporation was organized, capitalized at \$150,000, shares of \$100, each, the right being reserved to increase such capital to \$400,000. The object of the organization, which in fact was to purchase the copartnership business, was thereupon consummated, and \$359,000 of the capital stock was issued as a consideration for the conveyance of the copartnership business to the corporation. At or about that time the individual shareholders were the three brothers and Clement F. Romadka, the eldest son of Anthony V. Romadka. John M. Romadka died, his interest in the corporation going to the other three named. Then Anthony V. Romadka died and his interest devolved upon Amelia J. Talmadge, Clement F., Anthony J., Charles J., and Francis J., Romadka. Thus the holdings had changed, and were now limited to Charles P. Romadka, one of the original brothers, and the children of Anthony V. Romadka, another brother.

In or about the year 1901 the question was doubtless before the corporation and its shareholders, respecting a change of policy in its conduct, along larger lines. At or about this time Charles P. Romadka, the survivor of the original three brothers, agreed, in response to overtures made to him, to sell his entire holdings in the corporation to his nephews and niece, above named, and who, it will be observed, became the makers of the note in question. They were to pay him \$310,000, of which \$30,000, approximately, was in cash, securities, approximately, \$80,000, and the balance of \$200,000 by a series of notes of \$25,000 each. After this transfer was concluded, plans were immediately made by the corporation, then in control of the younger generation, to broaden the business; and one of the means of carrying out these plans was the assumption of large responsibilities in the construction of a new and very extensive plant, to which the business was to be and in fact was thereafter moved and carried on.

When Charles P. Romadka sold out his holdings as stated, the notes for \$200,000 were secured by deposit with him of practically the entire capital stock of the corporation. The various notes were all met as they became due, excepting the last of the series, which amounted to \$25,000. By this time, however, whatever the cause may have been, the corporate business was less profitable; in fact the company had reached a state of financial distress, rendering it necessary in some way to realize funds, or to reorganize its business and to engage new capital. It was apparently resolved to increase the capital stock of the company from \$359,000 to \$500,000, the stock to be thereafter classified, \$100,000 of preferred, \$400,000 of common, stock, the latter to be taken by the then holders of the corporate stock in exchange for the old stock, and the preferred was to be offered for sale in the market, the proceeds to meet the needs of the company.

The corporate action which was taken to meet the necessity last above noted is evidenced by records of meetings of shareholders and directors held on

March 17, 1909. Such action is to be considered in the light of the situation as it then existed, briefly this: That the heirs of Anthony V. Romadka (the signers of the note in question) then held the whole of the outstanding capital stock of the corporation; that such stock had been pledged as collateral security to claimant's testate, to secure the \$200,000 of notes, of which the note in question was the last, and then remained unpaid, and with interest amounted to approximately \$30,000; that the heirs of Anthony V. Romadka, the corporate shareholders, had, through personal accounts with the corporation, overdrawn the amounts which they were entitled to have, either by way of dividend or salaries, in approximately \$64,000; that they also had interests in a large amount of real estate which they inherited from Anthony V. Romadka, which, though heavily incumbered, was supposed to have an equity of some considerable value.

From the records of the shareholders' meeting held as stated, the following appears:

(1) The passage of a resolution, increasing the capital stock of the corporation to \$500,000, classifying it as hereinbefore indicated, and requiring present shareholders to surrender their shares in lieu of new common stock; a further amendment, increasing the number of directors from three to six.

(2) Provision for subscription to the new common stock by present shareholders, and providing for a surrender of their present holdings in satisfaction of such subscriptions.

(3) A statement by the president that "the heirs of the Anthony V. Romadka estate voluntarily offered to convey certain interests they owned in this and other states, for the purpose of strengthening the assets of the company; that, assuming such action would meet the approval of the stockholders, said heirs have executed a deed for the same; and he thought it advisable that his action in the matter be ratified and approved." A motion was made approving such action, and the lands covered by the deed are described upon the corporate record.

(4) A motion appears to have been made directing that there be credited to the personal accounts of said respective parties (doubtless referring to the A. V. Romadka heirs) the sum of \$64,800 as an agreed value for said property, and that after said property was sold, the proceeds over and above the mortgage indebtedness, and the payment of \$64,800, should be paid to the grantors aforesaid; it being agreed that the assets of this company were to be merely increased by the credit of \$64,800, and all other sums received over and above that amount to be and to belong and to be repaid to such grantors.

(5) The following also appears on this same record: "The president stated that there was a balance of principal unpaid to Uncle Charles P. Romadka amounting, with principal and interest, to about \$30,000; that in order to issue this new stock, the preferred and common stock, it is necessary that the present stock held by Uncle Charlie be canceled, and new stock issued to him. The president suggested that if Uncle Charlie was willing, to issue to him at least \$100,000 common stock as collateral security, and give to him the note signed by the sons and daughter of the late Anthony V. Romadka, said note to run three years, interest at 6 per cent., payable semiannually, the note to be assumed by this company. Mr. C. P. Romadka, who was present, preferred their note and indorsement. This matter was informally discussed, and, upon motion of Mrs. Talmadge, duly seconded, it was unanimously adopted and agreed that upon the execution of the note for \$30,000, due three years after the date of such note, it to be dated either at this time or at such time as the board of directors shall determine, the note to be executed by the said heirs and indorsed by this company by its president and secretary, Mr. C. P. Romadka consenting."

In connection with the foregoing it appears that under date of February 20, 1909, the A. V. Romadka heirs did execute a deed, which was acknowledged February 23, 1909, conveying to the corporation the described individual property, which deed, being recorded, was returned to the office of the bankrupt corporation's attorney, where the meeting referred to was held, and was there received on the day of holding such meeting, to wit, March 17, 1909; that at or about the same time, possibly later, the note in question in this matter, and which bears date on March 17, 1909, was executed.

The referee disallowed the claim, and claimants seek review of his action.

John M. W. Pratt and Cary, Upham & Black, all of Milwaukee, Wis., for claimants.

Miller, Mack & Fairchild, of Milwaukee, Wis., and Richmond, Jackman & Swansen, of Madison, Wis., for trustee.

GEIGER, District Judge (after stating the facts as above). It is clear that for some time prior to March 17, 1909, the financial affairs of the bankrupt corporation were in a condition requiring urgent attention; in fact, it was deemed imperative that some measure be adopted to avert impending disaster. Disregarding, for the moment, their relation to each other, there were certainly taken, to accomplish in some degree the desired object of rehabilitation, these two steps: (1) The increase of the capital stock of the corporation from \$359,000 to \$500,000, classified and to be issued, as stated; (2) the transfer by the A. V. Romadka heirs to the corporation of the real estate owned by them individually.

These two steps should be considered in connection with the fact that Charles P. Romadka had in his possession as pledgee, to the knowledge of the corporation and of all its shareholders, the entire capital stock, to secure payment of a debt of approximately \$30,000, owing by the shareholders to him; that at the meeting of March 17, 1909, although the shares of stock had not been transferred to him on the books of the corporation, his rights as pledgee were fully recognized by the shareholders and by the corporation as such, and it was conclusively assumed that the contemplated step to increase the capital stock could not be taken without his assent; that while the transfer of the real estate is not *expressly* shown to be the primary consideration for the guaranty of the note in question, both steps were in fact taken to accomplish a general plan of refinancing, or rehabilitating the corporation.

It is urged on behalf of the trustee that the corporation's act in guaranteeing the note was beyond its legitimate corporate power; that the obligation rested upon the individual A. V. Romadka heirs, and that the corporation could not, under the guise of furthering the corporate act of increasing its capital stock, in law bind itself to a pecuniary obligation in consideration of enabling it to increase its stock; that, upon the testimony, the transfer of the A. V. Romadka real estate by the heirs was in no way connected with the execution of the guaranty by the corporation, but, on the contrary, that had been agreed upon and consummated before the meeting of March 17, 1909, upon consideration of extinguishing the personal liability of the heirs to the corporation upon their respective overdrawn accounts.

Respecting the first of these contentions, it may be true that steps to be taken by a corporation in accordance with the statute, for the increase of its stock, for effectuating matters pertaining to corporate organization, are not the transactions of corporate business. In other words, a corporation having a right, in obedience to certain statutes, to enlarge or change its organization, cannot be presumed to have the power to do anything but to comply with the statute, as its terms prescribe, and that any bargaining to accomplish such results may justly be said

not to be the transaction of corporate business or the legitimate exercise of corporate powers. But the situation here is to be judged in the light of everything that transpired, and every fact present and acted upon by the corporation, not alone to enable it to increase its capital stock, but to enable it to better its financial condition, must be considered. Now, what was the situation as recognized by the corporation? It was this: The shareholders were possessed of real estate, which we must presume to be of some considerable value. They were indebted to the corporation on their personal accounts. They were also indebted to claimant's testate in the sum of \$30,000, as security for which he held the entire capital stock. They desired to strengthen the company financially, first, by transferring their real estate—by which act they would necessarily disable claimant's testate from looking to them for satisfaction of his debt out of such resources—secondly, they desired to increase the capital stock from \$359,000 to \$500,000, taking in exchange for their then holdings common stock to the amount of \$400,000, and to issue preferred stock for \$100,000, the latter involving necessarily the reduction of the stock held by claimant's testate to a position of juniority in its rank as a capital liability; and they assumed this could not be done without his assent, and they necessarily assumed that if the plan were adopted, the stock would then be of greater value because of the increase in the corporate assets.

With respect to the precise consideration prompting the transfer of the real estate to the corporation, there is controversy in the testimony, but it is fairly inferable from the evidence given by the bankrupt's then attorney, as well as by its former treasurer, that it was contemplated that, among other things, the difference between the \$359,000 of stock theretofore outstanding and the \$400,000 of common stock to be issued, namely, \$41,000, should go to the old shareholders as a consideration for such transfer, and as a part of the general plan of reorganization. The records of the corporation are singularly deficient in pointing out the details of the plan and the means of its execution; but this conclusion finds strong support in the testimony referred to, particularly such as is based upon recommendations made by an expert accountant, who pointed out that in this manner the apparent financial strength of the company would be increased, and a better showing could be made through the elimination of the personal accounts, which otherwise appeared to be a doubtful asset.

It may be noted that, unless it be conceded that the old shareholders were to receive the balance of the \$41,000—the excess of common stock to be issued beyond the \$359,000 then outstanding—no suggestion is made in the record respecting the disposition otherwise expected to be made of such \$41,000. The corporation's attorney, in giving his testimony, supported it by a memorandum showing the allotment to the five shareholders of their respective proportions of this \$41,000.

Now, whether, as matter of law, a pledgee could obstruct a plan such as was here proposed need not be determined. It would seem, however, that, the corporation and all its shareholders, having assumed and recognized the existence of such right on his part, and

he having dealt with them in justifiable reliance upon the existence of such right, the corporation at least should not now be heard to say that the result could have been accomplished without consulting him at all. But whatever be right upon this phase of the case, the evidence is susceptible of no other fair inference, except that all of the steps were taken for the consummation of a plan of refinancing, or rehabilitating the business of the corporation; and, after its accomplishment, no one ought to be heard to say that the act of one party participating therein was not taken into consideration by the others in ordering his or their conduct respecting individual rights at that time; and I therefore conclude that the heirs of A. V. Romadka made the transfer pursuant to negotiations which had been under way for a long time, that the resolution increasing the capital stock was likewise passed, and such increase was accomplished as a consummation of what was under discussion for a long time, and that each of such steps was taken, not only upon the supposition, but in consideration that the other would also be accomplished. Therefore the heirs made such transfer in contemplation of the issue of stock of a different character than that which they then held, also in contemplation of the surrender by Charles P. Romadka of the larger portion of his collateral, and the reduction of that which he retained, to a lower rank as a capital liability. The act of the corporation in accepting the transfer of the Romadka heirs; of Charles P. Romadka in giving his assent thereto, making the surrender of his collateral; the agreement through a corporate meeting to assume a liability on the claim then held by him against the shareholders—not only concurred in point of time, but were considerations each for the other to enable the result indicated. Such corporate agreement, no matter in what form it was ultimately executed, was a valid and binding corporate act, based upon sufficient consideration. Although in form a guaranty, in effect the corporation really assumed the personal debt. Viewed in this light, the transaction does not differ from the transfer of property by one to another, in consideration of the payment, by the transferee, of the transferor's debt to a third person.

The order of the referee is reversed, with instructions to allow the claim.

**BORDEN'S CONDENSED MILK CO. v. HORLICK'S MALTED MILK CO.
et al.**

(District Court, E. D. Wisconsin. July 24, 1913.)

TRADE-MARKS AND TRADE-NAMES (§ 67*)—UNFAIR COMPETITION—WHAT CONSTITUTES.

A controversy between the manufacturers of two articles, which concededly may properly be designated by the same name, as to which is the "original and only genuine" article of that name, does not involve any property rights which may be determined by a court of equity and protected by injunction.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 78; Dec. Dig. § 67.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the Borden's Condensed Milk Company against the Horlick's Malted Milk Company and others. On final hearing. Decree for defendants.

The bill charges unfair trade practices, and prays for an injunction. The complainant is a New Jersey corporation, for many years engaged in the manufacture of condensed, evaporated, and malted milks. Its business has become large and profitable, being carried on through numerous factories, in various states, and its products, particularly malted milk, have been widely marketed and sold. Such malted milk is a combination, in concentrated, dry, pulverulent form, of malted barley and malted wheat flour. The process of production is detailed in the bill.

The defendant Horlick's Malted Milk Company is a Wisconsin corporation, owned and controlled by the codefendants named, who are its officers and directors. Such parties will be referred to as the defendant. The corporation was originally known as Horlick's Food Company, and from about the year 1883 built up a large and profitable business in the manufacture of malted milk under a patent granted to the defendant William Horlick, which expired on June 5, 1900, by limitation.

The Elgin Milking Company, a corporation, after the expiration of the patent referred to, commenced the manufacture of malted milk, having therefore respected, during its lifetime, the patent referred to. The defendant Horlick's Malted Milk Company had designated its product under such patent as "malted milk." In or about the year 1902 it commenced a suit against the Elgin Milking Company, seeking to restrain it from using the term "malted milk" as a designation of its product. Such suit was determined in favor of the defendant by a judgment of the United States Circuit Court of Appeals for the Seventh Circuit (120 Fed. 264, 56 C. C. A. 544), the court holding that, as the defendant Horlick's Malted Milk Company had attached the name "malted milk" to a patented product, such name, upon expiration thereof, passed with the patent to the public. The complainant has succeeded to the business and trade rights of said Elgin Milking Company.

The complainant's case is thus further stated by counsel: "That at numerous places throughout the United States the defendant has widely and persistently advertised that it is the manufacturer of the original and only genuine malted milk, and has harassed the trade of the complainant by countless advertisements, statements by its salesmen and traveling agents, and by constantly alleging before the public, in medical journals, in circulars, in letters, and in newspaper and magazine advertisements, in signs placed in drug stores and in other public places of trade, upon blotters and leaflets, cards, and all manner of publications that the defendant was the producer of 'the original and only genuine malted milk.' That the defendant has abstracted or taken away the jars and ornamental receptacles labeled with the name of the complainant, which had been furnished and loaned by the complainant to its customers for use in dispensing or selling malted milk of complainant's production."

The defendant, in substance, admits the allegations of the bill respecting its claim of the origin of its manufacture of malted milk in the discovery of the process by the defendant William Horlick, also the origin and use of the term "malted milk," and admits the allegations respecting the claims that it has made, and makes, of its status as a manufacturer or producer of the *original and only genuine malted milk*.

The proofs of complainant were directed to establishing the history of manufacture of malted milk by it and its predecessor, the Elgin Milking Company, and it claims that the process of malting milk was originally discovered by Von Liebig, a German chemist, and that the same product was used by Countess Von Ebersberg. It also introduced the testimony taken in the case of the herein defendant against the Elgin Milking Company, above referred to, for the purpose of establishing that the defendant William Horlick in that case claimed that he was not the inventor of the product described and claimed in his patent; also proof that, in the High Court of Justice, Chancery Division, in England, in a suit prosecuted against said defendant William Horlick, the latter's English patent, substantially the same as the American

patent, had been annulled, because knowledge of the manufacture of malted milk, as therein described, was obtained from the complainant in that case.

There is considerable testimony describing the process of manufacture, and the chemical changes incident, or claimed to be incident, in the processes used in the manufacture of the products by the parties respectively. It is abundantly shown that the defendant has, as alleged in the bill, extensively advertised that it was the producer of "the original and only genuine malted milk." The defendant has also shown that in the trade the complainant has likewise claimed to produce the only genuine malted milk. The competition between the parties appears to have been keen, each making liberal claims respecting the merits of its own product, and each seems to have been active in cautioning the public to beware of imitations, etc.

Flanders, Bottum, Fawsett & Bottum, of Milwaukee, Wis., for complainant.

Lines, Spooner, Ellis & Quarles and Miller, Mack & Fairchild, all of Milwaukee, Wis., for defendants.

GEIGER, District Judge (after stating the facts as above). The case presents this situation: The parties have gone quite exhaustively into the history and method of manufacturing malted milk. It is conceded by each that the other manufactures and sells, rightfully, what is and may be designated as "malted milk." The controversy tendered by the complainant's bill and proofs is stated to be "whether the defendant, Horlick's Malted Milk Company, could claim to be the producer of the original and only genuine malted milk." This, it is further said, "forms the gravamen of complainant's bill of complaint, and the basis for the allegation and claim that the defendant has been guilty of unfair competition in so advertising, claiming, asserting, and giving out."

The question is therefore directly presented whether the claim of priority of original manufacture, and the extravagant and untruthful claim of a manufacturer or dealer that *his* goods are the original and only genuine, can be judicially determined to be tortious, constituting an invasion of the business and trade rights of another, to be restrained by injunction. It is urged that, when the defendant asserts to the trade that its product is the original and only genuine product, the necessary implication is that all others, including the complainant, are making an imitation, therefore a spurious and deleterious article. It is claimed in the case that the complainant's manufacture is according to a formula well known prior to the alleged discovery made by the defendant William Horlick, whereas the defendant seeks to establish that its formula is different, and different chemical processes are used, and that different chemical changes result. But each concedes that the other's product is malted milk.

Now, if each party is entitled to make and does make malted milk, is the claim by one that its product is the original, the only genuine, malted milk, an invasion of the *property rights* of the other, because of the possible implied charge therein that the latter's is *not* original or genuine, when the method or formula for manufacture is *not* protected as a patent right, when any one has the right to pursue any formula of manufacture according to which the product may in fact be made? If A. discovers a formula for making a new product, the product,

when so made, may in a certain sense be said to be the "original" or the "only genuine." But, if later, by another formula, the same, or possibly a similar, product, which, as here, may rightfully be called by the same name, may be manufactured, it does not follow that the latter manufacturer, in advertising his product to be the "original," the "genuine," is invading the former's *property rights*. He may be making exaggerated and false claims, he may be ascribing to himself and his products virtues which neither possesses, but he has not taken anything from his rival, any more than one competitor may take from another in an appeal to the public. He has made no representation whereby his goods are taken as and for the goods of his rival, nor whereby the public is induced to believe that his goods possess qualities whose bestowal upon the goods rests with the rival, as a peculiar property right.

It is true, in a sense, that one who proclaims his product to be the "genuine," who cautions against "imitations," may injure his rivals. He may, in this way, impliedly slander and impute spuriousness. But, conceding such asseverations to be demonstrably false, what right has been invaded, other than the broad right which one may possess that another tell the truth, or that he shall not falsify? In the present case, complainant has the undoubted right to manufacture, according to a formula said to have been discovered by Liebig, what it maintains may rightfully be called "malted milk." Its right is not claimed to be exclusive, nor is it claimed that its product has been marketed or recognized by the public as possessing qualities attributable thereto because of the use of such formula; nor does it appear that it has made any appropriation of any right from whose invasion the defendants should, because of their conduct, be restrained. In endeavoring to define the scope of the principles of unfair competition, a recent writer says:

"If another definition of unfair business competition may be attempted, it may be said to be the use in business competition of rights, property, or powers, which may or may not ordinarily be susceptible of exclusive appropriation by one individual, in such a way as to injure another by misrepresentation, deceit, dishonesty, or fraud, and usually with intent so to do. Unfair competition, in the sense in which it is most often used, is a question of representation—representing one person's goods to be those of another, and similar false representations. In England the term 'passing off' is practically confined to this sort of unfair competition. The latter term is not used here. It is held in France that unfair competition may arise without confusion between merchandise or business concerns, as where a merchant attributes to himself qualities, title, or rewards which he never actually obtained for himself. This is the meaning of the term which is recognized here, now and then, by the public press, but not by courts." Sims, *Unfair Business Competition*, 29.

As indicated, there is nothing to show that complainant had any peculiar right, power, or property in respect of the manufacture of malted milk, which was either susceptible of being, or had in fact been, *exclusively appropriated* by it in such manufacture; and the case narrows down to this: Can it prevent the defendants from claiming for or ascribing to themselves or their product "qualities, titles, or rewards" which they may not actually possess or be entitled to? Take

an analogous case: Rival shopkeepers are engaged in selling a fabric which may be of foreign or domestic manufacture. The foreign fabric is concededly of better quality, and consequently in greater favor. One dealer sells only the foreign, the other only the domestic, fabric. Suppose the latter advertises or proclaims the article sold by him to be of foreign manufacture, and that his establishment is the only one so dealing in such fabric of "genuine foreign" manufacture; has he invaded or taken from his rival's property rights? It would seem not. His act consists in an attempt to deceive the public, and, while his rival may be injured, he is not deprived of any personal legal right. Both are in the competitive field, and, while each may guard his own rights against invasion by the other, neither can, by injunction, exercise a censorship or guardianship over the commercial morals of the other in respect of appeals to the public, which are not based upon a deprivation of something legally belonging to the one claiming injury.

That the doctrine of unfair trade, or unfair competition, has not been thus extended, is well illustrated by the case of American Washboard Co. v. Saginaw Manufacturing Co., 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609, where complainant, a manufacturer of aluminum faced washboards upon which the word "aluminum" was used, complained of the defendant's manufacture of washboards upon whose face the same word appeared, though the product was not in fact made of such metal, claiming that the public was thereby deceived into buying it as a genuine aluminum washboard. The court, in affirming a dismissal of the bill, because demurrable, said:

"It is doubtless morally wrong and improper to impose upon the public by the sale of spurious goods; but this does not give rise to a private right of action, unless the property rights of the plaintiff are thereby invaded. There are many wrongs which can only be righted through public prosecution, and for which the Legislature, and not the courts, must provide a remedy. Courts of equity, in granting relief by injunction, are concerned with the property rights of complainant. * * * Take the metal which is the subject-matter of the controversy in this case. Many articles are now being put upon the market under the name of aluminum, because of the attractive qualities of that metal, which are not made of pure aluminum, yet they answer the purpose for which they are made and are useful. Can it be that the courts have the power to suppress such trade at the instance of others starting in the same business who use only pure aluminum? There is a widespread suspicion that many articles sold as being manufactured of wool are not entirely made of that material. Can it be that a dealer who should make such articles only of pure wool could invoke the equitable jurisdiction of the courts to suppress the trade and business of all persons whose goods may deceive the public? We find no such authority in the books, and are clear in the opinion that, if the doctrine is to be thus extended, and all persons compelled to deal solely in goods which are exactly what they are represented to be, the remedy must come from the Legislature, and not from the courts."

So, too, in the recent case of Borden Ice Cream Co. v. Borden's Condensed Milk Co. (C. C. A.) 201 Fed. 510 (7th Circuit), complainant sought to restrain the defendant from the use of the word "Borden" in the corporate name of the defendant, claiming that by such use the defendant purposed trading upon the reputation of complainant's goods and products, and deceiving the public into the belief that its product is of the complainant's manufacture. It appeared, however,

that complainant had not entered the competitive field in the manufacture of commercial ice cream, and that therefore none of its rights were invaded. The word "Borden," not being susceptible of exclusive appropriation, had not in fact been appropriated by the complainant, so as to give it a secondary signification attached to any of its products similar to those purposed to be manufactured by the defendant. The Circuit Court of Appeals said:

"The question to be determined in every case of unfair competition is whether or not, as matter of fact, the name used by the defendant had come previously to indicate and designate the complainant's goods; or, to put it in another way, whether the defendant, as a matter of fact, is, by his conduct, passing off his goods as the complainant's goods, or his business as the complainant's business. It has been said that the universal test question in cases of this class is whether the public is likely to be deceived as to the maker or seller of the goods. This, in our opinion, is not the fundamental question. The deception of the public naturally tends to injure the proprietor of a business, by diverting his customers and depriving him of sales which otherwise he might have made. This, rather than the protection of the public against imposition, is the sound and true basis for the private remedy. That the public is deceived may be evidence of the fact that the original proprietor's rights are being invaded. If, however, the rights of the original proprietor are in no wise interfered with, the deception of the public is no concern of a court of chancery. Doubtless it is morally wrong for a person to proclaim, or even intimate, that his goods are manufactured by some other and well-known concern; but this does not give rise to a private right of action, unless the property rights of that concern are interfered with. The use by the new company of the name 'Borden' may have been with fraudulent intent; and, even assuming that it was, the trial court had no right to interfere, unless the property rights of the old company were jeopardized. *Nothing else being shown, a court of equity cannot punish an unorthodox or immoral, or even dishonest, trader; it cannot enforce as such the police power of the state.*"

The facts in the present case seem to be incapable of treatment under any different or more extended principle. Indeed, in view of the concession that each of the parties to this cause is making what may rightfully be termed malted milk, the whole controversy narrows down to the question whether complainant is entitled to have an adjudication that defendant is not the original manufacturer, nor the maker of the only genuine, but that the complainant likewise makes a genuine malted milk; that it can be and is made under the one as well as under the other method or formula. The real effect of the adjudication would be negative; that defendant is making claims respecting its product which are not true. In other words, the complainant claims that its manufacture is under a formula discovered and in use prior to the date of discovery by defendant of its formula; that its product is therefore both original and genuine malted milk. The defendant, asserting that its manufacture is according to a formula discovered and in use as disclosed in the proof, claims that its product is the original and only genuine malted milk. I am satisfied that the controversy which has thus arisen between the parties involves no property rights to be protected by injunction, and, for any determination of such controversy, parties must look to the public.

There is some proof that defendant has, by means of circular letters addressed to druggists and dealers, made not only a claim that its

own product is the original and only genuine, but the direct charge that the product marketed by complainant was not genuine, but imitation. There are in the record two letters of this character, but no further proof respecting the extent to which this practice was carried on. This phase of the case has not been pressed, either in the proof or upon the argument, and is therefore not considered of sufficient importance to determine the question whether by reason of such acts the complainant is entitled to injunctive relief, or whether it must be referred to its remedy at law for damages as for the publication of libel. The conclusion is that the bill should be dismissed for want of equity.

SEATTLE ELECTRIC CO. v. CITY OF SEATTLE et al.

(District Court, W. D. Washington, N. D. August 15, 1913.)

No. 2,046.

1. CARRIERS (§ 2*)—LEGISLATIVE CONTROL—EFFECT OF LEGISLATIVE ACT.

The Public Service Commission Law (Laws Wash. 1911, c. 117), which expressly applies to street railroads and gives to the commission power to regulate rates, rules, and regulations of carriers subject to the act, deprives the city of Seattle of authority to pass an ordinance requiring street railroads to sell upon their cars commutation tickets.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 4, 5; Dec. Dig. § 2.*]

2. MUNICIPAL CORPORATIONS (§ 732*)—TORTS—EXERCISE OF GOVERNMENTAL POWERS—ENACTMENT OF ORDINANCE.

The adoption by the city of such an ordinance in excess of its powers was an exercise of a governmental power, not a private franchise, and the city is not liable for damages thereby occasioned.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1546; Dec. Dig. § 732.*]

In Equity. Suit for injunction by the Seattle Electric Company against the City of Seattle and others. Injunction granted.

James B. Howe and Hugh A. Tait, both of Seattle, Wash., for plaintiff.

James E. Bradford and Ralph S. Pierce, both of Seattle, Wash., for defendants.

RUDKIN, District Judge. The present bill was filed to enjoin the city of Seattle and certain of its officers from enforcing an ordinance of the city, entitled "An ordinance requiring the sale of street car tickets on street cars in the city of Seattle, limiting the price to be paid therefor, and providing penalties for violation," which became operative on the 30th day of October, 1911.

On the 31st day of March, 1900, the city, by ordinance, granted to the assignors of the plaintiff a franchise to construct and operate a street railway over certain designated streets in the city for the term ending at midnight on the 31st day of December, 1934. The ordinance

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

granting the franchise contained the following provisions material to our present inquiry:

The grantees, their successors and assigns, may establish and take a passenger toll or fare which shall not exceed the sum of five cents for a single continuous ride one way over any line or lines owned or controlled by the grantees, their successors or assigns, between points situated within the city limits or points on either of the extensions mentioned in section 13 hereof (when constructed or acquired), although a transfer or transfers shall be necessary; but no such transfer shall be good except upon the first connecting car at the point of transfer.

The grantees, their successors and assigns, shall keep on sale for one dollar each, at their main office and power stations within the city, commutation tickets entitling the purchaser to twenty-five rides. Such tickets shall not be transferable nor entitle the owner to a transfer, and the company may make such reasonable regulations in regard to the issue and use of the same as to enforce these provisions.

Numerous other franchises granted to the plaintiff by the city contained similar provisions. The ordinance of October 30, 1911, provides in its first section:

That all persons, companies or corporations owning, controlling or operating street cars in the city of Seattle be and they are hereby required to place on sale in each and every street car owned and operated by them within the city of Seattle street car tickets at a price not exceeding twenty-five (25) for one dollar or six (6) for twenty-five cents.

Section 2 provides a penalty for the violation of the preceding section, and section 4 provides when the ordinance shall take effect. It is the contention of the plaintiff that the latter ordinance impairs the obligation of the contract embodied in the earlier ordinance, in violation of section 10 of article 1 of the Constitution of the United States, and deprives it of its property without due process of law, and denies to it the equal protection of the laws, in violation of the fourteenth amendment to the Constitution of the United States.

[1] In view of the conclusion I have reached as to the validity of the ordinance of October 30, 1911, upon other grounds, I deem it unnecessary to consider or determine whether the earlier ordinance constituted a contract between the city and the street railway company within the meaning of the Constitution, or whether the later ordinance impairs the obligation of that contract, if one existed. I see no escape from the conclusion that the act of the Legislature of this state, approved March 18, 1911, commonly known as the "Public Service Commission Law" (Laws of 1911, c. 117), took away and superseded the power of municipalities to enact ordinances such as the one here in question. The act referred to is most comprehensive in its terms and extends the power of the Public Service Commission to nearly all the public utilities in the state.

Thus section 8 defines the terms "street railroad," "street railroad company," "common carrier," and "public service companies," and the terms "common carrier" and "public service companies," as there defined, include street railroads and street railroad companies. Section 9 provides that all charges made for any service rendered or to be rendered in the transportation of persons or property by any *common carrier* shall be just, fair, reasonable, and sufficient; that every *com-*

mon carrier shall construct, furnish, maintain, and provide safe, adequate, and sufficient service facilities, trackage, sidings, railroad connections, industrial and commercial spurs, or equipment to enable it to promptly, expeditiously, safely, and properly receive, transport, and deliver all persons or property offered to or received by it for transportation, and to promote the safety, health, comfort, and convenience of its patrons, employes, and the public, and that all rules and regulations issued by any *common carrier* affecting or pertaining to the transportation of persons or property shall be just and reasonable. Section 14 provides that every *common carrier* shall file with the commission, and shall print and keep open to public inspection, schedules showing the rates, fares, charges, and classification for the transportation of persons and property within the state between each point upon its route and all other points thereon. Section 15 provides that, unless the commission otherwise orders, no change shall be made in any classification, rate, fare, charge, rule, or regulation which shall have been filed and published by a *common carrier* in compliance with the preceding section except after 30 days' notice to the commission and to the public: Provided, the commission for good cause shown may by order allow changes in rates without requiring such notice. Section 18 provides that no *common carrier* shall charge, demand, collect, or receive a greater or less or different compensation for transportation of persons or property, or for any service in connection therewith, than the rates, fares, and charges applicable to such transportation as specified in its schedule filed and in effect at the time. Section 25 provides that no street railroad company shall charge, demand, or collect more than five cents for one continuous ride within the corporate limits of any city or town, and shall furnish transfers entitling passengers to one continuous trip over and upon portions of its lines within the same city or town not reached by the originating car. Section 53 provides that whenever the commission shall find, after a hearing had, upon its own motion or upon complaint, that the rates, fares, or charges demanded, exacted, charged, or collected by any *common carrier* for the transportation of persons or property within the state or in connection therewith, or that the regulations or practices of such common carrier affecting such rates are unjust, unreasonable, unjustly discriminatory, or unduly preferential, or in any wise in violation of the provisions of law, or that such rates, fares, or charges are insufficient to yield a reasonable compensation for the services rendered, the commission shall determine the just, reasonable, or sufficient rates, fares, or charges, regulations, or practices to be thereafter observed and enforced, and shall fix the same by order as hereinafter provided. Section 64 provides that the commission may, on its own motion or upon complaint, order repairs or changes in equipment. Section 65 provides for the investigation of equipment and appliances by the commission. Section 66 declares that every street car shall be equipped with proper and efficient brakes, steps, grabirons, or handrails, fenders or aprons, or pilots, and with such other appliances, apparatus, and machinery necessary for the safe operation of such street car, as the commission may prescribe. Section 67 provides for the inspection of safety appliances on street cars. Section 69 provides that all street railroads operating

in this state shall cause their trains and cars to come to a full stop at a distance not greater than 500 feet before crossing the tracks of another railroad at grades, except at crossings where there are established signal towers and signalmen, interlocking plants, or gates. Section 80 provides that complaint may be made by the commission of its own motion, or by any person or corporation, Chamber of Commerce, Board of Trade, or any commercial, mercantile, agricultural, or manufacturing society, or any *body politic* or *municipal corporation*, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any *public service corporation* in violation, or claimed to be in violation, of law, or of any order or rule of the commission. Section 92 provides for the valuation of street railway property and the ascertainment of its probable earning capacity. Section 94 provides that every *public service company* and all officers, agents, and employes of any *public service company* shall obey and comply with every order, rule, direction, or requirement made by the commission under the authority of the act so long as the same shall remain in force, and provides a penalty for violation thereof. Section 99 provides that all orders and rules of the commission shall be conclusive, unless set aside or annulled in a review as in the act provided. Section 101 provides that it shall be the duty of the commission to enforce the provisions of the act, and all other acts of the state, affecting public service companies, the enforcement of which is not *specifically* vested in some other officer or tribunal.

These several provisions and others that might be cited are in my opinion utterly inconsistent with the existence in one of the municipalities of the state of the power to enact an ordinance such as the one in question. In discussing the effect of a similar act on municipal charter provisions in *California-Oregon Power Co. v. City of Grants Pass* (D. C.) 203 Fed. 173, Judge Bean said:

"It thus appears that the purpose of the Legislature in adopting the law and the people in approving it was to provide a uniform system throughout the state for the control and regulation of public matters, and fixing the rates to be charged by them, and to create a tribunal for that purpose. By that act the power to fix the rates to be charged by public service corporations conferred on the different cities of the state by their charters is transferred to the Railroad Commission, and such charter provisions are therefore amended or superseded as far as they are in conflict or inconsistent with the powers so conferred. * * * When a public utility has filed its schedule of rates, as required by law, such schedule fixes the only rates which it may lawfully charge or collect until they are changed in the manner provided by law. If it does charge or receive any greater or less compensation, it is liable under the public utility law to a forfeiture for each offense, and its agent or officer offending to a fine. It follows, therefore, that after such schedule has been filed the power of a municipal corporation to change or modify the rates therein stated no longer exists, because it is inconsistent with the provisions of the Utility Act and the obligations and liabilities of public service corporations thereunder. If the rates stated in the schedule filed by the plaintiff company are unreasonable or unjust, the city has a remedy by the proper proceedings before the commission; but it cannot prescribe other rates by ordinance and punish the plaintiff or its officers for a failure to observe them."

If the plaintiff in this case obeys the ordinance in question, it violates the law of the state, because the charges made are less than those

fixed by the schedule on file; and if it obeys the law of the state, it violates the city ordinance. Such a conflict of authority is not to be tolerated. For these reasons I am satisfied that the act of the municipality in enacting the ordinance in question was ultra vires, and that the ordinance itself is null and void. The injunction must therefore issue as prayed.

[2] The plaintiff further contends that it has been damaged in the sum of \$5,000 per month since the commencement of this suit by reason of the fact that it has been compelled to sell commutation tickets at the reduced rates fixed by the ordinance, and it claims damages on that basis. Waiving the question whether these damages have been proved by competent evidence, I am clearly of opinion that they are not recoverable, either at law or in equity. Municipal corporations are created by the state for political objects, and are invested with certain governmental powers, to be exercised for local purposes and for the public good. As said by Judge Dillon:

"They possess, according to many courts, a double character—the one governmental, legislative or public; the other, in a sense, proprietary or private. The distinction between them, though sometimes difficult to trace, is highly important, and is frequently referred to, particularly in the cases relating to the implied or common-law liability of municipal corporations for the negligence of their servants, agents, or officers in the execution of corporate duties and powers. On this distinction, indeed, rests the doctrine of such implied liability. In its governmental or public character, the corporation is made by the state one of its instruments, or the local depository of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state, and for itself." Dillon on Mun. Cor. 39.

And for acts done by them in their public or governmental capacity, and in discharge of the duties imposed upon them for the public good, they partake of the state's immunity from suit and incur no liability to persons who may be affected or injured by their acts. In *Fowle v. Alexandria*, 3 Pet. 398, 409, 7 L. Ed. 719, Chief Justice Marshall said:

"Is a municipal corporation, established for the general purposes of government, with limited legislative powers, liable for losses consequent on its having misconstrued the extent of its powers, in granting a license which it had not authority to grant, without taking that security for the conduct of the person obtaining the license, which its own ordinances had been supposed to require, and which might protect those who transacted business with the person acting under the license? We find no case in which this principle has been affirmed. That corporations are bound by their contracts is admitted: that moneyed corporations, or those carrying on business for themselves, are liable for torts, is well settled; but that a legislative corporation, established as a part of the government of the country, is liable for losses sustained by a nonfeasance, by an omission of the corporate body to observe a law of its own, in which no penalty is provided, is a principle for which we can find no precedent. We are not prepared to make one in this case."

In *Trescott v. City of Waterloo* (C. C.) 26 Fed. 592, the court said:

"Again, the action of the city in adopting the ordinance in question was, upon its part, a legislative act, and the exercise of a right of sovereignty primarily belonging to the state, but by the state delegated to the city. For errors of judgment in the exercise of such powers the cities are not liable in their corporate capacity."

In *Commissioners v. Duckett*, 20 Md. 476, 83 Am. Dec. 557, the court said:

"With regard to the liability of a public municipal corporation for the acts of its officers, the distinction is between an exercise of those legislative powers which it holds for public purposes, and as part of the government of the country, and those private franchises which belong to it as a creation of the law. Within the sphere of the former it enjoys the exemption of the government from responsibilities for its own acts and for the acts of those who are independent corporate officers, deriving their rights and duties from the sovereign power."

See also, *Trammell v. Town of Russellville*, 34 Ark. 105, 36 Am. Rep. 1; 28 Cyc. 1262.

The distinction between governmental powers and mere private franchises has often been recognized by the courts of this state, and the nonliability of municipalities for acts committed in the exercise of the former has been asserted in the most positive terms. *Lawson v. Seattle*, 6 Wash. 184, 33 Pac. 347; *Simpson v. Whatcom*, 33 Wash. 392, 74 Pac. 577, 63 L. R. A. 815, 99 Am. St. Rep. 951; *Lynch v. North Yakima*, 37 Wash. 657, 80 Pac. 79, 12 L. R. A. (N. S.) 261; *Cunningham v. Seattle*, 40 Wash. 59, 82 Pac. 143, 4 L. R. A. (N. S.) 629; s. c., 42 Wash. 134, 84 Pac. 641, 4 L. R. A. (N. S.) 629, 7 Ann. Cas. 805. If a municipality ever acts in a purely governmental capacity, it would seem to so act in the passage of an ordinance of this kind in relation to a subject in which the general public is alone concerned, and in which it has no private or proprietary interest.

For the foregoing reasons, the claim for damages is disallowed, and a permanent injunction will be granted according to the prayer of the complaint, with costs to the plaintiff. Let a decree be entered accordingly. I have delayed a decision in this case for some time, in the hope that the Supreme Court of the state might determine the effect of the Public Service Commission Law on pre-existing legislation and charter provisions in a case now pending before it, but in justice to the litigants before the court I do not feel warranted in withholding my decision longer. Either party may, however, file a petition for a rehearing within 30 days after final decree, if so advised, in order to retain jurisdiction in this court until the Supreme Court reaches a decision. Such petition will not stay or supersede the injunction now granted.

In re SILVERMAN.

(District Court, N. D. New York. August 14, 1913.)

1. BANKRUPTCY (§ 303*) — COMPELLING DELIVERY OF PROPERTY — SUFFICIENCY OF EVIDENCE.

Evidence, on an application by a trustee in bankruptcy to compel the bankrupt to turn over to him property claimed to be withheld, held sufficient to support a finding by the referee that the bankrupt had in his possession, or subject to his control, merchandise or the proceeds thereof, which he had concealed from the trustee.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

2. BANKRUPTCY (§ 228*)—REVIEW BY JUDGE OF PROCEEDINGS BEFORE REFEREE.

On an application by a trustee in bankruptcy for an order requiring the bankrupt to turn over to him property claimed to be concealed, the credibility of witnesses was for the referee, and the judge on review would not reverse unless there was a clear case of error as to the facts or on questions of law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*]

3. BANKRUPTCY (§ 303*)—COMPELLING DELIVERY OF PROPERTY—SUFFICIENCY OF EVIDENCE.

While, before a bankrupt can be ordered to deliver to the trustee property claimed to be concealed by him, the evidence must clearly and satisfactorily show that he has the property or its proceeds and is able to comply with the order, the trustee is not required to prove by eyewitnesses that the bankrupt has the goods in his possession or the proceeds in the bank or in his pocket.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

4. BANKRUPTCY (§ 303*)—COMPELLING DELIVERY OF PROPERTY—SUFFICIENCY OF EVIDENCE.

Where, on an application by a trustee in bankruptcy to compel the bankrupt to deliver to him property claimed to be concealed or its proceeds, the evidence showed the recent possession by the bankrupt of thousands of dollars worth of property and but comparatively small sales, no money or proceeds of sales, but a small amount of property on hand, no uncollected accounts, no loss or destruction of goods, that the bankrupt had shipped goods as baggage which he had not accounted for, and that he had made no payments which could account for the disappearance of the proceeds if the goods were sold, it supported a finding that he had either the goods or their proceeds in concealment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

In the matter of Barney Silverman, bankrupt. Review of order of referee directing the bankrupt to turn over to his trustee goods, wares, and merchandise of the value of \$2,100, or in case he has secretly disposed thereof, then the proceeds to that amount. Order affirmed.

McGowan & Stolz, of Syracuse, N. Y., for trustee.

Claude E. Guile, of Fulton, N. Y., for bankrupt.

RAY, District Judge. [1] The referee has found, and the evidence amply sustains the finding: That the bankrupt, engaged in the mercantile business at Fulton, N. Y., and that before that he had been engaged in similar business at Watertown, N. Y., and that when there he went through involuntary bankruptcy. That he closed his store at Fulton December 15, 1911, and the next day filed his voluntary petition in bankruptcy. He took with him from Watertown to Fulton October 1, 1909, goods which cost \$3,000 or more but which he says were worth some \$1,600. He then owed no debts except his brother Isaac Silverman the sum of \$250. In May, 1910, the bankrupt made representations in writing, for the purposes of obtaining credit, that his fixtures and stock of goods on hand were worth \$5,000, and that he owed \$1,357 and was worth \$3,643. July 1, 1911, he claims to have had a stock of goods worth \$1,500. From July 1, 1911, to December 15, 1911, he purchased goods to the amount of \$4,956.49; total \$6,-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
206 F.—61

456.49. At the time he closed his store in December, he had cash \$23.75, \$200 in value of the goods purchased after July 1, 1911, and \$1,101.94 in value of old goods; total \$1,325.69. In short, from July 1, 1911, to December 15, 1911, 5½ months, he reduced his stock, that which he had July 1st, and that purchased during the time mentioned, \$5,130.80. He was then, December 15, 1911, owing on his own showing about \$5,251, a loss in about 19 months of some \$7,409, or about that. He does not explain this loss, but does claim sales were slow, etc. But he obtained the property on credit and disposed of it somewhere. He was running his business during this time and he says depositing the proceeds of sales less living and regular expenses in the Citizens' National Bank at Fulton.

He sold at retail in no case below cost, and all his payments were represented by bills and vouchers except such expenses and he paid out no cash except for expenses. His rent for store and house were \$50 per month, or some \$275 for the 5½ months, which with operating expenses he paid by checks on his deposits. He paid during this time to his son, clerk hire about \$110, to his creditors \$25.54, and to the Observer in cash and trade \$39.95. The referee allows for living expenses and incidental expenses \$600.58 and there was no evidence they exceeded that sum. His total deposits during that time were \$2,303.23. The total credits, in any event, the referee finds cannot exceed \$4,380.24. He is not charged with any profit on goods sold. The bankrupt did not account or claim to account for this disappearance of goods or of the proceeds thereof, if sold. There is no evidence of fire or casualty or theft or that he lost in speculation or gambling. He paid no old debts except as stated. There was evidence that he shipped away goods in trunks on two occasions; the destination and disposition being unknown. The bankrupt does not account for these goods or their disposition or loss. He simply denies the fact. He told a friend he had shipped goods as baggage and that all it cost was the price of a ticket. He also admitted to him that he had saved \$4,200 in cash and said that his creditors trimmed him at Watertown and he was going to trim them; that he was going to fail but would get even with his creditors. He kept no books or accounts showing his transactions. True, the man who gave this testimony had a bias against Silverman, who had testified against him to secure an indictment for arson.

[2] The referee saw and heard all the witnesses including the bankrupt. Their credibility was for the referee, and it has been many times decided that the judge on review should not reverse except in clear cases of error as to the facts or on questions of law. The decisions are numerous and uniform and this court has always so held. The referee was far better able than this court to determine the credit that should be given to Silverman and the witness referred to. It would be very unwise for a court that has not seen the witnesses to reverse the referee who did on the questions of the credibility of such witnesses.

Is the evidence sufficient, clear, and satisfactory that Silverman has concealed from his trustee and has in his possession or subject to his control merchandise of the value of \$2,100, or the proceeds in case he

has disposed of it? It is clear on his own testimony, taking the facts as a basis and not his conclusions or mere general statements, that he did not dispose of these goods at his store in Fulton, in due course of business, or that, if he did, he neither deposited the money in bank nor expended it. In view of the satisfactory evidence that he shipped goods away in trunks and has neither accounted for such goods nor their proceeds, it is equally clear that the goods are in the possession of the bankrupt somewhere or subject to his order, unless he has disposed of them in which case presumptively he has the proceeds. The law will not presume that he has sold the goods and spent or given away the money. The trustee has filed exceptions to the report and argues with force that the evidence shows a much larger quantity of goods in Silverman's possession than found by the referee. The referee was conservative indeed, but I am not disposed to disturb his findings.

[3] It is, of course, true that the evidence must clearly and satisfactorily show that the bankrupt has the property, or its proceeds, and is able to comply with the order. But this rule does not require that the trustee prove by eyewitnesses that the bankrupt now has the goods in his possession, or the money in bank, or in his pocket. Establish such a rule and the dishonest in contemplation of bankruptcy may conceal the goods themselves (bury valuables in the ground) or sell and store away or bury the money in some secret place, obtain a discharge, and, so long as there is no eyewitness as to the whereabouts of the money or property, go free to enjoy at a later day the fraudulently obtained and concealed property.

[4] When, as here, the evidence shows the recent possession by the bankrupt of thousands of dollars worth of property and but small sales comparatively, and no money or proceeds if sold, and but a small amount of the property on hand and no uncollected accounts, no loss or destruction, etc., of goods, and, added to this, there is substantial evidence that goods were shipped away by the bankrupt as baggage and not accounted for and the bankrupt made no payments which could account for the disappearance of the proceeds if the goods were sold, we can arrive at but one conclusion, and that is that the bankrupt has either the goods or their proceeds in concealment. *Seigel v. Cartel* (C. C. A. 8th Circuit) 164 Fed. 691, 90 C. C. A. 512; *In re Charles Nisenson* (D. C.) 24 Am. Bankr. Rep. 915, 182 Fed. 912; *In re Deuell* (D. C.) 100 Fed. 633; *In re Cashman* (D. C.) 103 Fed. 67; *In re Finkelstein* (D. C.) 101 Fed. 418; *In re Morgan* (D. C.) 101 Fed. 982; *In re Meyers* (D. C.) 96 Fed. 408.

In *Seigel v. Cartel*, *supra*, the goods were shown in possession between January 1, 1904, and August of that year, a period of seven months. In *re Charles Nisenson*, *supra*, the bankruptcy was in December, 1909, and the property was shown in his possession in January preceding. In this last case Judge Rellstab said:

"The presumption that property traced to the recent possession or control of the bankrupt remains there until he satisfactorily accounts for its disposition or disappearance (*Boyd v. Glucklich*, *supra* [116 Fed. 131, 53 C. C. A. 451] *Seigel v. Cartel* [C. C. A. 8th Cir.] 21 Am. Bankr. Rep. 140, 164 Fed. 691 [90 C. C. A. 512]) is a presumption of fact, varying in weight. The weight to be given depends upon the circumstances of each particular case.

In the present case there is no question of the bankrupt's recent possession of the property mentioned in the referee's order. This property not having been scheduled, the bankrupt is called upon to give an explanation of its disappearance. The burden is upon him to satisfactorily account for its nonproduction, but in assuming such burden he, because of the drastic means that may be invoked to enforce the order to turn over (imprisonment for contempt), is entitled to the benefit of the reasonable doubt. In *re Schlesinger*, supra [(D. C.) 97 Fed. 930]; In *re Mayer*, supra; *Boyd v. Glucklich*, supra; In *re Shachter* (D. C. Ga.) 9 Am. Bankr. Rep. 499, 119 Fed. 1010; In *re Goldfarb Bros.*, supra [(D. C.) 131 Fed. 643]."

In *Seigel v. Cartel et al.*, supra, the court said:

"The evidence clearly enough shows that this merchant, between the 1st day of January, 1904, and August of that year, just preceding the proceeding in bankruptcy, disposed of between \$11,000 and \$13,000 worth of goods. In other words, he was short that amount of stock at the time of the declared bankruptcy. He was called upon by the referee to account for these goods or their proceeds; the presumption being, as they were not on hand, that he had disposed of them and the proceeds were in his possession. In *re Deuell* (D. C.) 100 Fed. 633; In *re Cashman* (D. C.) 103 Fed. 67."

I do not see how the conclusion can be avoided that Silverman has the goods or the money, their proceeds, and probably some of both, in his actual possession, or under his control somewhere, to the amount, in value, of \$2,100, and probably more, and the order of the referee is therefore affirmed.

UNITED STATES v. CHESAPEAKE & D. CANAL CO.

(District Court, D. Delaware. March 18, 1913.)

No. 1, March Term, 1912.

1. PLEADING (§ 214*)—DEMURRER—ADMISSIONS BY DEMURRER.

In an action by the United States to recover dividends on corporate stock owned by it, a demurrer by the United States to a plea setting up the statute of limitations operates as an admission that the government owned the stock and was entitled to the dividends at the time mentioned in the bill of particulars made part of the declaration.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

2. LIMITATION OF ACTIONS (§ 11*)—ACTIONS BY UNITED STATES—STATE STATUTE.

In the absence of a federal statute limiting the time for the bringing of a suit by the United States in its sovereign capacity for the recovery of money to be paid into the national treasury, no state statute of limitations can bar the remedy.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 35-39; Dec. Dig. § 11.*]

3. UNITED STATES (§ 141*)—ACTIONS—PRESUMPTION.

In an action by the United States to recover dividends on corporate stock owned by it, it will be presumed, in the absence of allegations to the contrary, that the money to be recovered will be paid into the national treasury as public money.

[Ed. Note.—For other cases, see United States, Cent. Dig. §§ 136-139; Dec. Dig. § 141.*]

4. LIMITATION OF ACTIONS (§ 11*)—ACTION BY UNITED STATES.

An action of assumpsit, brought by the United States to recover dividends on corporate stock owned by it to be paid into the national treas-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ury, is a suit in its sovereign capacity, which is not barred by a state statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 35-39; Dec. Dig. § 11.*]

5. LIMITATION OF ACTIONS (§ 11*)—ACTION BY UNITED STATES.

The rule that the United States, when it becomes a stockholder in a corporation, does not thereby impart to the corporation its rights and privileges as a sovereign, and that it has only the rights of a stockholder with respect to the corporate transaction and affairs, does not prevent the application of the rule that a state statute of limitations will not bar an action by the government in its sovereign capacity to recover dividends on corporate stock owned by the government.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 35-39; Dec. Dig. § 11.*]

6. LIMITATION OF ACTIONS (§§ 165, 175*)—NATURE OF STATUTORY LIMITATIONS.

A statute of limitations bars the remedy, but does not affect the right, and it may be waived.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 649, 662; Dec. Dig. §§ 165, 175.*]

7. LIMITATION OF ACTIONS (§ 14*)—ACTIONS BY UNITED STATES—AGREEMENT AS TO TIME.

There is an essential distinction between a pure statute of limitations, on the one hand, and, on the other, time stipulations entering into and forming part of a contract on which the United States as one of the contracting parties brings suit; or a time limitation for an appeal, or the filing of pleadings, or the taking of other steps necessary to the due and orderly prosecution of legal or equitable remedies; or a requirement of notice to be given within a certain time as a condition precedent to the fixing of the liability of a party; in all of which latter cases the United States will be bound by a time limitation as would a private individual.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 59-61; Dec. Dig. § 14.*]

Action by the United States against the Chesapeake & Delaware Canal Company. Demurrer to the defendant's plea of the statute of limitations sustained.

John P. Nields, U. S. Atty., of Wilmington, Del.

Andrew C. Gray, of Wilmington, Del., and Charles Biddle, of Philadelphia, Pa., for defendant.

BRADFORD, District Judge. This is an action of assumpsit brought by the United States against the Chesapeake & Delaware Canal Company, a corporation of Delaware, for the recovery of dividends alleged to be due to the United States from it on 14,625 shares of its capital stock held and owned by the United States, together with interest thereon. The declaration contains four counts and a bill of particulars. The first three counts are for money had and received for the use of the United States, and the fourth count is for interest on such money. The bill of particulars is as follows:

Bill of Particulars.

Chesapeake and Delaware Canal Company, a Corporation of the State of Delaware, to The United States of America, Dr.

To sums of money due and owing to The United States of America as the owner and holder of fourteen thousand six hundred and twenty-five (14,625)

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

shares of the capital stock of said Chesapeake & Delaware Canal Company, being its pro rata share of dividends declared by said Chesapeake & Delaware Canal Company and also the interest due and owing to The United States of America on said sums of money.

Sum of money due said United States, being its share of dividend declared June 30, 1873.....	\$21,937.50
Interest on said sum of \$21,937.50 from and after June 30, 1873.	
Sum of money due said United States, being its share of dividend declared June 30, 1875.....	14,625.00
Interest on said sum of \$14,625.00 from and after June 30, 1875.	
Sum of money due said United States, being its share of dividend declared June 30, 1876.....	14,625.00
Interest on said sum of \$14,625.00 from and after June 30, 1876.	

[1] The defendant has pleaded to all the counts (1) non assumpsit, (2) release, and (3) statute of limitations. To the plea of the statute of limitations the United States has demurred, and upon this demurrer the case has been heard. It has been ably and exhaustively argued by counsel on both sides. The points involved, however, are few and simple. The demurrer to the plea of the statute of limitations operates as an admission by the defendant that the United States is and was the owner and holder of 14,625 shares of its capital stock and became entitled as such owner and holder to receive from it on the several dates mentioned in the bill of particulars when dividends were declared the sums of money therein specified, being the pro rata share due and owing to the United States of such dividends. All of the above dates were more than three years,—the statutory period of limitation in Delaware for actions of assumpsit,—after the last dividend became payable and before the bringing of this action.

[2-4] In the absence of a federal statute limiting the time for the bringing of suit by the United States in its sovereign capacity for the recovery of money to be paid into the national treasury, the maxim *nullum tempus occurrit regi* has full application, and no state statute of limitations can bar the remedy. The question now to be decided has relation, not to estoppel or the disputable presumption of payment after the lapse of twenty years from the accruing of the cause of action, but solely to the statute of limitations of Delaware. There is nothing in the declaration or bill of particulars to indicate that the United States is prosecuting this action as a merely nominal party, or that it owned or held the above mentioned shares of stock of the defendant or any part thereof in trust for or on account of any private beneficiary or enterprise; or that the moneys sued for, if recovered, would not go into the national treasury and form part of the public funds to be devoted to public and not private purposes. It must be assumed, in the absence of an allegation to the contrary, that whatever moneys may be recovered in this action will be paid into the treasury of the United States to be disposed of as part of the public moneys. Under these circumstances it is wholly immaterial that the United States became entitled to the money which, if recovered, is to go into the national treasury, through its ownership of stock of the defendant company or through an investment in any other form for its benefit. The United States in so suing for the recovery of money for the national treasury is proceeding in its sovereign capacity and cannot be defeated by a

state statute of limitations. *United States v. Thompson*, 98 U. S. 486, 25 L. Ed. 194; *United States v. Hoar*, Fed. Cas. No. 15,373; *United States v. Nashville, etc., Ry. Co.*, 118 U. S. 120, 6 Sup. Ct. 1006, 30 L. Ed. 81; *United States v. Knight*, 14 Pet. 301, 315, 10 L. Ed. 465; *Lindsey v. Miller*, 6 Pet. 666, 8 L. Ed. 538; *United States v. Belknap* (C. C.) 73 Fed. 19. In *United States v. Nashville, etc., Ry. Co.*, supra, the court said:

"It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound."

In *United States v. Beebe*, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121, the court said:

"The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right, or to assert a public interest, is established past all controversy or doubt. *United States v. Nashville, etc., Railway Company*, 118 U. S. 120, 125 [6 Sup. Ct. 1006, 30 L. Ed. 81], and cases there cited."

[5] An examination of the authorities cited on the part of the defendant shows that most, if not all, of them have no application to this case. The defendant contends that:

"If the government is not acting in *its sovereign capacity* but has chosen to buy stock in a corporation, thereby stepping down from its high position as a sovereign power, and becoming a stockholder, it must be bound by the same rules that regulate other stockholders."

[6] This undoubtedly is true so far as substantive rights are concerned, but it does not bear upon the application of the maxim *nullum tempus occurrit regi*. The statute of limitations is part of the *lex fori*. It bars the remedy but does not destroy the right. However important, it is not included among the substantive rights of parties to litigation. It may be waived, and under the decisions in Delaware is waived unless pleaded. *Parker v. Whittaker*, 4 Har. (Del.) 527, note. In the cases cited on the part of the defendant language is often used which taken by itself would lend some color to the contention made by it. But the significance of that language must be determined by a consideration of the facts of the case in which it has been employed. And when thus considered it lends little, if any, support to the defendant's case. Among the cases cited for the defendant some support the proposition that ownership by the United States or by a state of the whole or any part of the capital stock of a corporation chartered by it will not defeat the jurisdiction of a circuit (now district) court of the United States or of a state court over a suit against such corporation for the recovery of money or other property on the ground that the United States or the state enjoys immunity from being sued in such court. *United States Bank v. Planters' Bank*, 9 Wheat. 904, 6 L. Ed. 244; *Bank of Kentucky v. Wister*, 2 Pet. 318, 7 L. Ed. 437; *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 9 L. Ed. 709;

Louisville Railroad Co. v. Letson, 2 How. 497, 550, 11 L. Ed. 353; Curran v. State of Arkansas, 15 How. 304, 14 L. Ed. 705; Southern Ry. Co. v. North Carolina R. Co. (C. C.) 81 Fed. 595. In United States Bank v. Planters' Bank, *supra*, the court said:

"The state does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the state of Georgia, although the state holds an interest in it. * * * The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act. The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank."

Some cases cited by the defendant support the proposition that a state bank, of which the state granting the charter owns all the stock, in issuing its notes does not emit bills of credit in violation of the Constitution of the United States. Bank of Kentucky v. Wister, 2 Pet. 318, 7 L. Ed. 437; Briscoe v. Bank of Kentucky, 11 Pet. 257, 9 L. Ed. 709.

Other cases referred to by the defendant establish the proposition that a corporation, all or a part of whose capital stock is owned by a state, is not by reason of such ownership entitled to represent the state and rightfully claim preference or priority of payment over private persons. State Bank v. Gibbs, 3 McCord (S. C.) 377; Fields v. Creditors of Wheatley, 1 Sneed (Tenn.) 351.

The underlying principle of the three foregoing classes of cases is that ownership by the United States or a state of the whole or any part of the capital stock of a corporation, whether or not chartered by the United States or such state, does not operate to confer upon the corporation the privileges, prerogatives or immunities of sovereignty. These cases are wholly irrelevant to the point now before the court for decision. They do not directly or indirectly deal with the applicability of the statute of limitations to an action brought by the United States or by a state.

There is abundant authority to the effect that the United States or a state, in becoming a stockholder of a corporation puts itself upon the plane occupied by other and private stockholders, and with respect to the corporate transactions and affairs is entitled to only an equality of substantive rights with those possessed by other stockholders. By its acquisition of stock it assents to the provisions of the charter creating and defining the rights and duties of stockholders; and it, therefore, acts in the capacity of a stockholder, not in the exercise of its sovereignty, but under and pursuant to the rights and duties conferred and imposed by the charter upon stockholders. As stated in United States Bank v. Planters' Bank, *supra*:

"As a member of a corporation, a government never exercises its sovereignty."

And as repeated in substance in Southern Ry. Co. v. North Carolina R. Co., *supra*:

"So far as respects the transactions of the corporation, its contracts, or its torts, the state exercises no power, enjoys no privilege, with regard to them, not derived from the charter, or differing in any way with the power or privilege enjoyed by any other stockholder."

The equality between the United States, or a state, and the other stockholders of a corporation, as established by the authorities, is equality of rights, duties and privileges under the charter. Such equality has no application to a pure statute of limitations. Such a statute relates only to the remedy and as part of the *lex fori* is wholly outside of charter rights, duties and privileges. The cases, while recognizing that the substantive rights and duties of the United States or a state as a stockholder are similar and only equal to those of private stockholders, do not state or intimate that the United States or a state in suing for the recovery of dividends belonging to it, and to be paid into its treasury for public purposes, is not acting in a strictly sovereign capacity. On the whole it seems clear on both reason and authority that the maxim *nullum tempus occurrit regi* applies in full force to this case as presented on demurrer to the plea of the statute of limitations.

[7] There is an essential distinction between a pure statute of limitations, on the one hand, and, on the other, time stipulations entering into and forming part of a contract on which the United States as one of the contracting parties brings suit; or a time limitation for an appeal, or the filing of pleadings, or the taking of other steps necessary to the due and orderly prosecution of legal or equitable remedies. And also where the law applicable to a contract is such that the giving of notice is a condition precedent to the fixing of the liability of a party, as, for instance, in the case of drawers and endorsers of bills of exchange, the obligation to give such notice binds the United States as holder and owner equally with a private holder and owner. But such and other cases are clearly distinguishable from that before this court in that it involves the consideration of only a pure statute of limitations as being applicable or inapplicable to a suit by the United States in its sovereign capacity. No opinion is here expressed on the point whether a presumption of payment may not have arisen from the lapse of time after the dividends sued for were declared and before the commencement of this action which might be taken advantage of under a proper plea. But for the reasons above given the demurrer must be sustained, with leave to the defendant to plead over.

THAYER v. CITY OF BOSTON et al.

(District Court, D. Massachusetts. July 19, 1913.)

No. 334.

EMINENT DOMAIN (§ 118*) — PUBLIC PARK — APPROPRIATION TO NEW USE — RIGHTS OF ADJOINING OWNERS.

Under the law of Massachusetts the mere acquisition by a city of land for a public park under authority of an act of the Legislature, and the levying and collection of assessments on adjoining property to pay for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the same, did not create any contract or property right appurtenant to the assessed land to have the land purchased maintained forever as a park, and the state may authorize its use for any other public, although inconsistent, purpose, without violation of the constitutional provision against impairment of contracts or deprivation of property without due process of law.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 303; Dec. Dig. § 118.*]

In Equity. Suit by Alice R. Thayer against the City of Boston and others. On motion for preliminary injunction and hearing on the merits. Decree for defendants.

Matthews, Thompson & Spring and Hudson & Nichols, all of Boston, Mass., for complainant.

Joseph J. Corbett and George A. Flynn, both of Boston, Mass., for defendants.

DODGE, Circuit Judge. This bill was filed April 2, 1912, and a subpoena thereon issued, returnable May 6, 1912. A summons to show cause against the plaintiff's prayer for a preliminary injunction was also issued, returnable July 11, 1912. Affidavits in support of this prayer were filed by the plaintiff on June 27, 1912, for the defendants, against it, on July 5, 1912, and for the plaintiff, in reply, on July 8, 1912. On the latter date there was also filed a stipulation between the parties agreeing certain facts. On February 20, 1913, the bill was amended by consent, and on the same date the defendants filed their answer to it. Also on February 20, 1913, the parties agreed, by stipulation then filed, that the affidavits might be regarded as of the same force and effect as if filed for the purpose of a hearing on the merits, and that the facts agreed July 8, 1912, might be taken as true for the purposes of such a hearing. Such a hearing was had on March 12, 1913; the plaintiff first filing, by leave of court, a further amendment to its bill, the answer already filed applying to the bill as amended. The hearing is thus to be regarded as a hearing on pleadings and proofs.

The plaintiff owns and occupies a residence at 30 Fenway, in Boston. She bought the lot in 1895, and thereafter built a house upon it. The property abuts on and faces the Back Bay Fens, a public park, located, laid out, and established in Boston by the board of park commissioners of that city in 1879. The board was established by, and it acted under authority given it by, a state statute. St. Mass. 1875, c. 185.

The land included in this park was taken by the board and paid for by the city in accordance with provisions contained in the statute cited. Acting in accordance with other provisions, also contained in it, the board assessed about 70 per cent. of the money expended to acquire the land upon adjoining private estates adjudged to have been specially benefited by the "location or laying out" of the park. These assessments, having been held valid by the Massachusetts Supreme Court, were collected and paid, excepting such as were abated or assumed by the city. A parcel of land adjoining the park, between its Boylston street

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and Westland avenue entrances, designated as lot 44 in the assessment proceedings, was one of the estates thus assessed. Its then owner paid the assessment. In it was included the lot now belonging to the plaintiff. In each of the successive subsequent conveyances, whereby this lot has come from the then owner of lot 44 to the plaintiff, all privileges and appurtenances belonging to the land transferred have been expressly conveyed.

A later Massachusetts statute (St. 1911, c. 540), enacted June 10, 1911, has authorized the board of park commissioners above mentioned to permit the erection of a building for the High School of Commerce, within the limits of the park established as above, upon the request of the Boston schoolhouse commissioners and with the approval of the Boston school committee. These bodies having duly requested and approved their proposed action, the park commissioners have voted to permit the erection of the building for the purpose stated in the act of 1911, within the limits of the park; certain dimensions of the intended building being specified in their vote.

The city of Boston and its three schoolhouse commissioners, by name, are made defendants in the plaintiff's bill. Before filing it, on December 12, 1911, she notified the mayor of the city that she objected to the erection of the building as proposed. In her bill she alleges that the building is to be "directly opposite" her property, that the erection and maintenance of such a building is a use of the land thereby occupied inconsistent with its use as a park, and a use which will inflict great, permanent, and irreparable damage upon her. Further alleging that no compensation has been awarded her, nor any method provided by statute for the determination or payment of such compensation, she avers that the act of 1911 impairs the obligation of a contract between the state and city and the owners of land assessed as above, including herself; also that said act, the above proceedings under it, and the construction of the building in pursuance thereof, will deprive her of her property without due process of law, and will also deny her the equal protection of the law.

The defendants deny that the erection and maintenance of the proposed building is a use of the land so occupied inconsistent with its use as a park. But in *Higginson v. Treasurer, etc.*, 212 Mass. 583, 591, 99 N. E. 523, 42 L. R. A. (N. S.) 215, which was a taxpayers' suit to restrain the proposed erection, the highest court of the state has held that such a use of the land will be inconsistent with its use as a park, deciding also, however, that the state had the right, if it thought fit, to authorize such inconsistent use. The defendants' answer does not expressly deny that the proposed erection will inflict great, permanent, and irreparable damage to the plaintiff's property. In her affidavit she estimates the damage at more than \$5,000. The present value of the property is admitted to be at least \$45,000. Affidavits of three witnesses, variously qualified to give an opinion, filed on her behalf, are to the effect that such damage will be sustained, and that its amount will be at least \$5,000. On the other hand, the defendants submit three affidavits, wherein the opinion is expressed that the plaintiff's property will not be damaged in value. It is agreed by the parties that the rear

of the building, if erected as proposed, will be 700 feet distant in an air line from the plaintiff's premises—1,200 and 1,600 feet distant, respectively, therefrom by the traveled ways; also that its site is shown on the plan marked Exhibit A, which may be referred to in connection herewith, and that its length will be 300 feet, its depth 150 feet, its greatest height 86 feet. A photograph from a perspective drawing is annexed to the defendant Logue's affidavit, and shows the intended front aspect of the building when completed. Exhibit A, however, shows that the rear view will be the one presented toward the plaintiff's property. My conclusion, from all that is found in the affidavits and agreed facts upon the question, and from the plans and photographs above mentioned, is that substantial damage to the market value of the plaintiff's property is to be apprehended; and I am not satisfied that the damage may not be at least the jurisdictional amount.

Assuming that the erection of the building as proposed will thus substantially impair the present market value of the plaintiff's property, will it involve an invasion of her rights under the Constitution of the United States? This question, as to the owners generally of assessed abutting or neighboring land, the court declined to consider in *Higginson v. Treasurer, etc.*, above cited, because no such owner was a party to the case before it. The plaintiff says the question is one of first impression in this state. The plaintiff avers and the defendants deny that from the levying and collection of the assessments described there arose, by operation of law, an implied contract between the state and city, on the one hand, and the assessed owners, their heirs, executors, administrators, and assigns, on the other, that the land then taken for park purposes should be forever maintained as a park, and should never be devoted to any use inconsistent with that use. This is the contract, the obligation whereof she says the state and city are impairing by the enactment of the act of 1911 and the proceedings which have been taken under it. The plaintiff avers, and the defendants deny, that by the levying and collection of said assessments a property right appurtenant to the assessed land was created to have the land taken in those proceedings maintained forever as a park, instead of being devoted to any inconsistent use. This is the property right of which she says the state and city are to deprive her without due process of law, and in respect of which they are about to deny her the equal protection of the law.

That no compensation has been awarded the plaintiff in connection with the proposed erection, nor any proceedings had purporting to take any of her property, or any interest in the Fens belonging to her, is conceded. No method has been provided, or is suggested, whereby, if she has any right appurtenant to her land, such as she claims, she can get compensation for impairment of its value. Her right to the relief she asks depends on the question whether, as owner of her land, she has succeeded to any such right in contract as she claims, or to any appurtenant property right, such as she claims, to require perpetual maintenance of the park in its integrity.

Were the park land subject to any easement in favor of hers, created by grant, reservation, or express contract, it would be property belong-

ing to her, of which she could not be deprived for the public benefit without just compensation. *Ladd v. Boston*, 151 Mass. 585, 24 N. E. 858, 21 Am. St. Rep. 481. Property rights entitled to the same protection would belong to her, if, by any means, the park land had become subject to equitable restrictions in favor of hers, forbidding its use at any time for other than park purposes. Thus in *Muhlker v. N. Y., etc., Co.*, 197 U. S. 544, 25 Sup. Ct. 522, 49 L. Ed. 872 (1904), it was held that not even by permission or command of the state, and for a public purpose, could a city authorize an elevated railway to invade, without compensation, the right to light and air above the surface of a street belonging to an abutting owner whose predecessor in title had deeded the bed of the street to the city in trust, to be kept open forever for street purposes. In *Wilson v. Mass. Institute, etc.*, 188 Mass. 565, 75 N. E. 128 (1905), it was held that the state, after having granted certain land to educational institutions, under provisions addressed to future purchasers of surrounding lots then belonging to it, the provisions being that the granted land should be reserved from sale forever, kept as an open space or for the use of the grantee institutions, and that they should not cover with their buildings more than one-third of the granted area, could not, as against the owners of surrounding lots meanwhile bought on the faith of such provisions, by a later act authorize one of the grantee institutions to build over more than one-third of the area.

In the present case there was no dedication of the park land, nor any acquisition of it by the city, upon a trust imposed by former owners. The plaintiff has, in the first place, to show that the assessments upon adjacent properties, including hers, were levied and paid upon terms or under circumstances which fairly gave those assessed owners who paid them, or subsequent purchasers, the right to understand that they were then being assessed and were paying for nothing less than the perpetual maintenance of an adjacent park, consisting of the land acquired by the city as stated.

Nowhere in the state statute of 1875, or in any of the proceedings under it to take this land, or assess betterments therefor and collect them, or in the decision sustaining those assessments (*Foster v. Park Com'rs*, 133 Mass. 321), can any more explicit definition be found of the use for which the land was being taken than that it was for the "location or laying out of a public park or parks." The plaintiff says that a public park is in its nature of permanent duration, and that devotion of the land to other uses destroys the entire consideration for the assessments.

But in *Higginson v. Treasurer, etc.*, 212 Mass. 583, 99 N. E. 523, 42 L. R. A. (N. S.) 215, before cited, the Supreme Court of the state has held as to this land that, though taken by the city in fee, it had been taken by an agency of the state for a public use, and that the right remained in the state to change that public use when it saw fit, and devote the land, as it did, to another and an inconsistent use. This being the law of the state, I think all parties affected by the taking and assessments of 1879 must be presumed to have understood that the special benefits then paid for did not consist in having the land

taken maintained as a park forever, but only in having it established as a park and so maintained so long as the state should not see fit to substitute for that use a different public use. As is said in *Nichols, Eminent Domain*, § 141, with regard to the discontinuance of streets for the location whereof abutments have been assessed:

"The possibility of discontinuance is considered in reckoning the amount of the assessment."

Such substitution by the state of a different public use would, of course, be a thing unlikely to happen soon after the establishment of a park, and in this case it has not happened for more than 30 years afterward. Upon such authorities as have been found, I am unable to hold that any right to assume that it would never happen accrued in favor of the assessed land. In *Home, etc., v. Commonwealth*, 202 Mass. 422, 429, 430, 89 N. E. 124, 127 (24 L. R. A. [N. S.] 79), the court said:

"After the erection of the South Terminal Station in Boston, there was special taxation upon real estate, covering a very large area, because of the increase of its value from the establishment of the station there. *Sears v. Street Commissioners*, 180 Mass. 274 [62 N. E. 397, 62 L. R. A. 144]. If for good reasons, in the public interest, the Legislature should provide for the removal of the station, it can hardly be contended that the diminution in value of property in the neighborhood would entitle the owners to compensation as for a taking of their property under the right of eminent domain."

If this view of the matter is the right one, it can make no difference that the plaintiff's land abuts directly on the park, and thus suffers a greater diminution in value by the erection of the proposed school building than does assessed land not abutting and more remote. It paid more for a greater benefit than did such land in 1879, but acquired by such payment no right of a different nature. The plaintiff's case is put by her bill wholly upon the rights, whether contract rights or property rights, which she claims to have accrued by virtue of the assessment proceedings had when the park was established. She neither alleges nor proves that anything is to be done unlawfully affecting the public rights of people generally, but which will also cause special and peculiar damage to her property.

The plaintiff fails for the above reasons to maintain her contention that to permit the erection of the proposed building within the Back Bay Fens will impair the obligation of any contract with her or her predecessors in title, and to show that its erection will invade any property right belonging to her.

Her bill is therefore to be dismissed, with costs.

ZYWICKI v. JOS. R. FOARD CO. OF BALTIMORE CITY et al.

(District Court, D. Maryland. July 22, 1913.)

MUNICIPAL CORPORATIONS (§ 735*)—LIABILITY FOR TORTS—FAILURE TO EXERCISE CHARTER POWERS.

That the city of Baltimore is given power and authority by statute to regulate navigation on the Patapsco river, including the stationing and loading of vessels, and that it failed to make and enforce regulations governing the loading and shipment of explosives, does not render it liable to a stevedore, injured through the negligence of a foreman in stowing a cargo of dynamite.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1551; Dec. Dig. § 735.*]

In Admiralty. Suit by Barney Zywicki, by his mother and next friend, against the Jos. R. Foard Company, of Baltimore City, the General Stevedoring Company, and the Mayor and City Council of Baltimore. On exceptions by the city to the libel. Exceptions sustained.

Thomas F. Cadwalader, of Baltimore, Md., for libellant.

S. S. Field, City Sol., and Alexander Preston, both of Baltimore, Md., for Mayor and City Council of Baltimore.

ROSE, District Judge. In March last the British steamship *Alum Chine* came to Baltimore to take on board a cargo of dynamite to be carried to the Isthmus for use on the Panama Canal. The ship was lying in the quarantine anchorage of the port. Several hundreds of tons of dynamite in boxes had been put on board. A large gang of stevedores were taking similar boxes from a lighter alongside and were stowing them in the hold. A fire broke out on board. Those on the ship, or most of them, fled to a tug alongside. Before the latter could get sufficiently far away, a great explosion took place. Many on the tug, as well as others on other craft, were killed or injured. The libellant says that he was employed by the two respondents first named above to help in loading the dynamite. The work was in charge of a foreman, who, in order to fit a box of dynamite firmly in place, struck either it or a box adjoining with a bale hook. The blow caused "an explosion or flaring" of a part of the dynamite in the box with which the hook had come into contact. The cargo took fire.

The libellant was one of those who fled to the tug. He was frightfully injured by the explosion. He sues, not only the two corporations in whose employ he was, but the municipality of Baltimore. He says that by statute the respondent in question was given the power and charged with the duty of preserving the navigation of the Patapsco river and its tributaries, and of removing therefrom everything detrimental to navigation or health. It was authorized to regulate the stationing, anchoring, and moving of vessels and other water craft, and the manner in which dynamite and other high explosives should be delivered for shipment, shipped, and transported in and upon such waters. It assumed the discharge of all these obligations. The libel

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

then charges that the city failed to adopt or publish regulations governing the shipment of dynamite or other explosives, or the manner in which the same should be handled or loaded into vessels, in order to prevent explosions or to lessen the danger thereof. The libelant says he assumed, as he was entitled to assume, that the city had made such rules and was enforcing them, and that the dynamite would be handled in accordance with them, with care and caution, and that the use of sharp instruments in connection with such explosive substances would be prohibited.

The city has excepted to this libel. It says that the General Assembly of Maryland by the act of March 14, 1912, expressly relieved it from any future liability for damages suffered upon the waters of the Patapsco.

The libelant replies:

(1) The act relied on by the city was never validly enacted. Its title did not conform to the requirements of the state Constitution, and in defiance of the provisions of that instrument it dealt with various unrelated subjects.

(2) The provision referred to is in conflict with the fourteenth amendment to the federal Constitution. It seeks to deprive those who on the river suffer from the negligence of the city of the equal protection of the laws and takes from them their rights of action without due process of law.

(3) The act, when properly construed, has no application to the case set up by the libel.

Some or all of these contentions may require careful consideration in connection with the claims for compensation made by persons who were injured by this explosion, but who were not in any wise voluntarily connected with the placing of dynamite on the Alum Chine. But, for the question here at issue, is it necessary to inquire into either the validity or the construction of the act of 1912?

The libel says that the explosion was the result of the reckless act of the foreman of stevedores in striking a box of dynamite with a sharp instrument. It asserts that the city should have forbidden the use of such instruments in handling explosives. It assumes that such prohibition, if issued, would have been obeyed by the possibly hot-headed and conceivably careless stevedore. The assumption seems to be sufficiently doubtful.

For the purpose of disposing of the questions raised by the pleading, it may be taken as well founded. The contention of the libelant opens a more fundamental inquiry. Is a municipal corporation liable for all damage which might have been prevented by the full and vigilant exercise of all its charter powers? It is its duty to exercise reasonable forethought and energy to keep safe for travel the public highways whether on land or water. In this state and in this federal circuit the obligation is broadly construed and strictly enforced. *County Commissioners v. Duckett*, 20 Md. 468, 83 Am. Dec. 557; *State v. Miller*, 194 Fed. 775, 114 C. C. A. 495.

Libelant contends that a municipality is equally liable for failure to exert any other authority which has been granted it for the protec-

tion of life, health, or property. His argument is that, as the city has been given power to keep the highways free of nuisances and dangers, if it carelessly fails to use these powers it must make good to A. any damage which he in consequence suffers. It has no less authority to protect health and prevent conflagrations. If it fails to do so, it is liable to one who has been damaged as a result.

Every such grant of power imposes a correlative duty, enforceable by whosoever is hurt by its nonperformance. Quotations are made from various judicial opinions in highway and similar cases to show that the reasons which have made municipalities liable in them are equally applicable to the facts of the case at bar.

In the learned and able brief filed by libelant's proctor he does not question that a municipality cannot be held responsible for failure to exercise efficiently its purely governmental powers. He merely contends that its duty to safeguard life, health, and property is imposed upon it in its private rather than in its public capacity. He nevertheless fails to cite a single decided case in which judgment has been given against a municipality under circumstances which seem to be in any wise analogous to those alleged in his libel.

Libelant has been fortunate to secure the services of an unusually able and industrious proctor. There must have been hundreds and thousands of cases, perhaps tens of thousands of them, in which somebody has suffered injury to person or property which would not have been incurred, had municipalities done well everything they had the power to do. Guests at hotels and boarding houses and in private families have become ill, sometimes unto death, because some city has not done what it legally might have done to protect the public health. Workmen and others have been killed or maimed by the collapse of buildings which a negligent or corrupt municipal inspector had suffered to be erected. In all these cases the sufferers could have said that they assumed that the city has done all that it could and should have done.

If libelant's theory be granted, it perhaps makes no difference whether such assumption was conscious, or was altogether subconscious, or whether it was purely the creation of a useful legal fiction. The analogy between one who is injured in the highway in consequence of some neglect upon the part of the city to keep such highway clear of nuisances and dangers and the facts of the case in hand is to my thinking by no means so close as it appears to libelant. Municipalities have a proprietary interest in the highways and in much other property besides. To some of it whatever title they have is merely as trustee or quasi trustee for the public. Some of it belongs to them in very much the same sense as the property of other corporations is owned by the latter. There is nothing illogical in holding that their obligations with reference to the care and management of any property is different in kind as well as in degree from those resulting from the grant to them of the numerous and constantly increasing powers of regulation over the general activities and pursuits of the community.

It is admitted that there are some municipal powers for the non-exercise of which municipalities are not responsible to individuals. It is asserted, however, that much which has been said by courts of high authority logically forbids that such a case as that now under consideration shall be distinguished from the highway cases. Whether the distinction would or would not commend itself to a professional logician is beside the mark. The fact that in numerous cases municipalities have been held liable for injury resulting from their neglect of the duty of making and keeping the highways safe, and that no case has been found in which one of them has been made answerable under a set of facts at all similar to those now in question, sufficiently demonstrates the general understanding that such a distinction exists.

Logical anomalies are not unknown to any branch of the law. For the mere purpose of getting rid of the assumed existence of one of them, the courts may not, of their own motion, impose a great and burdensome obligation upon the municipalities of the country. If respect for logic requires that municipalities shall be made liable to those who in the future may be in like case with his client, the appeal must be addressed to the legislative and not to the judicial branch of the government. When, if ever, such an appeal is made, it will doubtless be found that there can be something said for restricting municipal liability within the bounds marked out by well-established precedents.

It follows that the exceptions of the mayor and city council of Baltimore to the libel must be sustained.

E. H. STANTON CO. et al. v. ROCHESTER GERMAN UNDER-
WRITERS' AGENCY.

(District Court, E. D. Washington, N. D. August 1, 1913.)

No. 1,551.

1. CONTRACTS (§ 147*)—CONSTRUCTION—INTENTION OF PARTIES.

In construing a contract, the intention of the parties as expressed in their language, taking the words in their ordinary and popular sense, must govern.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.*]

2. CONTRACTS (§ 148*)—CONSTRUCTION—PRELIMINARY NEGOTIATIONS.

In case of doubt as to the construction of a contract, preliminary negotiations may be taken into consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 731; Dec. Dig. § 148.*]

3. CONTRACTS (§ 143*)—CONSTRUCTION—LANGUAGE OF INSTRUMENT.

Where there is no doubt as to the meaning of a contract, there is no room for construction.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 723, 743; Dec. Dig. § 143.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexer

4. INSURANCE (§ 173*)—CONSTRUCTION OF POLICY—AMOUNT OF INSURANCE—SPECIAL PROVISION.

A fire insurance policy covering a packing plant which grouped the various structures together under several items, and provided for the amount of insurance upon each item, and also provided that the loss should attach to each building under the several items in the proportion that each bore to the value of all, plainly provides that the entire amount of the insurance for each item should not apply to any one building, but only the proportion thereof that the value of that building bears to the value of all.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 358; Dec. Dig. § 173.*]

5. INSURANCE (§ 316*)—AVOIDANCE FOR BREACH OF WARRANTY—STATUTORY PROVISIONS.

Where a fire insurance policy contained a warranty that the insured would maintain 40 fire alarm boxes and a watchman service, under the A. D. T. watch and clock system, which required the watchman to report by signal to the central office every hour, and to promptly turn in a fire alarm, the failure of the watchman to report every hour, although he did promptly turn in the alarm, would not avoid the policy, under Insurance Code Wash. 1911 (Laws 1911, c. 49) § 34, providing that a breach of warranty which does not contribute to the loss shall not avoid a policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 744-747; Dec. Dig. § 316.*]

6. INSURANCE (§ 302*)—IMPLIED REPEAL—INCONSISTENT PROVISIONS.

Section 34 of the Insurance Code (Laws 1911, c. 49) was not repealed by section 106 of the same act, which adopted the New York standard form of policy to become effective January 1, 1912, since there is no reason why the Legislature should enact section 34 for a fraction of the year, and the sections are not inconsistent; it being within the power of the Legislature to prescribe the form of a contract, and also to give it a form and construction different from that which would be given it by the courts.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 302.*]

7. COURTS (§ 366*)—UNITED STATES COURTS—CONSTRUCTION OF STATE STATUTES.

The construction of the insurance code of a state should be left to the state tribunals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. § 366.*]

At Law. Action by the E. H. Stanton Company and another against the Rochester German Underwriters' Agency. On trial to the court without a jury. Judgment rendered for the plaintiffs.

Cannon, Ferris & Swan, of Spokane, Wash., for plaintiffs.

W. W. Hindman, of Spokane, Wash., for defendant.

RUDKIN, District Judge. This is an action on two contracts of insurance to recover damages for a fire loss. The policies are of standard form with riders attached, and describe the subjects of insurance, and set forth the amounts on each class of property insured as follows:

\$......To apply proportionately upon each item (and its subdivisions) of the following schedule of amount and covering upon the property hereinafter described:

Item No.	Designation.	Construction.	Location.	Subdivision A Amounts Insured on Building.	Subdivision B Amounts Insured on Machinery.	Subdivision C Amounts Insured on Stock.	Totals Insured (in and on) Buildings.
1	{ Cold Storage, Lard, Killing, Smoke, Boiler, Fertilizer & Engine Buildings, Dressing Rooms and Fuel Vault..... }	{ Brick Concrete and Frame }	{ Blocks 29, 30, 31, 32, 33 and 43 of East Side Syndicate Addition and adjacent thereto. Spokane, Wash. }	\$75,000	\$27,000	\$30,000	\$132,000
2	Offices	Brick	Ditto	5,750	1,000	Nil	6,750
3	Garage	"	"	6,000	Nil	Nil	6,000
4	Blacksmith Shop.....	"	"	6,000	1,500	Nil	7,500
5	Ice House.....	"	"	5,000	5,000	Nil	10,000
6	Hotel	"	"	5,000	2,000	Nil	7,000
7	Stable	"	"	10,000	2,000	Nil	12,000
8	Fertilizer Warehouse.....	frame	{ W½ Sec. 15, Twp. 25, N. R. 43, E. W. M. on North Side of N. P. right of way between Green and Ferrel Sts. Spokane, Wash. }	900	Nil	500	1,400
9	Stable	frame		400	Nil	Nil	400
10	Dwelling	frame		100	Nil	Nil	100
	About 300 feet E. of Office, No. 212 Bernard Street.						
11	City Plant.....	brick	Spokane, Wash.	5,000	4,000	5,000	14,000
12	Stable	brick	Rear of Lot 17, Block 8, Havermale's Addition on S. S. of Alley, North of and running parallel to Main Ave., between Bernard and Browne Sts. Spokane, Wash.	1,000	Nil	Nil	1,000
13	On sheds, loading docks, platforms and other structures, fences, gates, flooring, vehicles, machinery, apparatus, tools, implements and appliances as located on premises of assured outside the various buildings above described and not otherwise insured.			1,200	650	Nil	1,850
				\$121,350	\$43,150	\$35,500	
	Grand Total.....						\$200,000

The first policy is in the sum of \$20,000, and the second in the sum of \$6,000. In all other respects the two policies are identical. The total loss was \$33,060.57, distributed among the different classes of property insured as follows:

Damage to the killing building described in item No. 1.....	\$19,402.48
Damage to the machinery contained in the killing building and described in subdivision B.....	3,893.99
Damage to stock contained in the killing building and described in subdivision C.....	9,764.10

But while the total loss was \$33,060.57, the plaintiffs only claim \$3,-239.75 under the first policy and \$971.80 under the second policy, by reason of other concurrent insurance covering the same loss. The sole controversy in the case arises over the following provisions contained in the policies:

"\$20,000 [\$6,000 in second policy] to apply proportionately upon each item (and its subdivisions) of the following schedule of amount and covering upon the property hereinafter described. * * *

"It is understood and agreed that, in event of loss, this insurance shall attach to each of the buildings and contents thereof described herein in the exact proportion that the value of each building and contents thereof shall bear to the value of all such buildings and contents thereof at the time of fire. This clause applies to items 1 and 13. * * *

"It is a part of the consideration of this policy and the basis upon which the rate of premium is fixed that the insured shall maintain upon the within insured premises 40 combination night watch and fire alarm boxes of the American District Telegraph Company, and the insured guarantees that, if said boxes of the American District Telegraph Company are removed at any time during the period in which this policy remains in force, they will immediately notify the representatives of the insuring company, and will pay back to said representative such proportion of the allowance now made as shall correspond to the time which this policy has then to run before terminating. * * *

"It is hereby warranted by the assured that one or more watchmen shall constantly be on duty in the premises herein described, night, Sundays and holidays, and at all times when the said premises are not in operation or open for business; watchman service being under A. D. T. watch or clock system."

A brief description of the insured premises and of the A. D. T. watch or clock system becomes necessary to a proper understanding and interpretation of the above provisions of the contracts of insurance. The main building of the packing plant is 201'x312', and includes all the subdivisions or departments under item No. 1.

The cold storage building consists of six stories and a basement, 114'x117', constructed of fireproof walls, 24 inches in thickness, rising 3 feet above the roof, and connects with the vestibule through heavy, fireproof refrigerator doors. This building is bounded on the north by the lard building with a 24-inch fireproof wall between.

The lard building consists of four stories and a basement, 48'x127'. The walls, except that adjoining the cold storage building, are fireproof, 20 inches in thickness, rising 3½' above the roof. This building also communicates with the vestibule through fireproof refrigerator steel doors.

The smokehouse building consists of four stories and a basement, 47'x49', constructed of 20-inch fireproof brick walls, rising above the

roof 3 feet, and communicates with the vestibule through steel fireproof doors.

The killing building consists of four stories and a basement, 66'x98', constructed of fireproof brick walls, 20 inches in thickness, rising 2 feet above the roof, and communicates with the vestibule through steel fireproof doors.

The fertilizer building consists of four stories and a basement, 66'x68', with a cattle pen on the roof. The floors are of reinforced concrete, and the walls are 20 inches in thickness, fireproof. It communicates with the killing building on the third and fourth floors only through 2-inch wooden doors.

The engine room is 1½ stories high, 50'x83'. The walls are fireproof, 16 inches in thickness, and it communicates with the vestibule through steel doors and wired glass windows.

The dressing rooms are located on the roof of the engine building, 17'x45' in dimensions, and inclosed by 4-inch concrete walls.

The boiler building is 1½ stories high, 47'x47' in dimensions, constructed of 16-inch fireproof brick walls, rising 1½ feet above the roof, and communicates with the fertilizer building by one unprotected opening.

The fuel vault is one story high, 17'x45' in dimensions, and constructed of concrete walls 8 inches in thickness. It communicates with the boiler building through an opening with sliding, fireproof doors.

The vestibule extends to the sixth story with re-enforced concrete floors and fireproof walls. It communicates with the cold storage building, the killing building, the smokehouse building, the engine building, and the dressing rooms through steel fireproof doors and fireproof refrigerator doors.

The offices, garage, and blacksmith shop, designated as items 2, 3, and 4, are in the same building.

The icehouse, hotel, stable, fertilizer warehouse, stable, dwelling, city plant, and stable, designated as items 5, 6, 7, 8, 9, 10, 11, and 12, are all separate buildings.

The several items which go to make up item No. 13 are scattered in different places about the plant and premises.

The A. D. T. boxes, 40 in number, are placed in the different rooms or departments of the building. "Watchman service being under A. D. T. watch or clock system" means that the watchman on duty shall ring in to the main or central office in the city of Spokane each hour for the purpose of registration. This, of course, serves as a check on the watchman, and is required for the purpose of ascertaining whether he is promptly attending to his duties. In case of fire an alarm is sent in in like manner, and is then transmitted to the city fire department.

It is admitted that a watchman was in fact on duty at the time of the fire, and that the fire alarm was sent in promptly; but it is likewise admitted that the requirement that the watchman should ring in each hour was never complied with.

Under the foregoing facts the plaintiffs contend that they are entitled to recover from the several insurance companies the full amount of their loss and proportionately from this company by reason of the

concurrent insurance, while the defendant contends that by reason of the average clause the insurance in any event only attached to the killing building, where the fire occurred, in the proportion that the value of the building bore to the value of all other items included in item No. 1 at the time of the fire, and that the like rule applies to the machinery and stock under subdivisions B and C. It further contends that by reason of the breach of the warranty to maintain the A. D. T. watch or clock system there can be no recovery in this action.

[1-4] 1. The courts have adopted certain rules for the construction of contracts, such as that the intention of the parties as expressed in their language must govern, that words are to be taken in their ordinary and popular sense, that the whole contract must be looked to, and that preliminary negotiations may be taken into consideration in cases of doubt. But it seems to me that one invariable and unvarying rule is controlling here, and that is, where there is no doubt, there is no room for construction. The contracts under consideration provide that the insurance shall apply proportionately upon each item and its subdivisions, and that in the event of fire it shall attach to each of the buildings and the contents thereof in the exact proportion that the value of each building and the contents thereof shall bear to all such buildings and the contents thereof, and to remove any possible room for doubt it is explicitly provided that the average clause shall apply to items 1 and 13. The plain meaning of all this is that the cold storage, the lard, the smoke building, and so forth, described in item No. 1, are each and all separate and distinct subjects of insurance, and that the amount of the policy was to be applied proportionately in the event of loss. It may seem a misnomer to call these separate parts or departments of one entire plant a building; but in entering into contracts parties have a right to adopt their own nomenclature, and if the language used is plain and free from ambiguity the courts have no alternative but to enforce the contract as they find it. The riders attached to the policies in suit were prepared with special reference to this plant, and, if the contracts do not mean what I have stated, they mean nothing at all, and the parties have used plain, simple language to no purpose. Further discussion could not make this more apparent. I am therefore of opinion that the insurance in question only attached to the killing building or department where the fire occurred in the exact proportion that its value bore to all the other buildings included under item No. 1 at the time of the fire, and that the same is true of the contents of the building, and under the stipulation of the parties the case will stand open for further testimony upon which to base the apportionment and fix the amount of the damages.

[5] 2. There is no merit in the claim that the failure of the packing company to maintain the A. D. T. watch or clock system defeats a recovery, for it is conceded that the failure of the watchman on duty to report to the central office hourly in no manner contributed to the loss, and section 34 of the Insurance Code of 1911 (Laws of 1911, pp. 161, 197) contains the provision that:

"The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss;

anything in the policy or contract of insurance to the contrary notwithstanding. In case a loss occurs while a breach of warranty exists, if it contributes to the loss, the insured shall only be entitled to recover the amount of insurance the premium paid would purchase at the rate that would be charged without the warranty. This section shall be liberally construed."

[6] The defendant contends, however, that this provision is in conflict with other sections of the act and particularly with section 106, adopting the New York standard form of policy as now or may be hereafter constituted, and that the operation of section 34 must be limited in point of time to the 1st day of January, 1912, when section 106 became operative, or, if its operation cannot be so restricted, that it was repealed by later conflicting provisions of the same act. I cannot agree with either of these contentions. No reason has been suggested why the Legislature should attempt to fill a temporary gap covering the brief period between 90 days after the adjournment of the 1911 session and the 1st day of January following, or why a warranty in an insurance policy should have greater effect after January 1, 1912, than before, and I discover none. The Legislature evidently intended that section 34 should form a part of the permanent Insurance Code of the state, and it is the duty of the courts to give full scope to the law as enacted. Nor is there any such conflict between section 34 and later sections as will work a repeal of the former. By one section the Legislature has prescribed a form of contract, and by another has declared the force and effect of that contract. This is not at all uncommon in legislation. Legislatures often prescribe the form of a deed or other instrument, and then give to it an effect which the courts could not give under the accepted canons of statutory construction. But the legislative will is supreme in that regard. Its powers are not restricted by the rules of grammar or the commonly accepted rules of construction; it may override both, and often does. In this case it has simply defined the force and effect of a breach of warranty in an insurance policy or contract, and it was entirely competent for that body to do so.

[7] Other questions have been discussed in the briefs; but they are not necessarily involved in this case, and the construction of the Insurance Code should be left to the tribunals of the state, where it primarily belongs.

McKERNAN et al. v. NORTH RIVER INS. CO.
(District Court, E. D. Washington, N. D. October 29, 1912.)

No. 1,578.

1. COURTS (§ 328*)—UNITED STATES COURTS—JURISDICTION—STATUTORY PROVISIONS.

An action involving \$2,500, exclusive of interest and costs, which was pending in the District Court on January 1, 1912, when Act March 3, 1911, c. 231, 36 Stat. 1169 (U. S. Comp. St. Supp. 1911, p. 246), codifying, revising, and amending the laws relating to the judiciary, took effect, is within the jurisdiction of the court under section 299 of that act, providing that the repeal of existing laws, or the amendments thereof, embraced in that act, shall not affect any suit or proceeding pending at the time of the taking effect of that act, but that all such suits and proceed-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ings may be prosecuted within the same time and with the same effect as if such repeal or amendments had not been made.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890-896; Dec. Dig. § 328.*]

2. COURTS (§ 256*)—UNITED STATES COURTS—JURISDICTION—STATUTORY PROVISIONS.

Act March 3, 1911, c. 231, § 299, 36 Stat. 1169 (U. S. Comp. St. Supp. 1911, p. 246), providing that the repeal of existing laws or the amendments thereof embraced in that act shall not affect any right accruing or accrued, or any suit or proceeding pending at the time of the taking effect of that act, but that all such suits and proceedings, and suits and proceedings for causes arising or acts done prior to such date, may be commenced or prosecuted within the same time and with the same effect as if such repeal or amendments had not been made, saves to the federal courts jurisdiction, not only of pending actions, but of causes of action which accrued prior to January 1, 1912.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 792; Dec. Dig. § 256.*]

3. INSURANCE (§ 330*)—AVOIDANCE OF POLICY—TITLE OR INTEREST OF INSURED—ENTIRE OR SEVERABLE CONTRACTS.

Where a policy for \$2,500, \$1,000 of which was on a dwelling house and \$1,500 on the household furniture therein contained, provided that the entire policy should be void if the hazard was increased by any means within the control or knowledge of the insured, or if the subject of insurance was personal property and should be or become encumbered by a chattel mortgage, the execution and delivery of a chattel mortgage on the household furniture avoided the policy, not only as to the furniture, but also as to the dwelling house, since by lessening the interest of the insured in the property it increased the hazard as to the dwelling house, as the destruction of a part of the property would almost inevitably result in the destruction of the whole.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 829-839; Dec. Dig. § 330.*]

4. INSURANCE (§ 330*)—AVOIDANCE OF POLICY—EFFECT.

Where a policy of insurance provided that it should be void if the property should be or become incumbered by a chattel mortgage, the giving of a chattel mortgage avoided the policy absolutely for all purposes and for all time, and the payment of the debt secured by the mortgage before a fire did not reinstate the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 829-839; Dec. Dig. § 330.*]

At Law. Action by Ida McKernan and others against the North River Insurance Company. Judgment of dismissal.

W. C. Donovan, of Spokane, Wash., for plaintiffs.

Happy, Cullen, Lee & Hindman, of Spokane, Wash., for defendant.

RUDKIN, District Judge. This is an action on a fire insurance policy. On the 26th day of March, 1910, the defendant company insured the plaintiff McKernan for the term of three years from noon of that day in an amount not exceeding the sum of \$2,500 against all loss or damage by fire on the following described property while located and contained as described in the policy: One thousand dollars on a one and one-half story frame building, its additions, etc., while occupied only as a dwelling house, situate at Lacy street, between Thirtieth and Thirty-First avenues, in the city of Spokane;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fifteen hundred dollars on household, kitchen furniture, etc., while contained in the above dwelling house and its additions. The following stipulation or condition, among others, was printed on the back of the policy and made a part of the contract of insurance:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, * * * if the hazard be increased by any means within the control or knowledge of the insured; * * * or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

On the 4th day of February, 1911, the plaintiff McKernan executed and delivered a chattel mortgage on all the personal property described in the policy to the plaintiff Michael Bohan, to secure an indebtedness of \$140 evidenced by a promissory note in that amount. On the 6th day of March, 1911, the dwelling house and the personal property therein contained was totally destroyed by fire. The chattel mortgage above mentioned was not satisfied or released of record until after the destruction of the mortgaged property, but the proof shows that the mortgage debt was in fact paid within a few days after the execution of the mortgage and before the fire. The present action was commenced in the state court to recover the full amount of the insurance some time during the year 1911, the exact date not appearing of record, as the original summons and complaint were never filed in the state court, but in any event it was prior to the 8th day of September, for on the latter date the cause was removed into this court, or rather into the old Circuit Court, on the petition of the defendant. Other matters were interposed in defense, but the foregoing statement is sufficient for the presentation of such questions as I deem decisive of the case.

Under the foregoing facts the plaintiffs contend, first, that this court is without jurisdiction, because the matter in controversy, exclusive of interest and costs, does not exceed the sum or value of \$3,000; second, that the policy was not avoided by the execution of the chattel mortgage, because only a part of the insured property was incumbered or mortgaged; and, third, that the insurance was only suspended while the incumbrance existed, and was immediately reinstated as soon as the indebtedness secured by the mortgage was paid. The defendant, on the other hand, contends that the court has jurisdiction, that the incumbrance of the personalty by chattel mortgage absolutely avoided the contract of insurance, and that the contract remained null and void, notwithstanding the payment of the mortgage debt before the destruction or loss of the insured property by fire.

[1, 2] 1. The case presented is clearly within the jurisdiction of this court. The amount in controversy is \$2,500, exclusive of interest and costs, and the action was pending here when the act of March 3, 1911, codifying, revising, and amending the laws relating to the judiciary, took effect on January 1st of this year. Section 299 of that act contains the following saving clause:

"The repeal of existing laws, or the amendments thereof, embraced in this act, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding, including those pending on writ of error, appeal, certificate, or writ of certiorari, in any appellate court referred to or included

within the provisions of this act, pending at the time of the taking effect of this act, but all such suits and proceedings, and suits and proceedings for causes arising or acts done prior to such date, may be commenced or prosecuted within the same time, and with the same effect, as if such repeal or amendments had not been made."

This section saves to the federal courts jurisdiction, not only of pending actions, but of causes of action which accrued prior to January 1, 1912. *Lincoln v. Robinson* (D. C.) 194 Fed. 571; *Taylor v. Midland Valley R. Co.* (D. C.) 197 Fed. 323; *Dallyn v. Brady* (D. C.) 197 Fed. 494.

[3] 2. There is at least apparent conflict of authority as to the rules by which we determine whether a contract of insurance which insures several items of property is entire or divisible. In *McGowan v. People's M. F. Ins. Co.*, 54 Vt. 211, 41 Am. Rep. 843, the court said:

"This is a question of great practical importance, as a large proportion of insurance contracts embrace more than one item of property insured. The decisions are apparently conflicting, but, we think, are easily reconciled by referring to the plain principles which should govern them. The general rule, 'void in part, void in toto,' should apply to all cases where the contract is affected by some all-pervading vice, such as fraud, or some unlawful act, condemned by public policy or the common law, cases where the contract is entire, and not divisible, and all those cases where the matter that renders the policy void in part, and the result of its being so rendered void, affects the risk of the insurer upon the other items in the contract. Keeping these rules in mind, the leading cases upon this subject can all be reconciled."

In *Loomis v. Rockford Insurance Co.*, 77 Wis. 87, 45 N. W. 813, 8 L. R. A. 834, 20 Am. St. Rep. 96, the court said:

"There is some apparent conflict of authority as to the rules by which it is to be determined whether the contract in a given case, which insures several items of property, is an entire contract, or whether it is divisible. An examination of the cases will show, we think, that as to a large majority of them, the conflict is apparent rather than real. All the cases seem to agree that, although the insurance is distributed to the different items of insured property, the contract is indivisible if the breach of the contract as to an item of property affects, or may reasonably be supposed to affect, the other items, by increasing the risk thereof."

The cases above cited contain a full review of the authorities bearing upon this question, and the rule announced is amply supported by both reason and authority. There is but little difficulty in applying these general rules to the facts of the present case. Incumbrance of insured property increases the hazard to the insurer, because it lessens the interest of the insured in the property to the amount of the incumbrance, and to that extent at least lessens his interest in protecting the property from loss or destruction. And if the hazard was increased as to the household furniture, it was of necessity increased as to the dwelling house which contained it, for the entire property was insured as one risk, and was so closely connected and associated together that the destruction of a part by fire would almost inevitably result in the destruction of the whole.

[4] 3. The proposition that a contract of insurance is only suspended by a breach of warranty, such as a failure to occupy the insured premises, the making of repairs, or by incumbering the prop-

erty, and becomes reinstated if the property is occupied, the repairs completed, or the incumbrance removed before the destruction of the insured property by fire, finds some support in the decided cases; but the great weight of authority is to the contrary, and this is especially true of the decisions in the federal courts. *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; *Assurance Co. v. Grand View Bldg. Ass'n*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; *Atlas Reduction Co. v. New Zealand Ins. Co.*, 138 Fed. 497, 71 C. C. A. 21, 9 L. R. A. (N. S.) 433; *Mulrooney v. Royal Ins. Co.*, 163 Fed. 833, 90 C. C. A. 317; *Gilchrist Transp. Co. v. Phoenix Ins. Co.*, 170 Fed. 279, 95 C. C. A. 475.

Thus, in *Moore v. Phoenix Ins. Co.*, 62 N. H. 240, 13 Am. St. Rep. 556, the policy contained the usual provision that it should become null and void if the insured premises became vacant and unoccupied for more than ten days without the consent of the insurance company indorsed thereon, and it was held that a vacancy of three months avoided the policy, even though the premises were occupied at the time of their destruction, and that the contract, being once terminated, could not be revived without the consent of both the contracting parties; and this case was cited with approval by the Supreme Court of the United States in *Imperial Fire Ins. Co. v. Coos County*, supra.

For the foregoing reasons, I am of opinion that the incumbrance of the personal property absolutely avoided the policy for all purposes and for all time, and a judgment of dismissal will be entered accordingly.

UNITED STATES v. SPOKANE & I. E. R. CO.

(District Court, E. D. Washington, N. D. September 17, 1912.)

No. 1,261.

STREET RAILROADS (§ 73*)—SAFETY APPLIANCE ACT—"CARS USED ON STREET RAILWAYS."

Cars which are "used on street railways," excepted by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1911, p. 1314), from the operation of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act April 1, 1896, c. 87, 29 Stat. 85, are such cars only as are used solely on street railroads, and do not include cars of an interurban line, though they are also run on a street car line, or cars of the street railway line when run on the interurban line.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 153; Dec. Dig. § 73.*]

Action for penalties by the United States of America against the Spokane & Inland Empire Railroad Company. On motion of defendant for judgment notwithstanding the verdict. Motion denied.

Oscar Cain, U. S. Atty., and E. C. Macdonald, Asst. U. S. Atty., both of Spokane, Wash., and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C.

Graves, Kizer & Graves, of Spokane, Wash., for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RUDKIN, District Judge. The present action was instituted by the United States attorney for this district, upon the suggestion of the Attorney General of the United States, and at the request of the Interstate Commerce Commission, to recover penalties for violations of the Safety Appliance Act of March 2, 1893, as amended by the acts approved April 1, 1896, and March 2, 1903, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]; 29 Stat. 85; 32 Stat. 943 [U. S. Comp. St. Supp. 1911, p. 1314]).

The complaint contains 15 causes of action in all, the first 12 for using in interstate commerce certain cars which were not provided with secure grabirons or handholds in the ends and sides of the cars for greater security of men in coupling and uncoupling the cars, as required by section 4 of the act, and the last 3 for permitting the hauling and using in interstate commerce of cars not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of men going between the ends of the cars, as required by section 2. The jury returned a verdict of guilty under the testimony as to the first 12 causes of action, and a like verdict, by direction of the court, as to the remaining 3 causes of action, and the defendant has interposed a motion for judgment notwithstanding the verdict. The sole ground of the motion is that that the cars in question were used upon street railways, within the meaning of the exception or saving clause embodied in the amendment of 1903, which exempts from the provisions of the act certain cars exempted by a prior amendment, "or which are used upon street railways." 32 Stat. 943, *supra*.

The claims of the respective parties may be thus briefly stated: The government contends that the saving clause excludes from the operation of the act only such cars as are used exclusively on street railways, or what might be styled street cars proper, while the defendant contends that all cars which are habitually operated over street railways are excluded, even though they are so operated for a small part of their journey only. This latter construction would, of course, exclude from the operation of the act practically all interurban trains, for it is conceded that such trains are usually, if not uniformly, operated over the street railways in the cities between which or through which they run. For the purposes of this opinion it would perhaps be a sufficiently definite description of the defendant's railway system to say that it differs in no respect from the interurban railways operated so extensively throughout the country. The company owns and operates a street railway system in the city of Spokane, and two or more interurban lines, one of which extends from the city of Spokane, in the state of Washington, to Cœur d'Alene City, in the state of Idaho, and is engaged in interstate commerce. The cars in question were hauled over this latter line. The passenger depot is in the heart of the city of Spokane, and passenger trains run from this depot over the street railway tracks to the private right of way of the company, a distance of a mile or more. From the latter point the trains run over the company's private right of way to Cœur d'Alene City, a distance of about 30 miles. The cars differ little from the passenger coaches

in common use on all commercial railways. They are usually operated in trains and run at a high rate of speed. The trains run on schedule time, and their movement is controlled by train dispatchers and telegraphic orders in the customary way. Trains take up passengers at different points within the city destined to points without the city, and discharge passengers at different points within the city from points without the city, but carry no passengers between points within the city. The trains carry baggage as well as passengers, and freight trains are operated over the private right of way, but not as a rule on the street railway tracks.

The cars mentioned in the first 12 causes of action were the interurban cars in common use, while the cars mentioned in the last 3 causes of action were ordinary street cars, chained together and used on the interurban line in an emergency. For the purposes of the present motion it must be assumed that the first 12 cars were not provided with the grabirons or handholds required by the statute, and it is admitted that the last 3 cars were not equipped with automatic couplers. The object of the Safety Appliance Act is to protect those engaged in hazardous occupations in which thousands of men are annually maimed and killed, and there is nothing in the record to indicate that there is less hazard in the operation of an interurban train than any other. Indeed, the chief difference between the interurban train of the present day and the train operated over the steam railway lies in the motive power. Nor has any satisfactory reason been suggested why interurban roads cannot readily comply with all the requirements of the Safety Appliance Act, or why trains so equipped cannot operate over street railways, if need be. True, the grabirons or handholds cannot be placed beneath the cars now in use, as required by the order of the Interstate Commerce Commission made pursuant to the act of Congress of April 14, 1910 (36 Stat. 298 [U. S. Comp. St. Supp. 1911, p. 1327]), because the long swing of the drawbar in turning street corners will either break the handholds or grabirons from the car or throw the car from the track. But the order in question was not in force at the time of the use of the cars here complained of, and it is not to be presumed that the Interstate Commerce Commission will make regulations which are either unreasonable or unnecessary; and, if it has done so, it is not to be presumed that it will refuse to modify such regulations on proper application and showing. In any event, a regulation made by the Interstate Commerce Commission under an act passed in 1910 can have but little bearing on the construction of an act passed in 1903.

It was urged in argument that a great many interurban railways were under construction at the time of the passage of the act of 1903, and that Congress had such roads in view when it employed the expression, "used on street railways." It seems to me that if Congress had such roads in mind it would have described them more definitely than by referring to a mere incident to their main or principal use. The term "used" means "employed for a purpose," and imports a certain degree of permanence.

Section 7 of the act of Congress of March 3, 1851 (9 Stat. 636, c. 43), entitled "An act to limit the liability of shipowners and for other purposes," contained the following exception or saving clause:

"This act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatever, used in rivers or inland navigation."

And in construing the term "used" in *Moore v. American Transportation Co.*, 24 How. 1, 16 L. Ed. 674, the court said:

"This word 'used' means, in the connection found, 'employed,' and doubtless, in the mind of Congress, was intended to refer to vessels solely employed in rivers or inland navigation."

So here Congress intended to exclude from the operation of the act such cars only as are used solely on street railways. This construction is reasonable and none too liberal. The exception or saving clause must be construed strictly, and no other construction will give full effect to the objects and purposes which Congress had in view. The first 12 cars mentioned in the complaint were therefore not used on street railways within the meaning of the law, and it is needless to say that street cars cannot lawfully be chained together and used for the purpose of carrying passengers in interstate commerce.

The motion for judgment notwithstanding the verdict is denied.

In re ROSE.

(District Court, N. D. Georgia. July 4, 1913.)

No. 257.

1. SALES (§ 454*)—CONDITIONAL SALE—CONTRACT—NECESSITY OF RECORDING.

A contract between R. and H., reciting that, in consideration of extension of credit for shoes sold and hereafter to be sold by R. to H., the said R. retains the title to said shoes, and providing that H. may sell them at retail, and that R. may at any time enter the premises of H. and take all shoes sold by R., and that H. shall bear any loss by fire, and in the event of the return of the shoes shall pay 25 per cent. of the invoice price, as liquidated damages to R., is clearly one of conditional sale, required by the laws of Georgia to be recorded, to be valid as against subsequent lienors.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1324, 1325, 1333, 1334; Dec. Dig. § 454.*]

2. BANKRUPTCY (§ 152*)—LIEN OF TRUSTEE—DATE OF LIEN.

The time when one is adjudged a bankrupt, as of which date the trustee in bankruptcy, by provision of Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), takes title, is the date when the judgment lien given the trustee, by the amendment of that act by Act June 25, 1910, c. 412, 36 Stat. 838, accrues and attaches.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 194; Dec. Dig. § 152.*]

3. BANKRUPTCY (§ 152*)—CONDITIONAL SALES—BANKRUPTCY OF BUYER—RIGHTS OF SELLER AGAINST TRUSTEE.

Though a contract of conditional sale to a bankrupt is not recorded till the day after the bankruptcy case is filed, the rights of the seller thereunder may be superior to those of the trustee in bankruptcy under

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

his lien on the property, depending somewhat on the laws of the state as to recording such contracts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 194; Dec. Dig. § 152.*]

In the matter of Harry Rose, bankrupt. On intervention of Rice & Hutchins. Heard on certificate of the referee. Referred back to referee.

Green & Michael and S. C. Upson, all of Athens, Ga., for interveners.

Smith, Hammond & Smith, of Atlanta, Ga., for trustee.

NEWMAN, District Judge. This case comes before the court on certificate of the referee. Rice & Hutchins filed an intervention in the bankruptcy proceeding of Harry Rose, asking to reclaim certain shoes which had gone from their wholesale store in Atlanta into certain stores operated by Harry Rose at Elberton, Ga., Calhoun Falls, S. C., and Seneca, S. C. The interveners claim that the goods were put in these stores on consignment.

The paper drawn up between Rice & Hutchins and the bankrupt is as follows:

"Georgia, Fulton County:

"This contract, made this the 14th day of March, 1911, between Rice & Hutchins, of said state and county, and Harry Rose, of Elbert county, said state, witnesseth: That in consideration of an extension of credit for shoes sold and hereafter to be sold by Rice & Hutchins to said Harry Rose, the said Rice & Hutchins hereby retain the title to all shoes now and hereafter sold to said Harry Rose, and hereby agree that said Harry Rose may sell any and all of said shoes at retail to bona fide retail customers; but it is agreed that no sale in bulk shall be made, and that said Rice & Hutchins may at any time enter the premises of said Harry Rose, and take possession of all shoes sold by them, either with or without process of law. It is further agreed that said Harry Rose shall bear any loss occasioned by fire, or loss or damage, and that, in the event of the return of said shoes, said Harry Rose shall pay 25 per cent. of the invoice price, as liquidated damages to said Rice & Hutchins. Witness my hand and seal."

The trustee for the bankrupt denied that the sales made under this paper were consignments, as claimed by the intervening firm, Rice & Hutchins, but that they were conditional sales, covered by a contract not recorded in Georgia at all, and not recorded in South Carolina until the day after the bankruptcy case was filed.

On the hearing before the referee he held that the goods could not be reclaimed. His opinion on the subject is as follows:

"This case really turns on a question of law, but in order to make a complete finding of fact as well as law, I hold that sufficient proof was adduced by the intervener to show to my satisfaction that shoes belonging to this creditor (should the contract have been one of consignment) were identified and set apart in the three stores of the bankrupt by a salesman of the creditor, to the amount of \$823.00, to-wit:

At Elberton, Ga., store	\$308 40
At Calhoun Falls, S. C.	190 50
At Seneca, S. C., store	324 10
Total	\$823 00

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"The parties had an attorney to draw their contract, and it is the foundation of the claim on which this reclamation is brought. It is contended now that this contract is ambiguous, and that it is incomplete, and does not fully set forth all the terms of the agreement; but I do not think that it is either incomplete nor ambiguous. It was, to my mind, a sale of the shoes, with retention of title thereto until paid. The paper was not recorded at all in Georgia, and not recorded in South Carolina until the day after bankruptcy case was filed.

"That the creditor considered the instrument as one of conditional sale is evidenced clearly by having same probated and recorded in South Carolina, though too late to make it valid as against the trustee's title, which vested as of the date of the filing of the involuntary bankruptcy petition, a day previous to the proper recordation in South Carolina. Having held that the instrument is a paper evidencing that the shoes were sold on a conditional bill of sale, and that the same was not recorded, it follows that the trustee's claim is superior to that of the intervenor.

"His honor, the judge of this District Court, has in a recent case of *In re Farmers' Supply Co.*, 196 Fed. 990, 28 Am. Bankr. Rep. 535, ruled on a case involving the same point as in the instant case, and his decision was that, under the amendment of 1910 to section 47 of the Bankrupt Act, the trustee's title to goods sold under a conditional sale, and not recorded as provided by the Georgia statute, was superior to the lien of the vendor.

"It is accordingly ordered that the petition of Rice & Hutchins, Atlanta, Ga., to reclaim the shoes in question, be denied. It is further ordered that the claim of Rice & Hutchins be allowed as an unsecured debt for purpose of receiving dividends in the sum of \$823."

[1] There was a prayer in the petition filed by the interveners stating that the contract as drawn between the intervenor and Rose did not state the true intent of the parties, that the intention was to make it a paper providing for a consignment of goods merely, by Rice & Hutchins to Rose. The referee did not see his way to reform the contract, and I am not aware that a referee in bankruptcy has any power to reform a written contract. He might have the power, if he thought the evidence showed that it was the real intent of the parties that a consignment was to take place, to so hold under certain circumstances, but this does not appear to me to be such a case. That this is a contract of conditional sale by this firm is clear and unmistakable.

[2] Such being the case, it is necessary under the laws of Georgia that it should be recorded to be valid as against subsequent lienors. Under the amendment to the Bankruptcy Act of June 25, 1910, trustees in bankruptcy are given a lien, but it is an open question as to whether the date of this lien should be considered as of the time of the institution of the bankruptcy proceedings or the time of the adjudication.

As to the case in Georgia, however, the paper is not recorded at all, and the referee says that it will be seen that it was not recorded in South Carolina until the day after the bankruptcy case was filed. By section 70 of the Bankruptcy Act, the title of the trustee to the property of the bankrupt is as of the date he was adjudged a bankrupt. So, taking this provision of section 70 of the original act as to the time when title vests in the trustee, it would seem that this judgment lien given the trustee by the amendment of June 25, 1910, would accrue and attach as of the date the trustee takes title under the original act.

[3] It may be, therefore, that the record of this conditional sale in South Carolina antedated the rights of the trustee so far as the judg-

ment lien is concerned, depending somewhat upon the record statutes of South Carolina concerning the record of such papers. Clearly, then, according to the referee's report, as I understand it, as to the property in Georgia (that is, in the store at Elberton), the trustee's rights are superior to the rights of Rice & Hutchins, while in South Carolina it may be different, depending upon the laws of South Carolina.

The matter is referred back to the referee for further consideration and disposition as to the South Carolina property.

J. ELWOOD LEE CO. v. GRACE HOSPITAL.

(District Court, D. Massachusetts. July 18, 1913.)

No. 247 (C. C. 840).

1. COURTS (§ 264*)—JURISDICTION OF FEDERAL COURTS—ANCILLARY PROCEEDING.

Independently of diverse citizenship, amount involved, or federal question, a federal court has jurisdiction of a proceeding by its receiver to collect a claim; the proceeding being ancillary.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 801; Dec. Dig. § 264.*]

2. COURTS (§ 505*)—JURISDICTION OF FEDERAL COURTS—CLAIM AGAINST DECEDENT'S ESTATE.

A federal court has jurisdiction to adjudicate a claim against executors for a legacy of a definite amount, which they have refused to pay, notwithstanding administration of the estate is proceeding in a probate court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1410; Dec. Dig. § 505.*]

3. EXECUTORS AND ADMINISTRATORS (§ 314*)—ACTION FOR LEGACY—GROUND FOR DISMISSAL.

That the assets of a decedent's estate, administration of which is proceeding in a probate court, are insufficient to pay all legacies in full, affords no reason for a federal court dismissing or declining to proceed on a petition against the executors on a claim for a legacy which they have refused to pay, where the amount available for legacies has been ascertained, though this may be available as part of the defense.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1274-1297; Dec. Dig. § 314.*]

4. EXECUTORS AND ADMINISTRATORS (§ 314*)—ACTION FOR LEGACY—PARTIES.

Where the amount available for legacies has been ascertained, the fact that the assets of a decedent's estate, administration of which is proceeding in a probate court, are insufficient to pay all legacies in full, does not require the other legatees to be made parties to a proceeding in a federal court against the executors for a legacy which they have refused to pay.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1274-1297; Dec. Dig. § 314.*]

In Equity. Bill by the J. Edward Lee Company against the Grace Hospital. On motion to dismiss, and plea in abatement of receivers' petition, filed September 3, 1912, against executors of will of Annie Preston Lincoln and others. Motion denied, and plea overruled

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Adams & Blinn, of Boston, Mass., for complainant.
Frank W. Knowlton, of Boston, Mass., for defendant.
Stimson, Stockton, Livermore & Palmer, of Boston, Mass., for Edw. Friebe, Abbey F. Friebe and the State Street Trust Co.
H. C. Dunbar, of Boston, Mass., for Jacob Snyder.
James M. Swift, Atty. Gen. of Massachusetts, pro se.

DODGE, Circuit Judge. In this case receivers were appointed March 24, 1911, upon a creditors' bill, and were authorized to take possession of the respondent's property, conduct its business until the further order of the court, and collect its assets. The bill prayed for the application of its assets, under the direction of the court, to the payment of its debts.

On September 3, 1912, the receivers filed the petition above referred to under authority from the court. Their petition alleges that among the respondent's assets is a claim to a legacy of \$25,000 under the will of Annie Preston Lincoln, late of Boston, and that the executors have paid over to them \$10,000 on account of said legacy, but refuse to pay over the remainder without security to hold them harmless, and question their right to the remainder. Alleging, further, that the amount is needed for the administration of the respondent's assets as directed by the court, they ask the court to decree that they are now entitled to the remainder, and order the executors to pay it over to them forthwith. The executors have moved to dismiss the petition, for the reason:

"That the probate court for the county of Suffolk, commonwealth of Massachusetts, acting under a petition for the probating of the will of said Annie Preston Lincoln, filed May 10, 1910, and allowed May 26, 1910, has already taken jurisdiction of the will and estate of said Annie Preston Lincoln and of the payment of the bequests thereunder, and the settlement of the estate in that court is still pending."

They have also filed a so-called "plea in abatement" to the petition, in which they allege that:

"The estate of Annie Preston Lincoln has been and is insufficient to pay in full all legatees under said will, and that, therefore, every such legatee is a party in interest to this proceeding, and should have been made a party respondent thereto."

[1] The questions thus raised have been submitted upon facts agreed by the parties. There can be no question as to the jurisdiction of the court, independently of diverse citizenship, amount involved, or federal question; the proceeding against the executors being ancillary to the suit in which it is brought. The executors, indeed, have not properly questioned the jurisdiction. Their motion to dismiss represents only that the court should not take jurisdiction; and, although it is said in the agreed statement of facts that they have appeared specially, this statement is not borne out by the records, which contain a general appearance on their behalf without reservation.

[2] While the court might, in its discretion, decline jurisdiction, the motion to dismiss sets forth no sufficient reason for doing so. The fact that the will has been proved and administration of the estate is

proceeding in the probate court is no objection to the jurisdiction of this court over a claim against the executors for a legacy of definite amount which they have refused to pay. While this court has no jurisdiction to determine matters purely of administration, it may adjudicate the claim against the estate. *Waterman v. Canal & Co.*, 215 U. S. 33, 45, 30 Sup. Ct. 10, 54 L. Ed. 80; *Northrup v. Browne* (C. C. A.) 204 Fed. 224, 229, 230. The petition does not ask or require the court to interfere with the probate administration of the estate or the settlement of the executors' probate accounts.

[3] As to the "plea in abatement," the agreed statement of facts sets forth that the assets of the estate are insufficient to pay all legacies in full, after payment of debts and administration charges. But it sets forth, also, that the amount available for legacies has been ascertained, and the computation of the amount payable upon them, pro rata, may easily be made. These facts afford no reason for dismissing the petition, or declining to proceed upon it, though they may be available to the executors as part of their defense.

[4] Nor do these facts require the joinder, as parties, of all other legatees named in the will. "But where a legatee sues for a specific legacy, or for a sum certain on the face of the will, it is not in general necessary that other legatees should be made parties." *Story, J.*, in *West v. Randall et al.*, 2 Mason, 181, 192, Fed. Cas. No. 17,424. See, also, *Glover v. Patten*, 165 U. S. 394, 402, 403, 17 Sup. Ct. 411, 41 L. Ed. 760.

The motion to dismiss is denied, and the plea overruled.

THE A. H. CHAMBERLAIN.

(District Court, E. D. New York. July 25, 1913.)

1. SEAMEN (§ 27*)—LIEN FOR WAGES—"CANAL BOAT"—CONSTRUCTION OF STATUTE.

Rev. St. 4251 (U. S. Comp. St. 1901, p. 2929), which provides that "no canal boat without masts or steam power, which is required to be registered or licensed or enrolled and licensed," shall be subject to a maritime lien for wages, applies to any boat without masts or steam power, which is used as a canal boat on canals and rivers, and required to be registered, whether architecturally a "canal boat" or a scow.

[Ed. Note.—For other cases, see *Seamen*, Cent. Dig. §§ 4, 141, 157-169; Dec. Dig. § 27.*

For other definitions, see *Words and Phrases*, vol. 1, p. 948.]

2. SEAMEN (§ 27*)—LIEN FOR WAGES—"MASTER."

A captain of a scow, having no seamen under him, and who does the work of a deckhand, and does not have the right to control the vessel's movements or employment, and collects freight only by special direction of the owner, is not a "master," and as a general proposition is entitled to a lien for wages.

[Ed. Note.—For other cases, see *Seamen*, Cent. Dig. §§ 4, 141, 157-169; Dec. Dig. § 27.*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4403, 4404.]

In Admiralty. Sui by Albert H. Doty against the scow A. H. Chamberlain and Michael K. Neville as owner. Decree for libellant.

Silas B. Axtell, of New York City, for libellant.
Avery F. Cushman, of New York City, for claimants.

CHATFIELD, District Judge. The libellant was employed by the agent of the owner of the scow A. H. Chamberlain, at the rate, as he alleges, of \$40 per month. All his transactions were with Michael K. Neville, the agent, and payments of wages have been made by Mr. Neville on behalf of his wife. Since January, 1910, the libellant has kept a record, in which he has entered month by month the amount of payments to him, and these show a balance in his favor of \$385.65 up to the month of July, 1912. During this period only January, 1912, shows receipts by the libellant for the full amount of \$40 claimed by him.

During the month of March, 1912, certain checks for his wages were given to him, each containing the statement "in full to date for services," and are indorsed by the libellant. The answer denies the right of a scow captain to obtain a lien for wages, and alleges that the rate of employment was for \$30 and \$35 per month, but was never at the rate of \$40.

[1] The claimant on the trial also charged that the Chamberlain was not a boat subject to a maritime lien. It is alleged that she is in fact a canal boat, and that under section 4251, R. S. (Act July 20, 1846, c. 60, 9 Stat. 38 [U. S. Comp. St. 1901, p. 2929]), she may not be libeled for wages.

It appears that the Chamberlain is a square-built scow without motive power or masts, and that she has been used both in the canals and in waters around New York, going as far as New Haven and through the Sound, up the Hudson, and through the canals and rivers to Philadelphia. The fact that she is used like a "canal boat" does not make her a "canal boat" from the standpoint of ship's architecture, as the word conveys a definite meaning which has attached to boats of a particular shape, and which are distinguishable from scows, even if both carry cargo in similar waters and are drawn by similar motive power.

But when we consider the statute, it is apparent that its use of the words "canal boat" is intended to mean a cargo boat of the sort described, used or to be used on the rivers or the canals during the voyage or service under consideration, and would include all boats used as cargo carriers and towed as "canal boats" through the canals and rivers. The statute adds to the words "canal boat" "without masts or steam power, which is required to be registered, licensed, or enrolled and licensed." A scow-built boat, operating the canals for the same use as a canal boat, would have to be registered, and would be (for all purposes covered by the statute) treated as a canal boat. Any reason (arising from the relationship of the owners or other parties to a boat) for exempting it from liens for wages would apply to any boat capable of registry and use as a canal boat; and the section would therefore seem both in language and purpose to apply to such a boat as the Chamberlain, if liable to registry and use upon voyages through the canals during a large part of the period in which the libellant's

claim for wages has accrued. The Chamberlain has actually been in the service of carrying cargo through the canals of this state and other states, and it is difficult to see how he could support his claim for a general lien for services rendered while the boat was in fact a "canal boat" under the statute. On the other hand, if she was not registered or used as a canal boat, she would not be subject to the provisions of this statute when on a trip up the Sound or around the harbor. *The William L. Norman* (D. C.) 49 Fed. 285.

The libellant signed himself as captain, receipted bills of lading, and generally acted as the owner's representative in whatever was necessary to be done upon the scow's trips. In some instances he accepted freight money and applied it to his wages account. In other respects he was but a mere deckhand, and in fact during the greater part of the time was the only person employed upon the scow for everything which had to be done. Such a man would not be a master, and it would seem could have a lien for wages, as a general proposition.

In *Willard v. Dorr*, Fed. Cas. 17,679 (1822), it was held that, since at common law a master had no lien upon a ship for wages, no such lien could be recognized in the admiralty courts of this country, and the reason for this has been placed upon the ground that the master is the representative of the owner, and therefore cannot impress a lien upon funds in his own control, or that he has made a personal contract with the owner which is not dependent upon the security of the boat, and that his hiring of the other members of the crew upon the boat gives them a different status than his own. *The Orleans v. Phœbus*, 11 Pet. 175, 9 L. Ed. 677; *The Carrier Dove*, 97 Fed. 111, 38 C. C. A. 73.

[2] Section 4612, R. S. (U. S. Comp. St. 1901, p. 3120), defines a master to be "every person having command of a vessel of a citizen of the United States," while "seamen" are "persons employed to serve in any capacity on board the same." These definitions are for the purposes of "title 53" relating to "Merchant Seamen." But by analogy a boat having no "seamen" required to sign for the voyage, and hence having no master, would still be the subject of a maritime lien by a wage-earner working thereon, unless the boat be a canal boat or local craft not subject to admiralty jurisdiction. *Orleans v. Phœbus*, 36 U. S. (11 Pet.) 182, 9 L. Ed. 677.

But the captain of a scow or barge, who does the work of a deckhand, and does not have the right to control the vessel's movements nor employment, and can act only as agent, in the sense that any sailor might act under specific direction of his captain, is not a master, and does come within the provisions of the section.

Doty seems to have contracted personally with the owner's agent. But Doty did not represent the owner in such a way as to indicate that his services were rendered to the individual rather than to the boat. While, therefore, it will be held that he might acquire a lien, considerable question arises from the fact that he did nothing to enforce this lien, nor to establish it, for several years, and that during a considerable part of the time the boat appears to have been a canal boat within the meaning of section 4251, R. S.

There is no satisfactory testimony to contradict Doty's claim that his wages were \$40 per month, and his use of the three checks given, with the words written in "in full to date for services," will not estop him from showing that a balance is in fact due; but he can recover only for services when the boat was not in fact a "canal boat," under section 4251.

This may be disposed of on the reference, which will be ordered.

UNITED STATES v. SPOKANE MILL CO.

(District Court, E. D. Washington, N. D. May 8, 1913.)

No. 88.

1. ABATEMENT AND REVIVAL (§ 39*)—DISMISSAL—REINSTATEMENT AFTER DISSOLUTION OF CORPORATION.

An action against a corporation, which has been dismissed for want of prosecution, with leave to move to reinstate, will not be reinstated, where it appears that the corporation has been dissolved by operation of the state law under which it was created.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 194-204; Dec. Dig. § 39.*]

2. COURTS (§ 366*)—UNITED STATES COURT—DECISION OF STATE COURT AS AUTHORITY—CORPORATE RIGHTS.

The effect of the failure of a corporation to pay the annual license fee required by the state statute is a question of local law, upon which the decision of the state court is final.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. § 366.*]

3. ABATEMENT AND REVIVAL (§ 39*)—DISSOLUTION OF CORPORATION.

The dissolution of a corporation abates an action pending against it at the time of its dissolution, in the absence of a special statute to the contrary.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 194-204; Dec. Dig. § 39.*]

Action by the United States against the Spokane Mill Company, a corporation. On motion of the United States for reinstatement of the action, which had been dismissed for want of prosecution. Motion denied.

Oscar Cain, U. S. Atty., of Spokane, Wash.

RUDKIN, District Judge. The present action was commenced on the 13th day of May, 1892, almost 21 years ago, to recover the value of certain timber removed from the public domain. The appearance docket shows that certain proceedings were had in the action during the years 1892 and 1893, but no further steps were taken until the 5th day of April, 1898, when a motion for a continuance was filed, by which party does not appear, as the motion itself is not among the files. The case was then permitted to lie dormant until the 8th day of October, 1912, when it was dismissed by the court, of its own mo-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion, for want of prosecution, with leave to move to reinstate within 60 days.

[1] A motion to reinstate has been interposed, and under ordinary circumstances the motion would be granted; but the attorney for the government admits that the defendant corporation was dissolved by operation of the laws of the state of Washington several years ago for failure to pay its annual license fee, and in the face of this admission it would be an idle formality to reinstate the case, only to dismiss it upon another ground.

[2, 3] In *Hawley v. Bonanza Queen Mining Co.*, 61 Wash. 90, 111 Pac. 1073, the court held that a corporation organized under the laws of this state was dissolved by operation of law for failure to pay its annual license fee for a period of two years, or to apply for reinstatement within the time prescribed by law thereafter, and that such dissolution during the pendency of an action abated the action by mere operation of law. The proposition that a corporation is dissolved by operation of law for failure to pay its annual license fee presents a mere question of local law, upon which the decision of the highest court of the state is final, and the proposition that the dissolution of the corporation abates an action pending against it is fully supported by the decisions of the Supreme Court of the United States.

In *National Bank v. Colby*, 88 U. S. (21 Wall.) 609, 22 L. Ed. 687, Mr. Justice Field said:

"With the forfeiture of its rights, privileges, and franchises the corporation was necessarily dissolved, as the decree adjudged. Its existence as a legal entity was thereupon ended; it was then a defunct institution, and judgment could no more be rendered against it in a suit previously commenced than judgment could be rendered against a dead man, dying *pendente lite*. This is the rule with respect to all corporations whose charter existence has come to an end, either by lapse of time or decree of forfeiture, unless by statute pending suits be allowed to proceed to judgment notwithstanding such dissolution. The prolongation of the corporate life for this specific purpose as much requires special legislative enactment as does the original creation of the corporation. No such enactment is found in the act of Congress authorizing the creation of national banks and prescribing their powers, nor is there any provision elsewhere that we are aware of which would prevent the dissolution of a corporation from working the abatement of a suit pending against it at the time. 'I cannot distinguish,' says Story, in *Greeley v. Smith*, 3 Story, 658 [Fed. Cas. No. 5,748], 'between the case of a corporation and the case of a private person dying *pendente lite*. In the latter case the suit is abated at law, unless it is capable of being revived by the enactment of some statute, as is the case as to suits pending in the courts of the United States, when, if the right of action survives, the personal representative of the deceased party may appear and prosecute or defend the suit. No such provision exists as to corporations, nor, indeed, could exist without reviving the corporation *pro hac vice*, and therefore any suit pending against it at its death abates by mere operation of law.'"

For the foregoing reasons, the motion to reinstate is denied, and a final order of dismissal will be entered.

GOLDSMITH SILVER CO. v. SAVAGE.

(District Court, D. Maine. August 23, 1913.)

No. 703.

TRADE-MARKS AND TRADE-NAMES (§ 95*)—INFRINGEMENT AND UNFAIR COMPETITION—PRELIMINARY INJUNCTION.

A preliminary injunction, before the answer is filed and the issues made up, in a suit for infringement of a trade-name and unfair competition, should not be granted, complainant's rights not being free from doubt, and there being a sharp contention on all the points presented, especially in view of the new equity rules, enabling parties to obtain a speedy hearing.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*]

In Equity. Suit by the Goldsmith Silver Company against Llewellyn W. Savage. In the matter of complainant's motion for a temporary injunction. Motion denied.

Harry C. Silver, of Boston, Mass., and Maurice E. Rosen, of Portland, Me., for complainant.

Frank Fellows, of Portland, Me., and P. B. Gardner, of Bangor, Me., for defendant.

HALE, District Judge. In its bill the complainant shows: That it and its assignors since 1886 have been the manufacturers of a five-cent cigar, called the "108," the trade-mark or trade-name of which was given it for the reason that complainant's first place of business was 108 State street, Boston. This name has been used continuously, and is now used, in connection with this cigar, a five-inch cigar, Londres shape, with a Connecticut seed wrapper, known as a block cigar. On it appear the letters "G. S. & Co., Boston, Mass., 108."

For a number of years the defendant has been engaged in the sale of cigars in Maine, especially in the sale of a so-called "208" cigar; the sales being for the most part in Penobscot, Washington, and Aroostook counties. That defendant's cigar is also a five-cent cigar, and a five-inch cigar, Londres shape. It also has a Connecticut seed wrapper, bears no branding, and the only difference between the two cigars, aside from the branding, is that the cigar made by the complainant is of clear Havana, scrap filling, made from clippings from ten-cent cigars, while the defendant's cigar is a so-called long filler, but of much inferior tobacco. That it is impossible to distinguish the difference between the two cigars, except by cutting them open, and then finding that one is a long filler and the other a short filler. Three or four years ago the complainant discovered the use by the defendant of the trade-mark "208," and immediately wrote to the defendant, notifying him that it was an infringement, and afterwards wrote again. Later it appeared to the complainant that the 208 cigar was taken off the market; and nothing further was done until recently, when complainant discovered that cigar 208 was again on the market. After bringing the matter to the attention of the defendant, this bill in equity

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was brought. Complainant enjoys a large sale of his 108 cigar in the section where the 208 cigars are sold. The complainant makes the above allegations, and says that these facts were known to the defendant; he having been engaged in the cigar business for many years.

The bill sets up infringement of the trade-mark, and unfair competition. The complainant now asks for a temporary injunction. Many affidavits and exhibits are brought before me.

Without commenting in detail upon the proofs, it is sufficient to say that complainant has not shown a case sufficiently strong to satisfy me that a temporary injunction should be granted. The learned counsel for the complainant urges that its trade is suffering near Bangor, and in the eastern portion of the state, from this alleged infringement, and from defendant's unfair competition. The testimony is, however, conflicting. The labels which are found upon the cigar boxes of the defendant are entirely different from those of the complainant's. There are no such resemblances as have been found vital in the *Daoust Case*, 206 Fed. 434, in which an opinion has just been handed down by the Court of Appeals in this circuit.

On the question of unfair competition, the complainant's proofs do not satisfy me that there is such similarity in the two cigars, or of the two boxes, as would induce ordinary purchasers to accept the defendant's goods in place of complainant's.

Before an answer is filed and the issues made up, the granting of a preliminary injunction is a matter resting in the discretion of the court. Such injunction ought not to be granted unless the injury is pressing, delay dangerous, and the complainant's rights are made entirely free from doubt. *Foster's Federal Practice* (4th Ed.) § 233; *Irwin v. Dixon*, 9 How. 10, 13, 13 L. Ed. 25; *Van Camp Packing Co. v. Cruikshanks Bros. Co.*, 90 Fed. 814, 33 C. C. A. 280.

In the case at bar, complainant's rights are not free from doubt. There is a sharp contention on all the points presented before me. The bill shows the likelihood of other contentions when the issues are made up. The new equity rules enable parties to obtain a speedy hearing. In exceptional cases, where promptness of action is required, rules 47 (198 Fed. xxxi, 115 C. C. A. xxxi), 54 (198 Fed. xxxiii, 115 C. C. A. xxxiii), and 56 (198 Fed. xxxiv, 115 C. C. A. xxxiv) may be invoked, to promote dispatch. With these rules now available, a court should be especially careful not to cumber a case with temporary injunctions or restraining orders before the issues are presented, so that the case can be fully and finally disposed of.

Motion for a temporary injunction is denied.

REYNOLDS v. GREAT NORTHERN RY. CO.

(District Court, E. D. Washington, N. D. January 4, 1913.)

No. 1,347.

INFANTS (§ 116*)—ACTIONS—COSTS—GUARDIAN AD LITEM.

In the absence of statute, to the contrary, the guardian ad litem of an infant plaintiff is personally liable for costs, while such a guardian of an infant defendant is not.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 333-336; Dec. Dig. § 116.*]

At Law. Action by Gail Hamilton Reynolds, by his guardian ad litem, Robert Fairley, against the Great Northern Railway Company. On motion to modify judgment. Denied.

H. M. Stephens and Kenneth Durham, both of Spokane, Wash., for plaintiff.

Charles S. Albert, Thomas Balmer, and Edwin C. Matthias, all of Spokane, Wash., for defendant.

RUDKIN, District Judge. This is a motion to modify a judgment. The sole question presented by the motion is the personal liability of a guardian ad litem of an unsuccessful infant plaintiff for costs.

Section 488, 1 Rem. & Bal. Code of Washington, provides as follows:

"When costs are adjudged against an infant plaintiff, the guardian or person by whom he appeared in the action shall be responsible therefor, and payment may be enforced by execution."

The defendant contends that this statute is made applicable to actions and proceedings in the federal court by section 721 of the Revised Statutes (U. S. Comp. St. 1901, p. 581), which provides:

"The laws of the several states, except when the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Whether this case is controlled by the local statute or by the general principles of the common law I deem immaterial, for in either case the result will be the same. The general rule undoubtedly is that the *prochien ami*, next friend, or guardian ad litem of an infant plaintiff is liable for costs, while the guardian ad litem of an infant defendant is not. The reason for this distinction is well stated in *Perryman v. Burgster*, 6 Port. (Ala.) 99:

"The true ground of distinction between the *prochien ami* of an infant plaintiff and the guardian of an infant defendant we take to be this: The one voluntarily comes into court, and makes himself a party of record, while the other, without his own agency, is made such, by the court. This distinction does not always hold good, in point of fact, for the guardian ad litem sometimes solicits the appointment; yet the court, in some instances, exerts a coercive authority, and as in these he is not chargeable with costs, for the sake of uniformity, he is held not to be liable in any case."

The rule is thus stated in the *Encyclopedia of Pleading and Practice* and in the *Cyclopedia of Law and Procedure*:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"The matter of costs is usually regulated by statute, but it is the general rule that, in an action prosecuted by a next friend for an infant, the infant is not primarily liable for costs of an unsuccessful suit. These must be borne, in the first instance, by the next friend or guardian ad litem, and this very liability has frequently been said to be one of the reasons for the appointment of a next friend or guardian ad litem." 14 Ency. of Pl. and Pr. 1044.

"The next friend or guardian ad litem of an unsuccessful infant plaintiff is as a general rule liable for costs, especially where the suit was needlessly or recklessly brought for the interest of the infant. The guardian ad litem of an infant defendant is not ordinarily chargeable with costs, unless in case of gross misconduct on his part; but it has been held that a guardian ad litem, who appeals on behalf of an infant defendant, is liable for the costs of appeal, where the judgment is affirmed." 22 Cyc. 710.

The rule thus stated is amply supported by the authorities cited. In *Vance v. Fall*, 48 Iowa, 364, it was held that the next friend of an infant plaintiff is liable for costs, in the absence of a statute providing otherwise. In the course of the opinion of the court, Rothrock, Chief Justice, said:

"At common law, and by the Statute of Westm. 16, 48, and 2 C. 15, an infant cannot sue in his own name, but the action must be brought by his guardian or next friend. The Code (section 2565) provides that an action of a minor must be brought by his guardian or next friend. This is a simple recognition of the common-law rule. The rule always has been, and the Code provides, that 'costs shall be recovered by the successful against the losing party.' Whatever exceptions there may be to this rule need not now be considered. Our statute being merely declaratory of the common law, the question presented by this appeal must be determined by ascertaining the rights of the parties, independent of any statute. It appears that it has almost uniformly been held that the next friend of an infant plaintiff is liable for costs, except in those jurisdictions where such liability is regulated by statute. Schouler's Dom. Relations, 594, and authorities cited in notes; 1 Am. Leading Cases, 325, 329; Bacon's Abridgment, vol. 3, 153. At common law, the next friend of an infant plaintiff was not a competent witness in the action, because of his liability for costs. 1 Greenleaf's Evidence, §§ 347, 391. Code 1851, § 1689, provided that the next friend should be responsible for costs. In the Revision of 1860, and in the present Code, there is no such express provision. It may be said that the repeal of the provision making him liable indicates a legislative intent that there should be no such liability. We think, however, that, as that provision was merely declaratory of the common law, it may well be said it was omitted because the next friend is liable without any statutory enactment."

For the foregoing reasons, I am of opinion that the judgment for costs was properly entered against the guardian ad litem, and the motion to modify the judgment is accordingly denied.

In re PAGE.

(District Court, E. D. Michigan, S. D. April 14, 1913.)

ALIENS (§ 68*)—NATURALIZATION—CERTIFICATE OF ENTRY.

It is not ground for refusing naturalization to an alien, otherwise qualified, that the certificate of his entry into the United States, duly made by the Department of Commerce and Labor, and filed with his petition as required by Naturalization Act June 29, 1906, c. 3592, § 4 (2), 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 529), was not based on the record of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

his entry, but on information otherwise obtained by the department; it appearing that through oversight of the inspector he was not registered.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-145; Dec. Dig. § 68.*]

On petition by Dell Hayes Laverne Page to be admitted a citizen of the United States and objections thereto. Petition granted.

Bethune Duffield, of Detroit, Mich., for petitioner.

Merton A. Sturges, of Chicago, Ill., opposed.

TUTTLE, District Judge. The petitioner was born at Ridgetown, Ontario, Canada, on October 7, 1888, and is a citizen of Canada. He came to Detroit, Mich., in the United States, on May 15, 1907, crossing from Windsor on the ferry, landing at the regular landing for inspecting foreigners. His baggage was examined by the inspectors at the customhouse, but through ignorance of the law on his part and oversight on the part of the emigration inspectors he was not registered at the emigration office. He has resided here in Detroit ever since that time, and was graduated from the Detroit College of Law on June 20, 1912. On February 26, 1909, he took out his first papers of citizenship before the clerk of the circuit court for the county of Wayne, at Detroit, Mich. Thereafter, and for the express and announced purpose of securing naturalization papers, he presented himself for examination before the United States inspector at Detroit, and made a satisfactory showing that he had resided continuously in the city of Detroit, Mich., from May 15, 1907. The inspector at Detroit made a report to the Department of Commerce and Labor at Washington, which department thereupon issued a certificate showing that the petitioner had arrived at Detroit on May 15, 1907, which certificate was filed with this petition. Said certificate had an indorsement upon the back thereof showing that it was not based upon registry at the time of entry, but was issued as the result of an examination subsequently conducted by the inspector in charge at Detroit, and reaffirms and admits that the petitioner did actually enter on May 15, 1907. Said indorsement further states that the petition was granted solely for the purpose of allowing the alien to file a petition so that the court in which such petition is filed might judicially determine whether the certificate of arrival required by section 4 of the Naturalization Act (Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1911, p. 529]) must be made up from the registration prescribed in section 1 of said act.

The naturalization officer now objects to the granting of the prayer of the petition on the ground that the petitioner had not complied with the requirements of Emigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1911, p. 499), and especially with the requirements of section 2 of said act, providing for the inspection of aliens from Canada, and of rule 12, made in pursuance of said section. An examination of section 44 of said Emigration Act will show that section 32 of that act did not take effect until July 1, 1907, and was not in force at the time the petitioner entered the United States.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This certificate is regular in form upon the face thereof. It complies with all the requirements of the fourth paragraph of the second subdivision of section 4 of the Naturalization Act, which reads as follows:

"At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Commerce and Labor, if the petitioner arrived in the United States after the passage of this Act, stating the date, place, and manner of his arrival in the United States * * * which certificate * * * shall be attached to and made a part of his petition."

The indorsement upon the back of the certificate does not affect the genuineness of the signature or the correctness of the information stated in it. This certificate complies with the requirements of the law. This ruling of the court cannot in any way work to the detriment of the rigid enforcement of the emigration laws by the Department of Commerce and Labor. They were not required to issue the certificate; and, having issued it in this case, there is no reason why they must do so in a similar case in the future. The Naturalization Act requires records of entry to be kept by the Emigration Department. The court is of the opinion that they would be warranted in refusing a certificate of entry unless such entry was shown by their records. However, that question is not before this court at this time. If proceedings are ever brought by an alien to compel the issuance of a certificate of entry upon other showing than the records of the emigration office, it will be time enough for the court to pass upon that question. When the Department of Commerce and Labor see fit to issue a certificate showing the entry of an alien, they ought not to be heard to say in opposition to the admission of the alien to citizenship that, while the certificate is genuine and states the truth, the court ought not to give any weight to it because the official issuing it did not have proper proof before him.

The petitioner will therefore be admitted to citizenship on taking the proper oath at the next regular naturalization hearing in this court.

STARKE v. HOERNING.

(District Court, E. D. Michigan, S. D. April 14, 1913.)

No. 5,582.

REMOVAL OF CAUSES (§ 75*)—JURISDICTION OF FEDERAL COURT—AMOUNT IN CONTROVERSY.

Where, in an attachment suit begun in a state court, the defendant has not been served nor entered a general appearance, but appeared specially and filed a petition for removal, the amount in controversy, for the purpose of determining the jurisdiction of the federal court on a motion to remand, is limited to the indebtedness claimed in the affidavit for attachment, which is the full amount for which the court could render judgment, in the absence of personal jurisdiction over the defendant.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 132; Dec. Dig. § 75.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At Law. Action by Edmond Starke against Otto Hoerning. On motion to remand to state court. Motion granted.

Race & Haass, of Detroit, Mich. (Howard Streeter, of Detroit, Mich., of counsel), for plaintiff.

Richard G. Kirchner, of Detroit, Mich., for defendant.

TUTTLE, District Judge. Plaintiff began this suit in the state court by attachment. The affidavit therefor alleges an indebtedness of \$2,555.80. The writ of attachment claimed damages not exceeding \$3,000. The declaration was on the common counts only. The ad damnum was in the sum of \$5,000. At the time the defendant filed his petition for removal of the cause to this court, there had been no personal service of process or other paper upon defendant. The defendant had not appeared generally. His default had not been entered. The plaintiff has made a motion to remand the case to the state court, contending that the amount in controversy does not exceed \$3,000.

It is the contention of the defendant that, for the purpose of determining the amount in controversy, the court is bound by the amount claimed in plaintiff's declaration. The court is of the opinion that the question of jurisdiction must be determined upon the present status of the case. At the present time judgment could not be rendered, for want of an appearance and plea, in a sum exceeding that sworn to in the affidavit, viz., \$2,555.80. *Rose v. Palmer*, 74 Mich. 332, 41 N. W. 1080. That sum is not sufficient to give this court jurisdiction on removal proceedings.

This court is also of the opinion that no larger sum can be recovered in a suit than the amount claimed in the writ. In this case the writ claims damages not exceeding \$3,000, while the statute provides that, in order to give this court jurisdiction, the amount involved must be more than \$3,000.

For the reasons already assigned, the petition to remand must be granted.